ARNOLD & PORTER LLP

CLIENT ADVISORY

SEC ADOPTS CHANGES TO FOREIGN PRIVATE ISSUER ANNUAL REPORTING

Rules to Require Earlier Filing of Annual Reports; Increased Disclosure; Annual Assessment of Foreign Private Issuer Status

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On September 23, 2008, the US Securities and Exchange Commission (SEC) adopted significant changes to the reporting requirements of foreign private issuers. The revised foreign private issuer disclosure rules[1] will:

- accelerate the deadline for filing the Annual Report on Form 20-F from six months to four months after the issuer's fiscal year-end;
- require additional disclosure in Form 20-F with respect to:
  - changes or disagreements with the issuer's accountant;
  - fees and charges payable by American Depositary Receipt (ADR) holders to depositaries, and all payments made by depositaries to the issuer; and
  - significant differences between corporate governance practices of the issuer and the corporate governance practices of domestic issuers;
- require foreign private issuers that provide a reconciliation to generally accepted accounting principles used in the United States (US GAAP) to furnish the detailed US GAAP reconciliation required by Item 18 of Form 20-F, rather than the more limited US GAAP reconciliation disclosure required by Item 17, with exceptions for third-party financial statements and Canadian filers under the Multijurisdictional Disclosure System (MJDS);
- eliminate the existing exception in Item 17 of Form 20-F allowing an issuer to exclude segment reporting in its US GAAP financial statements;
- permit foreign private issuers to assess their foreign private issuer eligibility once per year, as of the last day of the second quarter, instead of continuously throughout the fiscal year; and
- amend Rule 13e-3 of the Securities Exchange Act of 1934 (Exchange Act), which pertains to "going private" transactions by issuers or their affiliates, to reflect the changes to termination of reporting and deregistration rules applicable to foreign private issuers.

The amendments, known as the "Foreign Issuer Reporting Enhancements," are intended to enhance the information about foreign private issuers that is available

1 *See* Release No. 33-8959, 34-58620, Sept. 23, 2008 (Release).

to investors in US markets and improve the accessibility of US public markets to these issuers. The changes further synchronize the SEC reporting requirements of foreign and domestic issuers and therefore will increase the burdens on foreign private issuers that are subject to SEC reporting requirements. However, the SEC has provided lengthy transition periods before the more burdensome provisions take effect. For example, the SEC has provided a three-year transition before the deadline for filing Form 20-F is accelerated and a three-year transition before foreign private issuers that furnish a US GAAP reconciliation will be required to provide a detailed US GAAP reconciliation under Item 18 of Form 20-F. In December, the SEC eliminated the requirement that foreign private issuers prepare a US GAAP reconciliation if they prepare their financial statements in accordance with International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). Therefore, the three-year transition period will ease the burden on many foreign private issuers that will be required to adopt IFRS in their home country in 2011.

In some cases, foreign private issuers may find complying with the accelerated filing deadline challenging. This is likely to be the case if the Annual Report on Form 20-F is due before financial statements are required to be filed in the issuer's home country, where a detailed US GAAP reconciliation must be prepared, or where the foreign private issuer needs time to translate local financial information into English or to comply with certain Sarbanes-Oxley requirements. Some foreign private issuers may be less likely to list their securities on a US national securities exchange or to offer securities in the US and may otherwise attempt to avoid becoming subject to SEC reporting requirements or, if they are already subject to such requirements, to seek to terminate their Exchange Act registration and reporting requirements.

One of the changes that the SEC is making will be beneficial to foreign private issuers that need to monitor their status as foreign private issuers, such as those issuers that have close to 50 percent of their shares owned by US residents. Effective December 6, 2008, foreign private issuers will be permitted to assess foreign private issuer eligibility once per year, instead of continuously throughout the fiscal year.

This Advisory discusses these changes in more detail, including applicable deadlines and the steps that foreign private issuers should take to prepare for the changes.

ACCELERATION OF FORM 20-F FILING DEADLINE

The current Form 20-F filing rules require that a foreign private issuer file its Form 20-F within six months of the end of its fiscal year. The amended rules will require foreign private issuers to file Form 20-F within four months after fiscal year-end, without regard to their status as an accelerated or non-accelerated filer. The SEC considered, but rejected, a proposal to require the filing of the Form 20-F within 90 days of fiscal year-end by foreign private issuers that are large accelerated filers or accelerated filers.

In explaining the change to a shorter filing deadline, the SEC notes in the Release that many home countries have shorter filing deadlines than six months for annual reports. The filing deadline for foreign private issuers is more relaxed than the filing deadlines for domestic US issuers, which have to file either 60, 75, or 90 days after fiscal year-end, depending on their filing status. Moreover, foreign private issuers will have a three-year transition period to prepare for the accelerated filing deadline. This transition period will ease the burden on many foreign private issuers that are required to adopt IFRS in their home country in 2011 because such issuers will not be required to provide a US GAAP reconciliation if they prepare their financial statements in accordance with IFRS as issued by the IASB.

In some cases the rule amendments will require a foreign private issuer to file an Annual Report on Form 20-F with the SEC prior to or at the same time that financial statements must be filed in the issuer's home country. In addition, even where the filing of financial statements in the issuer's home country precedes the filing of Form 20-F, a foreign private issuer may have difficulty meeting the accelerated filing deadline for Form 20-F where the issuer is required to provide a US GAAP reconciliation under Item 18 of Form 20-F. Some foreign private issuers may feel additional time pressure under the amended rules in order to translate their local financial information into English, or to meet certain Sarbanes-Oxley Act requirements such as officer

certifications and review of internal controls over financial reporting. In the case of foreign private issuers that must provide additional disclosures under Industry Guide 3, Statistical Disclosure by Bank Holding companies, the staff will consider what accommodations are appropriate.

MJDS issuers that file their Annual Report on Form 40-F will be unaffected because the filing deadline for Form 40-F has not changed.

Compliance Date: Foreign private issuers must begin to comply with the new filing deadline for their Form 20-F with their first fiscal year ending on or after December 15, 2011. Foreign private issuers should use this three-year transition period to make necessary changes to their Exchange Act reporting timelines and disclosure controls and procedures so that they will be in a position to meet the accelerated filing deadline.

ADDITIONAL NEW REQUIRED DISCLOSURES

The new rules require foreign private issuers to add additional disclosure to their Form 20-F filings, including with respect to disagreements with accountants, ADR-related fees, and corporate governance differences.

Changes in Certifying Accountant

The SEC amended Form 20-F, along with the forms for the registration of securities (Forms F-1, F-3 and F-4), to require that foreign private issuers include certain disclosure regarding their certifying accountants. Such new required disclosure is similar to the information already required to be disclosed by domestic issuers on Form 8-K. While foreign private issuers listed on the New York Stock Exchange are required to disclose a change in accountants on a Form 6-K, as are foreign private issuers who are required to report such a change in their home country, Form 6-K does not have the substantive disclosure requirements of Form 8-K. The new rules will require disclosure, similar to that required of domestic issuers, on a Form 20-F (and Forms F-1, F-3, and F-4), and the requirement will apply to all foreign private issuers.

Generally, the new disclosure in Form 20-F and Forms F-1, F-3, and F-4 will require foreign private issuers to, among other things:

- disclose whether an independent accountant that was previously engaged as the issuer's principal accountant has resigned, declined to stand for re-election or was dismissed;
- disclose any disagreements or reportable events that occurred within the issuer's last two fiscal years and any interim period preceding the change in accountant; and
- disclose whether, during the fiscal year during which the change in accountants took place or during the subsequent year, the issuer had similar, material transactions to those which led to the disagreement with the former accountant, whether such transaction was ultimately accounted for or disclosed in a manner different from that which the former accountant would have concluded was required, and if so, the effect on the financial statements if the method that would have been required by the former accountant had been followed. This disclosure is intended to require issuers to disclose instances in which a company sought a certain accounting treatment from their accountant and, upon disagreement with such accountant, engaged a new accounting firm willing to provide such accounting treatment.

An issuer will be required to provide a copy of the disclosure to the former accountant, and the accountant will be required to furnish to the issuer a letter stating whether the accountant agrees with the disclosure, and if not, stating the respects in which it does not agree. The issuer will be required to file the former accountant's response letter as an exhibit to the Form 20-F or registration statement that contains this disclosure. The filing of the accountant response letter may be delayed if the change in accountant occurred less than 30 days prior to the filing of the annual report or registration statement.

Compliance Date: Foreign private issuers must begin to comply with this requirement for their first fiscal year ending on or after December 15, 2009.

ADR Fees

Foreign private issuers will be required to disclose in Form 20-F information about fees and other charges paid in connection with their domestic US ADR facilities. In the Release, the SEC stated that it believes that ADR holders

will benefit from the additional disclosure, particularly since sponsored ADR facilities have increased fees and many holders purchase ADRs in book-entry form, without having an opportunity to review all of the ADR fees imposed by the depositary. The Release requires foreign private issuers to also disclose any incentive payments received from depositaries in connection with their ADR facilities. Issuers and depositary banks can use the transition period to review depositary agreements, make appropriate changes, as necessary, in light of the new disclosure requirements, and to determine the disclosure that will be required.

Compliance Date: Foreign private issuers must begin to comply with this requirement for their first fiscal year ending on or after December 15, 2009.

Corporate Governance

The Release contains new rules requiring foreign private issuers to describe, in Form 20-F, significant ways in which their corporate governance practices differ from practices followed by domestic US companies under the relevant exchange's listing standards. The SEC acknowledged that the format of such disclosure may vary from issuer to issuer, and the content will be similar to the disclosure currently provided by foreign private issuers that are listed on a US securities exchange. Currently, both NASDAQ Stock Market and New York Stock Exchange rules require such disclosure, however, such rules permit disclosure either in the issuer's annual report or on its corporate website. The Release requires the disclosure to be contained in Form 20-F. In the interest of providing investors with current, easy-to-locate disclosure, issuers may wish to continue to include a description of their corporate governance variances on their website; however, issuers must ensure that such disclosure is also included in Form 20-F.

Compliance Date: Foreign private issuers must begin to comply with this requirement for their first fiscal year ending on or after December 15, 2008.

FINANCIAL REPORTING

US GAAP Reconciliation

Foreign private issuers that do not prepare their financial statements under US GAAP or in accordance with IFRS as issued by the IASB must provide a US GAAP reconciliation in annual reports and Exchange Act registration statements filed on Form 20-F. Under the amended rules, foreign private issuers that are required to provide a US GAAP reconciliation will be required to do so under Item 18 of Form 20-F, rather than under the more limited reconciliation requirements of Item 17 of Form 20-F, with certain limited exceptions.

Currently, Item 17 permits issuers who only list a class of securities on a US national securities exchange, or only register a class of equity securities under Section 12(g) of the Exchange Act, without conducting a public offering in the US, to omit certain footnote disclosures required by US GAAP and Regulation S-X in their US GAAP reconciliation on Form 20-F. In addition, foreign private issuers that engage in certain non-capital raising offerings, such as offerings pursuant to dividend reinvestment plans, offerings upon conversions of securities, or offerings of investment grade securities, are permitted to provide Item 17 financial statements in registration statements filed under the Securities Act of 1933 (Securities Act). The amended rules will eliminate the Item 17 limited reconciliation option for annual reports and Exchange Act registration statements filed on Form 20-F and for certain non-capital raising offerings registered under the Securities Act on Forms F-1, F-3, or F-4. Item 17 will continue to be available for third party financial statements of non-SEC registered companies that are required to be included in foreign private issuer registration statements or reports (e.g., financial statements of significant acquired businesses, significant equity method investees and exempt guarantors). Item 17 will also continue to be available for the financial statements of Canadian issuers filing under the MJDS.

The SEC states in the Release that the number of foreign private issuers affected by this change is expected to be small. Many foreign private issuers will prepare their financial statements in accordance with IFRS as issued by the IASB before they would otherwise be required to comply with the new requirement for fiscal years ending on or after December 15, 2011. In addition, the SEC estimates that most foreign private issuers that do not prepare their financial statements in accordance with US GAAP already provide

the information required by Item 18 of Form 20-F.

Although most foreign private issuers will be unaffected by the change, this is a significant change for those foreign private issuers that are affected. The SEC has provided a three-year transition period before affected foreign private issuers must furnish full US GAAP reconciliation under Item 18. Foreign private issuers affected by the change should use the transition period to prepare.

Compliance Date: Foreign private issuers (other than those that prepare financial statements in accordance with either US GAAP or IFRS as issued by the IASB) must comply with the requirement to provide a US GAAP reconciliation under Item 18 of Form 20-F beginning with their first fiscal year ending on or after December 15, 2011.

Segment Reporting

Additionally, the Release eliminates an infrequently used exception under Item 17 of Form 20-F, whereby foreign private issuers that present financial statements otherwise fully in compliance with US GAAP may omit segment data from their financial statements, and also are permitted to have a qualified US GAAP audit report as a result of this omission. The SEC believes that this accommodation is no longer necessary, given recent changes in international financial reporting and the SEC's recently adopted rules permitting foreign private issuers to file financial statements prepared in accordance with IFRS as issued by the IASB, which requires the presentation of segment data.

Compliance Date: Foreign private issuers must comply with the segment reporting requirement beginning with their first fiscal year ending on or after December 15, 2009.

ASSESSING FOREIGN PRIVATE ISSUER STATUS

The Release modifies the current rules regarding the assessment of an issuer's "foreign private issuer" eligibility status. Currently, issuers must continually monitor and test their eligibility to meet the SEC's definition of a foreign private issuer. For issuers with close to 50 percent of their shares owned by US residents, this can be a difficult and administratively burdensome exercise. In addition, under the current rules, an issuer that loses its status as a foreign private issuer becomes immediately subject to the reporting rules for domestic issuers. The rule amendments improve the ability of foreign private issuers to take corrective actions regarding their foreign private issuer status before the eligibility test date should option exercises or other transactions jeopardize their status.

The SEC's definition of the term *"foreign private issuer"* has not changed. The term still means any foreign issuer other than a foreign government except an issuer meeting the following conditions: (1) more than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

The new rules permit a foreign private issuer to conduct an annual test to determine that it meets the definition of a foreign private issuer. The annual test must be done on the last business day of the issuer's second fiscal quarter. The SEC uses the same measurement date to determine accelerated filer and smaller reporting company status under other SEC rules. MJDS filers will also utilize the new annual testing rules with respect to their foreign private issuer status; however, MJDS filers will still need to assess their eligibility to file annual reports on Form 40-F and to use Form 6-K under the existing rules.

The loss of foreign private issuer status results in significant reporting changes for an issuer. Under the amended rules, if an issuer determines on the last business day of its second fiscal quarter (e.g., June 30, 2009, for a calendar year company) that it no longer qualifies as a foreign private issuer, such issuer must begin complying with the domestic company reporting requirements beginning on the first day of the fiscal year following such determination date (or January 1, 2010, for a calendar year company). Thus, the amended rules provide a six month transition period for an issuer that determines it no longer qualifies as a foreign private issuer to prepare to transition to domestic reporting obligations and the corresponding forms. Accordingly, on the first day of the fiscal year following the determination

date, the former foreign private issuer would become subject to the filing requirements for the Annual Report on Form 10-K, quarterly reports on Form 10-Q, current reports on Form 8-K,[2] and Section 16 "short-swing" profit provisions and reporting obligations.[3] Additionally, such issuers would be required to comply with SEC proxy rules, which include requirements relating to executive compensation and corporate governance disclosure.

US domestic issuers that determine that they qualify as a foreign private issuer as of the testing date may immediately shift to the foreign private issuer reporting regime, including foreign private issuer forms and filing deadlines. The issuer does not need to wait until the beginning of the next fiscal year. For example, such an issuer may cease filing Form 10-Qs and 8-Ks for the remainder of the year, and instead furnish reports on Form 6-K. Additionally, issuers that determine, after conducting the eligibility test, that they are a foreign private issuer are exempt from proxy and Section 16 obligations.

Although the Release notes that a formal notice is not required, issuers should consider voluntarily announcing the change in their status in a press release or SEC filing. This would not be necessary where the issuer's SEC filings effectively provide prompt notice of the change to the market and investors.

Compliance Date: This rule is effective on December 6, 2008. Accordingly, foreign private issuers should conduct the eligibility test as of the last business day of their most recently completed second fiscal quarter. For calendar year companies, the first test date will be June 30, 2009.

2 Issuers generally have four business days to file a Form 8-K for the events that are required to be disclosed on Form 8-K, except where the issuer is furnishing a Form 8-K solely to satisfy its obligations under Regulation FD, in which case the due date might be earlier. The SEC adopted Regulation FD to address the selective disclosure of material, nonpublic information by publicly traded companies and persons acting on their behalf.

3 Section 16 of the Exchange Act applies to officers, directors and ten percent shareholders who beneficially own more than 10 percent of a class of the company's equity securities registered under the Exchange Act. Although Section 16 does not use the term "insider," these persons are often referred to as "insiders." Under Section 16, public company "insiders" are generally required to report transactions in a publicly traded issuer's securities within two business days, and to disgorge "short-swing profits" from trading in these securities within a six-month period.

AMENDMENT TO RULE 13e-3

Currently, Rule 13e-3 of the Exchange Act requires any issuer or affiliate of an issuer that engages in a "going private" transaction to disclose certain information on Schedule 13E-3. The SEC has emphasized that Rule 13e-3 is only triggered if a given transaction has the "reasonable likelihood or purpose" of causing the termination of reporting obligations under the Exchange Act. In March 2007, the SEC adopted rules that made it easier for foreign private issuers to terminate their reporting obligations and deregister their securities. Under Rule 12h-6, a foreign private issuer of equity securities can terminate its reporting obligations under either Section 13(a) or Section 15(d) of the Exchange Act by comparing the average daily trading volume of its securities in the United States with its worldwide average daily trading volume, using a 5 percent benchmark.

The amendments to Rule 13e-3 incorporate the SEC's March 2007 rules on termination of Exchange Act reporting obligations and deregistration by foreign private issuers. As amended, the triggering event of Rule 13e-3 is deemed to have occurred when any transaction or series of transactions of the type specified in the rule has either a reasonable likelihood or a purpose of (1) causing any class of equity securities of the issuer which is subject to Section 12(g) or Section 15(d) of the Exchange Act to become eligible for termination of registration under Rule 12g-4 or Rule 12h-6, or causing the reporting obligations with respect to such class to become eligible for termination under Rule 12h-6, or suspension under Rule 12h-3 or Section 15(d), or (2) causing any class of equity securities of the issuer to cease to be listed on a national securities exchange.

As a result of these amendments, a foreign private issuer that elects to deregister a class of securities or terminate its reporting obligations pursuant to the recently adopted SEC rules should consider whether it will be engaging in any transaction or series of transactions which would trigger the application of Rule 13e-3 and the rigorous disclosure obligations that apply to going private transactions under the rule. Not all foreign private issuers that deregister a class of securities or terminate their reporting obligations under the Exchange Act will implicate Rule 13e-3. The SEC states in the Release that Rule 13e-3 will continue to govern share

repurchases made in the ordinary course of an issuer's business only when such repurchases are executed with the purpose or reasonable likelihood of causing security holders to lose "the benefits of public ownership," which in this context means the benefits of US reporting.

CONCLUSION

The changes to foreign private issuer reporting are part of the SEC's initiatives toward a single set of globally accepted accounting standards that would apply to foreign and domestic reporting issuers. By narrowing the discrepancies between foreign private issuer and domestic issuer reporting, the amended rules impose additional obligations on foreign private issuers that have reporting obligations in the US. However, the SEC has provided a three-year transition period before the deadline for filing Form 20-F is accelerated to four months after the issuer's fiscal year-end and before foreign private issuers that furnish a US GAAP reconciliation must provide a detailed US GAAP reconciliation. This transition period should ease the burden on foreign private issuers that will be required to adopt IFRS in their home country in 2011 because such issuers will not be required to provide a US GAAP reconciliation as long as their financial statements are prepared in accordance with IFRS as issued by the IASB. However, for those foreign private issuers that will be required to provide a full US GAAP reconciliation under Item 18 of Form 20-F, this is a significant change.

Foreign private issuers may find complying with the accelerated filing deadline challenging, for example, where the Annual Report on Form 20-F is due before financial statements are required to be filed in the issuer's home country, where a detailed US GAAP reconciliation must be prepared, or where the foreign private issuer needs time to translate local financial information into English or to comply with certain Sarbanes-Oxley requirements.

The amended rules permit foreign private issuers to assess foreign private issuer eligibility once per year instead of continuously. This will reduce the compliance burden of foreign private issuers that must closely monitor their foreign private issuer status, such as those issuers that have close to 50 percent of their shares owned by US residents. The amended rules also benefit foreign private issuers who no longer meet the definition of a "foreign private issuer" by providing a six-month transition period before the issuer becomes subject to US reporting requirements.

Foreign private issuers should use the transition periods afforded by the SEC to prepare for the accelerated filing deadline and increased disclosure obligations. Foreign private issuers will need to revise their timeline for Exchange Act reporting, make changes to disclosure controls and procedures, and coordinate in advance with outside accountants and counsel in order to allow sufficient time for preparation and review of their Form 20-F under the revised rules.

Finally, as a result of the amendments to Rule 13e-3, a foreign private issuer that elects to deregister a class of securities or terminate its reporting obligations pursuant to the recently adopted SEC rules for foreign private issuers should consider whether it will be engaging in any transaction or series of transactions which would trigger the application of Rule 13e-3.

If you would like more information about any of the topics discussed, please contact your Arnold & Porter attorney or:

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