

## **SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 230, 239, 240 and 249**

**[RELEASE NOS. 33-8959; 34-58620; INTERNATIONAL SERIES RELEASE NO. 1310; File No. S7-05-08]**

**RIN 3235-AK03**

### **FOREIGN ISSUER REPORTING ENHANCEMENTS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting a number of amendments to our rules relating to foreign private issuers that are intended to enhance the information that is available to investors. These amendments are part of a series of initiatives that seek to effect changes in our disclosure and other requirements applicable to foreign private issuers in light of market developments, new technologies and other matters in a manner that promotes investor protection and cross-border capital flows. We are adopting amendments that would enable foreign issuers to test their eligibility to use the special forms and rules available to foreign private issuers once a year, rather than continuously. We also are adopting amendments to change the deadline for annual reports filed by foreign private issuers and to eliminate an option under which foreign private issuers are permitted to omit segment data from their U.S. GAAP financial statements, and an amendment to the rule pertaining to going private transactions to reflect the new termination of reporting and deregistration rules for foreign private issuers. In addition, we are adopting amendments that would revise the annual report and registration statement forms used by foreign private issuers to improve certain disclosures provided in these forms.

**DATES:**      Effective Date: December 5, 2008.

Compliance Dates: The compliance dates are as follows:

- A foreign private issuer must begin to comply with the requirements to provide information pursuant to Item 16G of Form 20-F, which pertains to corporate governance disclosures, for its first fiscal year ending on or after December 15, 2008.
- A foreign private issuer must begin to comply with the amendment to eliminate Instruction 3 to Item 17 of Form 20-F, which permits the omission of segment data in certain circumstances; to provide disclosure pursuant to Item 16F of Form 20-F, which pertains to a change in registrant's certifying accountant; and to provide disclosure about American Depositary Receipts fees and payments for its first fiscal year ending on or after December 15, 2009.
- A foreign private issuer must begin to comply with the requirement to file its Form 20-F annual report on an accelerated basis for its first fiscal year ending on or after December 15, 2011. A foreign private issuer must begin to comply with the requirements to file transition reports pursuant to the amendments to Rules 13a-10(g)(3) and 15d-10(g)(3), and special financial reports pursuant to the amendments to Rule 15d-2(a) for its first fiscal year ending on or after December 15, 2011. In addition, a foreign private issuer must begin to comply with the requirement to prepare financial statements according to Item 18 of Form 20-F in the annual report filed for its first fiscal year ending on or after December 15, 2011.

**FOR FURTHER INFORMATION CONTACT:** Felicia H. Kung, Senior Special Counsel, Office of International Corporate Finance, Division of Corporation Finance, at

(202) 551-3450, or Craig Olinger, Deputy Chief Accountant, Division of Corporation Finance, at (202) 551-3400, or Jeffrey J. Minton, Chief Counsel, Office of the Chief Accountant, at (202) 551-5300, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

**SUPPLEMENTARY INFORMATION:** We are adopting amendments to Rule 405<sup>1</sup> of Regulation C,<sup>2</sup> Form F-1,<sup>3</sup> Form F-3<sup>4</sup> and Form F-4<sup>5</sup> under the Securities Act of 1933 (“Securities Act”),<sup>6</sup> Form 20-F<sup>7</sup> under the Securities Exchange Act of 1934 (“Exchange Act”),<sup>8</sup> and Exchange Act Rules 3b-4,<sup>9</sup> 13a-10,<sup>10</sup> 13e-3,<sup>11</sup> 15d-2,<sup>12</sup> and 15d-10.<sup>13</sup> The amendments will: (1) Permit foreign issuers to test their qualification to use the forms and rules available to foreign private issuers on an annual basis, rather than on the

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<sup>1</sup> 17 CFR 230.405.

<sup>2</sup> 17 CFR 230.400 et seq.

<sup>3</sup> 17 CFR 239.31.

<sup>4</sup> 17 CFR 239.33.

<sup>5</sup> 17 CFR 239.34.

<sup>6</sup> 15 U.S.C. 77a et seq.

<sup>7</sup> 17 CFR 249.220f.

<sup>8</sup> 15 U.S.C. 78a et seq.

<sup>9</sup> 17 CFR 240.3b-4.

<sup>10</sup> 17 CFR 240.13a-10.

<sup>11</sup> 17 CFR 240.13e-3.

<sup>12</sup> 17 CFR 240.15d-2.

<sup>13</sup> 17 CFR 240.15d-10.

continuous basis that is currently required; (2) Accelerate the filing deadline for annual reports filed on Form 20-F by foreign private issuers under the Exchange Act by shortening the filing deadline from six months to four months after the foreign private issuer's fiscal year-end, after a three-year transition period; (3) Eliminate an instruction to Item 17 of Form 20-F that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; (4) Amend Rule 13e-3 under the Exchange Act by reflecting the new termination of reporting and deregistration rules for foreign private issuers;<sup>14</sup> (5) Require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F; and (6) Amend Form 20-F to require foreign private issuers to disclose information about changes in the issuer's certifying accountant, the fees and charges paid by holders of American Depositary Receipts ("ADRs"), the payments made by the depository to the foreign issuer whose securities underlie the ADRs, and, for listed issuers, the differences in the foreign private issuer's corporate governance practices and those applicable to domestic companies under the relevant exchange's listing rules.

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<sup>14</sup> Although amending Rule 13e-3 is consistent with other Commission initiatives that seek to address changes in our disclosure and other requirements applicable to foreign private issuers, the amendment also will apply to transactions effected by domestic issuers.

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## **I. Summary**

### **A. Proposed Amendments**

In February 2008, we published for comment proposed amendments to rules and forms aimed at enhancing the disclosures that foreign private issuers provide to investors in the U.S. public markets, and improving the accessibility of our public markets to these issuers.<sup>15</sup> The proposed amendments reflect changes in the nature of the global capital markets, as well as advances in technology with respect to the gathering and processing of information, that have occurred since the Commission's adoption of Form 20-F almost 30 years ago. When the Commission adopted Form 20-F, the form used by foreign private issuers<sup>16</sup> to register a class of securities under the Exchange Act and to file annual reports,<sup>17</sup> our objective was to elicit disclosures from foreign private issuers that were as

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<sup>15</sup> Release No. 33-8900 (Feb. 29, 2008) [73 FR 13404] (hereinafter "Proposing Release").

<sup>16</sup> "Foreign private issuer" is defined in Exchange Act Rule 3b-4(c). A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States, (ii) more than 50 percent of its assets are located in the United States, or (iii) its business is principally administered in the United States.

<sup>17</sup> Form 20-F is the combined registration statement and annual report form for foreign private issuers under the Exchange Act. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act.

equal as practicable to that provided by domestic issuers.<sup>18</sup> Because of differences in the national laws and accounting regulations applicable to foreign private issuers, we provided specified disclosure accommodations in Form 20-F.<sup>19</sup> However, we indicated that our assessment of the appropriate disclosure requirements for foreign private issuers was part of an ongoing evolutionary process.<sup>20</sup>

As noted previously in the Proposing Release, there has been a movement toward greater international agreement on the accounting and other non-financial statement disclosures that should be provided by issuers. The Commission has undertaken a number of initiatives that recognize this. For example, we adopted rules last December to permit foreign private issuers to file financial statements with the Commission that are prepared in accordance with International Financial Reporting Standards ("IFRS"), as issued by the International Accounting Standards Board ("IASB"), without reconciliation to generally accepted accounting principles ("GAAP") used in the United States.<sup>21</sup> Those rules are part of our efforts to foster a single set of globally accepted accounting standards. We also incorporated into Form 20-F all of the International Organization of

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<sup>18</sup> See Release No. 34-16371 (Nov. 29, 1979) [44 FR 70132] (hereinafter "Form 20-F Adopting Release").

<sup>19</sup> See id.

<sup>20</sup> See id.

<sup>21</sup> Release No. 33-8879 (Dec. 21, 2007) [73 FR 986].

Securities Commission's ("IOSCO")<sup>22</sup> International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers,<sup>23</sup> which pertain to prospectuses prepared by foreign issuers for public offerings and listing of equity securities.<sup>24</sup>

In addition, the Commission has sought to facilitate cross-border capital flows. When implementing certain provisions of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act"),<sup>25</sup> we also provided several significant accommodations to foreign private

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<sup>22</sup> IOSCO consists of securities regulators from 109 countries ("ordinary" members) who are committed to working together "to promote high standards of regulation to maintain just, efficient and sound markets." IOSCO, General Information About IOSCO, at <http://www.iosco.org/about/>.

<sup>23</sup> Available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf>. The IOSCO Technical Committee recently published the International Disclosure Principles for Cross-Border Offerings and Listings of Debt Securities by Foreign Issuers (2007), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD242.pdf>. These IOSCO Principles apply to prospectuses used by foreign issuers for offerings and listings of debt securities. The Commission's prospectus disclosure requirements for debt securities offered by foreign private issuers, which are contained in Form 20-F, are also consistent with these IOSCO Principles.

<sup>24</sup> Release No. 33-7745 (Sept. 28, 1999) [64 FR 53900].

<sup>25</sup> 15 U.S.C. 7201 et seq.

issuers relating to the requirements on internal control over financial reporting<sup>26</sup> and audit committee independence.<sup>27</sup> These accommodations recognized non-U.S. practices and requirements. In March 2007, we also adopted rules that made it easier for foreign private issuers to terminate their reporting obligations and deregister their securities.<sup>28</sup> We adopted these rules to address concerns that the burdens and uncertainties associated with terminating their registration and reporting obligations under the Exchange Act could serve as a disincentive to foreign private issuers accessing the U.S. public capital markets.<sup>29</sup> In a related release,<sup>30</sup> we are adopting amendments to Exchange Act Rule

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<sup>26</sup> We permitted foreign private issuers to comply with the requirement to include in their annual reports management's report on the company's internal control over financial reporting and the auditor's attestation on a delayed basis compared to some domestic issuers. See Release No. 33- 8392 (Feb. 24, 2004) [69 FR 9722] (extending the original compliance dates for accelerated filers to fiscal years ending on or after November 15, 2004, and for companies that are not accelerated filers and for foreign private issuers, to fiscal years ending on or after July 15, 2005); Release No. 33-8545 (Mar. 2, 2005) [70 FR 11528] (adopting an additional one-year extension of the compliance dates for companies that are non-accelerated filers and for foreign private issuers filing annual reports on Forms 20-F or 40-F); Release No. 33-8730A (Aug. 9, 2006) [71 FR 47056] (extending for one year the date by which a foreign private issuer that is an accelerated filer and that files annual reports on Forms 20-F or 40-F must begin to comply with the requirement to provide the auditor's attestation report on internal control over financial reporting). Foreign private issuers also are permitted to report changes in their internal controls over financial reporting on an annual basis, rather than on a quarterly basis as is required of domestic issuers. Release No. 33-8238 (June 5, 2003) [68 FR 36636].

<sup>27</sup> See Release No. 33-8220 (Apr. 9, 2003) [68 FR 18788].

<sup>28</sup> Release No. 34-55540 (Mar. 27, 2007) [72 FR 16934].

<sup>29</sup> Id.

<sup>30</sup> Release No. 34-58465 (Sept. 5, 2008).

12g3-2(b)<sup>31</sup> to expand the availability of this exemption from registration under Section 12(g)<sup>32</sup> of the Exchange Act for foreign private issuers, so that a qualified foreign private issuer that meets specified conditions can claim the exemption automatically without regard to the number of its U.S. shareholders. In another related release, we are adopting amendments that expand and enhance the utility of the cross-border exemptions for business combination transactions.<sup>33</sup> These amendments are expected to encourage offerors and issuers in cross-border business combinations, and rights offerings by foreign private issuers to permit U.S. security holders to participate in these transactions in the same manner as other holders.

As part of our continuous assessment of our rules pertaining to foreign private issuers, we proposed amendments to rules and forms last February that reflected our view that some of the disclosure accommodations that we provided to foreign private issuers almost 30 years ago may no longer be appropriate or necessary in light of global market developments and advancements in technology.<sup>34</sup> These proposed rule and form amendments sought to balance our dual objectives of enhancing the reporting of information by foreign private issuers, including the timeframe within which investors can have access to that information, and improving the accessibility of our public markets to these issuers. Among other things, we proposed amendments that would permit

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<sup>31</sup> 17 CFR 240.12g3-2(b).

<sup>32</sup> 15 U.S.C. 78l(g).

<sup>33</sup> See Release No. 34-58597 (Sept. 19, 2008).

<sup>34</sup> See Proposing Release, supra note 15.

reporting foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers once a year, rather than on a continuous basis. We also proposed amendments to change the deadline for annual reports filed by foreign private issuers and to eliminate an option under which foreign private issuers may omit segment data from their U.S. GAAP financial statements, and an amendment to the rule pertaining to going private transactions to reflect the new termination of reporting and deregistration rules for foreign private issuers. In addition, we proposed amendments that would revise Form 20-F to improve certain disclosures provided in that form.

#### **B. Principal Comments Received**

We received 52 comment letters in response to our proposed rule and form amendments from a variety of market participants.<sup>35</sup> The respondents included businesses, financial and legal associations, law firms, accounting firms, depository banks, financial services providers, and one securities exchange. The comments received on most of the proposed amendments were supportive, although commenters provided useful suggestions on several of the proposals. Almost all of the comments received on the proposal to permit foreign issuers to test their status as foreign private issuers once a year, rather than continuously, were very positive. Commenters noted that this proposal would reduce compliance burdens on foreign private issuers, as well as align the testing and transition requirements for foreign private issuer status with the requirements applicable to determining accelerated filer and small reporting company status.

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<sup>35</sup> These comment letters are available on the Commission's Internet Web site, located at <http://www.sec.gov/comments/s7-05-08/s70508.shtml>, and in the Commission's Public Reference Room in its Washington, DC headquarters.

We also received mainly positive comments about the proposed amendments to require foreign private issuers to disclose in their Form 20-F annual reports changes in and disagreements with their certifying accountant, and significant differences in the corporate governance practices of listed foreign private issuers compared to the corporate governance practices applicable to domestic companies under the relevant exchange's listing standards. While several commenters believed the proposed disclosure would be more useful if it was made on a more timely basis, commenters generally noted that the proposal regarding disclosure of a change in a registrant's certifying accountant would provide investors with useful information, and would be consistent with the disclosure currently required of domestic issuers. With respect to the corporate governance proposal, commenters noted the usefulness of having all of a foreign private issuer's corporate governance information in one location.

In addition, we received primarily positive feedback on our proposed amendments to eliminate the option permitting foreign private issuers to omit segment data from their U.S. GAAP financial statements, to reference the new termination of reporting and deregistration rules applicable to foreign private issuers in Exchange Act Rule 13e-3, and to require annual disclosure in Form 20-F about ADR fees and payments. These proposals were supported as providing useful information to investors, and in the case of Rule 13e-3, providing regulatory consistency with the new deregistration and termination of reporting provisions.

We received a wide range of comments on some of the other proposed amendments. In particular, many commenters opposed the proposal to accelerate the reporting deadline for Form 20-F annual reports. We had proposed amendments to





















































































































































































































