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The SEC Adopts Amendments to Foreign Private Issuer Registration and Disclosure Requirements, Including Those Relating to Cross-Border Mergers, Tender and Exchange Offers and Rights Offerings

At an Open Meeting held August 27, 2008, the Securities and Exchange Commission ("SEC") unanimously approved various rule amendments that significantly affect the registration and disclosure requirements applicable to foreign private issuers in three key areas.[1] Specifically, the SEC acted on a set of proposals that, once they become effective following publication in the Federal Register, will:

(1) substantially streamline the conditions to reliance on an exemption from SEC registration and reporting requirements under the Securities Exchange Act of 1934, as amended ("Exchange Act), that otherwise would apply to foreign companies that have attracted substantial investor interest in the U.S. over-the-counter ("OTC") markets, while at the same time greatly enhancing the widespread public accessibility of English-language information regarding those companies via the Internet or other means of electronic publication;

(2) expand the content, and accelerate the filing due date from six to four months after fiscal year-end, of annual reports on Form 20-F that must be filed by those foreign companies that are not eligible for an exemption from Exchange Act registration and reporting requirements, because they listed their stock on a U.S. stock exchange and/or made a registered public offering in the United States; and

(3) make more "user friendly" various SEC-created exemptions available in connection with cross-border mergers, tender offers and other business combinations involving a non-U.S. target company, as well as rights offerings by foreign companies, without increasing the current U.S. beneficial ownership thresholds determining eligibility to rely on these exemptions, in order to promote the inclusion of U.S. investors in these transactions. Some of these reforms have been extended to tender offers for U.S. companies.

Because the SEC has not yet published any of the three adopting releases containing the text of the amended rules and explaining how they will work, this alert is based on the SEC's related press release available on the SEC's Internet website at http://www.sec.gov/news/press/2008/2008-183.htm, along with the proceedings of the August 27 Open Meeting (which has been archived and can be found at http://www.sec.gov/news/openmeetings.shtml). Also accessible via the SEC's website are the posted opening statements of the SEC's Chairman Christopher Cox, available at http://www.sec.gov/news/speech.shtml#chair, and of those staff members responsible for the various rulemaking projects (as outlined below). As soon as the adopting releases and final

regulatory text are made available to the public, we will send you a more expansive follow-up alert.

Summary of the SEC's Newly Adopted Amendments

Amended Rule 12g3-2(b)

The SEC adopted amendments that change the eligibility and disclosure requirements of the Rule 12g3-2(b) exemption from Exchange Act registration and reporting,[2] which exemption may be claimed only by certain "foreign private issuers"[3] that have neither listed their stock on a U.S. stock exchange, nor made a registered public offering in the United States. Once these amendments become effective, the exemption will be automatically available to eligible foreign private issuers, thus eliminating the longstanding paper application and subsequent home-country document submission process that was a condition to reliance on Rule 12g3-2(b).[4]

To claim and maintain the Rule 12g3-2(b) exemption, a foreign company need only satisfy the following conditions:

- Maintain a listing of the subject class of equity securities on one or more foreign exchanges that comprise its "primary trading market" – defined to mean that market (which can mean up to two foreign exchanges located in no more than two different jurisdictions outside the United States) representing at least 55% of the worldwide average daily trading volume ("ADTV") of that class of equity securities during the company's most recently completed fiscal year. If the company aggregates its non-U.S. ADTV in two foreign markets to satisfy this test, the ADTV in one of these markets must be greater than the U.S. ADTV of the subject class of equity securities. As the staff explained at the Open Meeting, this condition is intended "to help assure that there is a non-U.S. jurisdiction that principally regulates and oversees the issuance and trading of the issuer's securities, which makes more likely the availability of a set of non-U.S. disclosure documents to which a U.S. investor may turn for material information when making investment decisions about the issuer's securities."[5]
- Unless the company plans to claim the Rule 12g3-2(b) exemption immediately upon completing its Exchange Act deregistration under Rule 12h-6, it must have published in English since the beginning of the company's most recently completed fiscal year, on the company's own Internet website or through an electronic information delivery system generally available to the public in the company's primary trading market, specified non-U.S. disclosure documents (*e.g.*, annual and interim reports containing home-country financial statements). To remain eligible for the exemption, the company must continue to publish these documents in English for subsequent fiscal years.
- The company must not otherwise incur an Exchange Act reporting obligation, by listing a class of securities on a U.S. stock exchange and/or making a U.S. registered public offering. Unlike the current rule, amended Rule 12g3-2(b) will not require a company to look back over the past 18 months and determine whether it had any active or suspended SEC reporting obligations during that period.

The SEC staff made clear during the Open Meeting that a company could lose its Rule 12g3-2(b)-exempt status if it failed to meet any of the three conditions described above. This means that a company will have to comply with Exchange Act registration and reporting requirements if it ceases electronic publication of English translations of certain non-U.S. disclosure

documents, lists a security on a U.S. exchange (or makes a registered offering in the United States), or no longer maintains a listing on an exchange in its primary trading market.

Finally, there will be a three-year transition period to accommodate a current Rule 12g3-2(b)-exempt company that otherwise would lose the benefits of the exemption upon the effective date of amended Rule 12g3-2(b). This might occur, for example, if the company did not satisfy the 55% worldwide ADTV test with respect to its most recently completed fiscal year. In addition, companies that are otherwise eligible for the revised exemption will have a three-month "grace" period designed to allow issuers to make sure that they have complied fully with respect to electronic publication of the necessary English-language versions of their non-U.S. disclosure documents, and to enable investors to determine how best to gain access to these documents.

For more information on newly amended Rule 12g3-2(b), we recommend that you review SEC Staff Remarks by Elliot B. Staffin, August 27, 2008, available at http://www.sec.gov/news/speech/2008/spch082708ebs.htm.

Determining "Foreign Private Issuer" Status; Acceleration of Form 20-F Filing Deadline and Related Enhanced Disclosure Requirements

The SEC also adopted amendments intended to ease the burdens associated with determination of a company's status as a foreign private issuer,[6] accelerate the existing Form 20-F filing deadline of six months after fiscal year-end, and expand Form 20-F's disclosure requirements. Each of these changes is discussed briefly below:

- Foreign companies no longer will be expected to monitor their levels of U.S. share ownership and/or business operations almost continuously to ensure that they have not lost the benefits of "foreign private issuer" status under Exchange Act Rule 3b-4 – including but not limited to the SEC's exemptions from quarterly reporting on Form 10-Q and "current" reporting on Form 8-K, as well as from compliance with the SEC's proxy rules and the insider beneficial ownership reporting/short-swing profit recovery provisions of Exchange Act Section 16. Instead, beginning on the as-yet unknown effective date of the amended rules, foreign companies will be able to evaluate their status as a foreign private issuer on the last business day of their second fiscal quarter – which is the same date on which U.S. companies determine their "accelerated filer" and "smaller reporting company" status. A non-U.S. company that fails to qualify as a "foreign private issuer" on this date will have six months advance notice in which to prepare for compliance with the SEC's domestic company reporting system. By contrast, non-U.S. companies that now find themselves in this situation must begin immediately to comply with all requirements applicable to U.S. companies.
  - The SEC indicated that there will be a three-year transition period, which means that the amendments will first apply for companies with fiscal years ending on or after December 15, 2011. Foreign companies with fiscal years ending December 31 therefore would have to comply beginning with the Form 20-F filed in the spring of 2012.
- Annual reports on Form 20-F will now be due within four (4) months (or 120 days) after the company's fiscal year end (instead of the current six (6) month deadline). The SEC believes that many foreign private issuers now are subject to three- or four-month filing deadlines in their home countries, and that many also will soon (if not already) be relieved of Form 20-F's

U.S. GAAP reconciliation requirements as they migrate to International Financial Reporting Standards ("IFRS"), as adopted by the International Accounting Standard Board ("IASB").[7]

- The amendments enhance disclosure in Form 20-F by eliminating certain U.S. reconciliation options and adding new disclosure requirements, as follows:
  - Item 17 of Form 20-F, which provided a somewhat less burdensome method of reconciling a foreign private issuer's home-country financial statements to U.S. GAAP for SEC reporting purposes (where such private issuers are not otherwise exempt from U.S. GAAP reconciliation because financial statements have been prepared in accordance with "pure" IFRS; i.e., as adopted by the IASB), will no longer be available for Form 20-F filers. As a result, Form 20-F filers will now have to comply with the more onerous Item 18. However, the SEC is retaining Item 17 in the Form to enable those Form 20-F filers that must reconcile to present third-party financial statements – for example, of an acquired company or an equity-method investee – under Item 17. Affected foreign private issuers will not be required to comply with this amendment until their annual reports on Form 20-F for fiscal years ending on or after December 2011 (meaning the Form 20-F filed in 2012).[8]
  - There will be new 20-F disclosure requirements relating to: (a) changes in or disagreements with the company's certifying public accountant; (b) ADR fees, payments and other charges; and (c) the significant ways in which the company's corporate governance practices differ from those followed by domestic issuers under the relevant U.S. stock exchange's listing standards (the listing standards of the U.S. stock exchange's already require such disclosure, but allow it to be made on company Internet websites).
- Schedule 13e-3 for "going-private" transactions by reporting companies has been amended to reference the recently streamlined provisions for foreign private issuer deregistration and termination of SEC reporting obligations. *See* Exchange Act Rule 12h-6.

For more information on this set of amendments, please see SEC Staff Remarks by Felicia H. Kung, August 27, 2008, available at http://www.sec.gov/news/speech/2008/spch082708fhk.htm.

Amendments to Cross Border Business Combination and Rights Offering Rules

The SEC also acted on August 27 to adopt revisions to its exemptive rules under the Exchange Act and the Securities Act of 1933, as amended ("Securities Act"), and to update interpretive guidance previously furnished under those rules, in a renewed effort to facilitate the inclusion of U.S. investors in cross-border mergers, tender offers and other acquisitions of the securities of non-U.S. companies, as well as rights offerings by such companies. (The SEC also allowed certain foreign institutional investors to use a short-form Schedule 13G, rather than a long-form Schedule 13D, for beneficial ownership reporting purposes). Although these amendments and the modified guidance together should encourage the extension to U.S. investors of offerings involving the securities of foreign companies, the revisions do not go quite as far as many commenters had hoped. For example, the SEC declined commenters' invitations to raise existing U.S. share ownership ceilings codified in the so-called "Tier I" and "Tier II" exemptions available for transnational tender and exchange offers (respectively, 10% and 40% of the target company's securities), and the Securities Act exemption for rights offerings in Rule 801 (10% of the outstanding class of securities that is the subject of the rights offering). Similarly, the 10%

U.S. share ownership cap contained in the Securities Act exemption that can be invoked in cross-mergers and exchange offers, Rule 802, remains in place.

Still, there are many positive changes in the amended rules, at least one of which (early commencement of certain exchange offers) the SEC has decided to extend to tender offers for U.S. companies. In a nutshell, these changes focus on:

- **Calculation of U.S. Share Ownership:** The determination of U.S. beneficial ownership of the subject class of equity securities for purposes of the various cross-border exemptions will now be made on any date within 120 days before or, if this isn't feasible for as-yet unspecified reasons, no more than 30 days after, the first public announcement of the transaction, and will exclude 10% holders other than the bidder[9];
  - An alternate trading volume test previously limited to hostile deals will be revised and broadened to allow those companies unable to conduct the modified U.S. "look through" analysis in a negotiated or "friendly" deal to make the requisite calculation of U.S. equity ownership by comparing U.S. vs. worldwide ADTV of the subject securities. It is otherwise unclear what percentages this ADTV comparison will entail. In addition to this comparison of trading volumes, the amended alternate test will require a prospective acquirer in the context of a tender/exchange offer or merger, or an issuer contemplating a self-tender or rights offering, to take into account publicly available U.S. share ownership data, whether reflected in SEC or home-country filings or other sources the acquirer or issuer has "reason to know" about.
- Expansion of the Scope of the Tier I and Tier II Exemptions: The amended rules containing these exemptions will:
  - Expand the scope of the Tier I exemption to cover Rule 13e-3 cross-border transactions, regardless of whether those transactions are otherwise conducted under Rule 802 (the Securities Act exemption for tender/exchange offers, mergers, etc.) or Rules 13e-4(h)(8)(issuer tender offers) or 14d-1(c)(third-party tender or exchange offers). What this may mean, we believe, is that Tier I coverage may now cover "schemes of arrangement" under the laws of the United Kingdom, and "plans of arrangement" under Canadian law, as recommended by some commenters.[10]
  - Expand the scope of the Tier II exemption to cover unregistered tender offers subject only to the tender-offer antifraud provisions of Exchange Act Section 14(e) and Regulation 14E, such as tender offers for equity securities that are not registered under Section 12 of the Exchange Act, or debt securities.
- **Codifying Relief Related to Tier II Offerings:** The SEC adopted amendments that codify certain staff interpretive positions, including:
  - Allowing more than one offer to be made abroad in conjunction with a U.S. offer, and relaxing SEC rules regarding who may be included in each offer;
  - Permitting bidders to suspend back-end withdrawal rights after the expiration of a tender offer, while tendered securities are being counted and before their acceptance for payment;
  - Permitting subsequent offering periods in tender offers to extend beyond 20 U.S. business days;

  - Permitting early termination of the initial offering period in a cross-border tender offer, once all offer conditions have been satisfied; and
  - Permitting purchases to be made outside of the tender offer without being deemed to violate Rule 14e-5's prohibition against such purchases.
- **Expanding the Availability of "Early Commencement" for Exchange Offers**: The SEC has expanded the types of exchange offers that may commence before the effectiveness of the related Securities Act registration statement not just for Tier II transactions, as had been proposed, but also for exchange offers targeting the securities of U.S. companies. Because such early commencement thus far has been permissible only in the case of exchange offers subject either to the third-party or issuer tender-offer requirements of Regulation 14D and Rule 13e-4, respectively, this could signal the possibility that early commencement may be available for those Regulation 14E exchange offers that otherwise must be registered under the Securities Act. However, we will have to wait until the adopting release is published to be certain.
- **Foreign Institutions and Beneficial Ownership Reporting:** Certain types of foreign institutions will be allowed to report beneficial ownership of equity securities on Schedule 13G to the same extent as their domestic counterparts, so long as they certify to the following:
  - The particular foreign institution is subject to a regulatory scheme substantially comparable to the regulatory scheme applicable to U.S. institutions; and
  - The subject securities have been acquired, and are held, in the ordinary course of business and without the purpose or effect of influencing control of the issuer of those securities.

Corresponding changes will be made to the Section 16(a) rules governing beneficial ownership reporting by officers, directors and large shareholders (holders who beneficially own more than 10% of a class of Section 12-registered equity securities, whether directly or indirectly).

- **SEC Interpretive Guidance on Tender-Offer Issues Frequently Addressed by the Staff:** According to the SEC staff statement published in connection with the Open Meeting, this SEC guidance, which unlike staff pronouncements is binding, will relate to:
  - limitations on previous SEC guidance regarding the ability of bidders to reduce or waive a minimum acceptance condition in a tender offer without providing withdrawal rights after this change in the terms of the offer;
  - the ability of bidders in tender offers for U.S. companies to exclude non-U.S. shareholders of the foreign target, notwithstanding U.S. equal treatment principles;
  - the ability of bidders in cross-border tender offers (for non-U.S. companies) to exclude U.S. target shareholders without violating U.S. tender offer rules; and
  - the ability of bidders in cross-border exchange offers to use "vendor placements," which involve the payment of cash consideration to U.S. holders while offering securities to foreign target holders.

The staff indicated, without elaboration, that the foregoing "guidance is consistent with that previously provided in the cross-border proposing release issued on May 6, 2008,[11] although we recommend providing some additional detail." For more information on this set of amendments,

please see SEC Staff Remarks by Christina Chalk, August 27, 2008, available at http://www.sec.gov/news/speech/2008/spch082708chalk.htm.

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If you have any questions on these matters, please do not hesitate to speak with your regular contact at Weil, Gotshal & Manges LLP or members of the Firm's Public Company Advisory Group: Howard B. Dicker, 212-310-8858; Cathy Dixon, 202-682-7147; Gil Friedlander, 214-746-8178; Holly J. Gregory, 212-310-8038; P.J. Himelfarb, 202-682-7197; Robert L. Messineo, 212-310-8835; and Ellen J. Odoner, 212-310-8438. Our email protocol is firstname.lastname@weil.com.

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[1] The SEC also voted unanimously at the August 27 meeting to approve the issuance of a "roadmap" for the agency's possible future acceptance, from domestic reporting companies that now file financial statements presented under U.S. Generally Accepted Accounting Principles, of financial statements that instead are prepared in accordance with International Financial Reporting Standards or "IFRS." We summarize this proposal in a companion client alert.

[2] Unless the Rule 12g3-2(b) exemption is available, a foreign private issuer (as defined by Exchange Act Rule 3b-4, discussed in footnote 3 below), that has (i) 300 or more U.S. holders of record of a class of that issuer's equity securities at the end of its most recently completed fiscal year, with 500 or more such holders worldwide, and (ii) more than US $10 million in assets, must register the class of equity securities with the SEC under Section 12(g) of the Exchange Act and thereafter comply with applicable SEC reporting requirements for foreign private issuers.

[3] As defined in Exchange Act Rule 3b-4 (c), the term "foreign private issuer" means any foreign issuer, other than a foreign government, *except* an issuer that has more than 50% of its outstanding voting securities directly or indirectly held of record by U.S. residents, and that meets any one or more of the following three criteria: (a) the majority of its executive officers or directors are U.S. citizens or residents; (b) more than 50% of its assets are located in the United States; or (c) its business is administered principally in the United States.

[4] Prior to its recent amendment, Rule 12g3-2(b) required eligible foreign private issuers to make an initial paper submission to the SEC staff in the Division of Corporation Finance before or on the date its first Exchange Act registration statement would have had to be filed in the event the Section 12(g) registration and reporting thresholds described in note 2, above, were triggered. Assuming this submission was not rejected by the staff, a company thereafter was obligated to furnish paper copies to the Division of Corporation Finance, in English, of information made public or otherwise provided to investors in its home country. Any U.S. investor who wanted to read these submissions would have to pay a document service for copies or personally travel to SEC headquarters in Washington, D.C. to request copies from the SEC.

[5] In light of commenters' objections, the SEC did not adopt a proposed requirement that a foreign company's U.S. ADTV represent no more than 20% of the subject security's worldwide trading volume in the most recently completed fiscal year. The SEC appeared to find persuasive commenters' arguments that this additional 20% test would discourage foreign private issuers from creating or maintaining sponsored ADR facilities in the United States, or making U.S.-directed private offerings.

[6] *See* note 3, above.

[7] According to the SEC staff, "[i]n the next several years a majority of the foreign private issuers who file annual reports with the Commission will have incentives to use IFRS as more countries adopt IFRS as their basis of accounting, or permit companies to use IFRS as their basis of accounting. Recent [SEC] rule amendments that exempt foreign private issuers from the reconciliation requirement if they prepare their financial statements according to IFRS, as issued by the IASB, should make it easier for many foreign private issuers to prepare their annual reports on Form 20-F." There appears to be an assumption that foreign private issuers will elect, where permitted by their home jurisdictions, to forego reliance on home-jurisdiction deviations from IFRS as promulgated by the IASB to avoid U.S. GAAP reconciliation requirements. Only time will tell whether this assumption proves accurate; the answer may depend in part on whether the SEC and FASB act to eliminate U.S. GAAP as contemplated by the "IFRS roadmap" for U.S. companies approved on August 27, 2008. See note 1, above.

[8] The SEC decided not to adopt its proposal to require that foreign private issuers provide financial information in their annual reports on Form 20-F for completed acquisitions that are significant at the 50% or greater level, due to concerns regarding the timeliness and usefulness of such information.

[9] All securities held by shareholders of more than 10% of the subject class of securities previously had to be excluded from the U.S. share ownership calculation.

[10] *See, e.g.*, Comment Letter filed by the Committee on Federal Regulation of Securities of the ABA's Section of Business Law dated July 18, 2008, which some of our Firm's lawyers helped to draft. This and other comment letters filed with the SEC are available on the SEC's website at http://www.sec.gov/comments/s7-10-08/s71008.shtml.

[11] Revisions to the Cross-Border Tender Offer, Exchange Offer and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, SEC Proposing Release No, 33-8917 (May 6, 2008), available at http://www.sec.gov/rules/proposed/2008/33-8917.pdf.

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