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If you would like further information regarding the proposed EDGAR amendments that will require foreign private issuers to file by EDGAR, please contact the Mintz Levin attorney who ordinarily handles your legal affairs.

Advisory

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SECURITIES LAW

SEC Proposes That Foreign Issuers File Electronically On EDGAR

On September 28, 2001, the U.S. Securities and Exchange Commission (SEC) proposed amendments to its EDGAR rules and forms which would require foreign private issuers and foreign governments to electronically file all necessary documents on EDGAR, the SEC's electronic filing system, rather than continue to submit filings in paper format. The current EDGAR rules permit, but do not require, foreign issuers to file their SEC documents on EDGAR. U.S. issuers have been required to electronically file on EDGAR since 1996.

What is EDGAR?

EDGAR stands for Electronic Data Gathering, Analysis, and Retrieval (system). EDGAR is the system that allows the electronic transmission of filings to the SEC, which has been the required method of filing for all U.S. companies since 1996.

Transition Period

It is currently expected that the proposal will be adopted into final rules at the end of the comment period. During the comment period, which expires on December 3, 2001, the SEC receives comments from issuers and the public with regard to the proposal and considers whether to revise its proposal based on the comments. Once the comment period ends, the SEC will most likely adopt the proposed rules, with some changes as recommended by the submitted comments. Some of the comments that have been submitted to the SEC have suggested expanding the filing hours for foreign issuers, not requiring all foreign language exhibits to be filed in English, and making the Transition Period longer than four months. Some practical considerations of the change to EDGAR for foreign issuers are discussed below.

Under the current SEC proposal, the new rules would become effective four months after they are formally adopted. During this four

month Transition Period, foreign issuers would still be permitted to file in paper but would be encouraged to begin voluntarily filing electronically in order to become familiar with the mechanics of filing by EDGAR, which would help ensure that they are ready to begin filing all documents electronically once the Transition Period ends.

Foreign Issuers' Forms and Documents Affected By the Proposed Amendments

As proposed, the amendments would require that foreign issuers file substantially all of their SEC documents electronically through the EDGAR system, just as U.S. domestic issuers currently do. The foreign issuer securities documents expected to be affected by the new rules include:

- Registration statements on Form F-1, F-2 and F-3 for securities offered and sold in the U.S., Form F-4 for mergers and exchange offers and Form F-6 relating to American depositary Receipt programs
- Annual reports on Form 20-F
- Exchange Act reports on Form 6-K, the form used by foreign issuers for submitting current and periodic reports to the SEC
- Form CB for certain cross-border tender offers, exchange offers, business combinations and rights offerings
- Third party forms that pertain to non-U.S. issuers, such as Schedule TO (tender offers) and beneficial ownership reports on Schedule 13D or 13G
- Filings by Canadian issuers under the Multijurisdictional Disclosure System, such as registration statements on Forms F-7, F-8, F-9, F-10 and F-80, annual reports of Form 40-F, and Schedules 13E-4F, 14D-1F and 14D-9F relating to tender offers
- Forms T-1, T-2, T-3 and T-6 regarding trustee eligibility and indenture qualification under the Trust Indenture Act of 1939
- Form F-N, which banks and foreign insurance companies will be required to electronically file to designate a U.S. agent for service of process upon filing of a registration statement under the Securities Act.

The proposed rules will not alter the SEC's current practice of permitting the following documents to be filed on paper:

- Annual reports to security holders and the related Form 6-K if the sole purpose of the Form 6-K is to submit the annual report to security holders
- Form CBG where neither the bidder nor the target company is subject to U.S. periodic reporting requirements
- Applications and supporting documents for exemption from U.S. registration under Rule 12g3-2(b) and ongoing submissions of home jurisdiction reports that a Rule 12g3-2 (b) issuer must make to maintain its exempt reporting status.

How EDGAR Filing Will Affect Foreign Issuers — Practical Considerations

Just as U.S. issuers were required to do in 1996, the first step for any foreign issuer is to decide who will do its EDGAR filings and apply to the SEC for filing codes. Most U.S. issuers utilize professional financial printers to do their EDGAR filings, although a small number of issuers choose to do their own filings. Issuers provide to the financial printers electronic versions of the SEC documents that are to be filed (or paper versions, which need to be converted to electronic files); the financial printers, using special software provided by the SEC, convert the files to a format that is accepted by EDGAR and then electronically transmit the files to the SEC. Once received, the EDGAR system sends a confirmation of filing.

Foreign issuers that will file on EDGAR will face some of the same hurdles as U.S. issuers, plus some that are specific to foreign issuers. Based on our experience since 1996 with U.S. issuers, these are some of the more significant issues we believe foreign issuers should be aware of when beginning the process of becoming EDGAR filers under the current SEC proposals:

1. *All documents filed on EDGAR must be in English.* EDGAR filing requirements would prohibit the filing of non-English language documents in electronic format. If a required document, such as a material contract that must be filed as an exhibit, is in a foreign language, a filing person must file in its place an English translation that is certified as fair and accurate by a designated officer of the filing person. In contrast, the existing paper filing rules permit the filing of documents in other languages as exhibits to or other parts of a registration statement or report so long as the documents are accompanied by a “summary, version or translation in the English language.” The SEC proposes to eliminate the special treatment of non-English language documents under the paper filing rules, so that all documents filed with the SEC will have to be in English or full English language translation. Foreign issuers will need to begin preparing English translations well in advance of the SEC filing deadlines.
2. *EDGAR Formatting Requirements.* It takes time to convert ordinary documents to the EDGAR format, particularly tables. Any sections of a filing which must be approved by officers, particularly financial tables, should be approved well in advance of the filing deadline, and outside parties providing such sections should also be given early deadlines. Accountants should be encouraged to provide tables in ASCII format or at least to refrain from putting them into spreadsheet programs which can be difficult to convert to EDGAR format.

In addition, the first one or two times that a company files by EDGAR, there are sometimes filing delays caused by the filer using the wrong identification numbers (CIK and CCC numbers, which the SEC assigns) or having misplaced the numbers. Delays can be minimized by making test filings at least 24 hours before the actual filing to confirm that the identification numbers are correct.
3. *Filing Deadlines.* Filing electronically requires completion of documents earlier than when filing by paper. EDGAR filings can be made between 8:00 a.m. and 10:00 p.m. Eastern Time, but filings started after 5:30 p.m. will receive the next day’s date as a filing date. The financial printers, who have been making EDGAR filings for a number of years, are well aware of the time necessary to process filings so that deadlines are not missed and are experienced at handling the last minute rush to file around certain key filing dates. However, delays by the company in getting files to the printer, using file formats that are difficult to convert to the EDGAR-required format, and having to convert lengthy exhibit files can lead to missed filing deadlines. Financial printers typically suggest that filers transmit to them all files at least several days prior to the expected EDGAR filing date.
4. *Exhibits.* As a practical matter, issuers should always get electronic copies of any contracts or other documents which they anticipate needing to file with the SEC, in order to save the cost of scanning or manually inputting lengthy documents at the time of filing. It is particularly important to remember this when the issuer is not the one generating the document, e.g., when the other party to a contract is the one which maintains the document on its computer system throughout the negotiations. Also, issuers should bear in mind early in the process of making a filing the lead-time that may be needed to convert any lengthy paper exhibits into EDGAR format.
5. *Cost.* The financial printers have fee schedules for converting and filing EDGAR documents, which typically are based on the number of pages involved in the filing. Once a document is converted to EDGAR, making additional changes will lead to additional fees. However, when a filing deadline is approaching, companies often need to send a file to the financial printer before the document is finalized in order to begin the process of converting the file;

finalizing the document can then lead to costly changes, which cannot be avoided. Companies should discuss expected fees with the financial printers in advance of filing in order to appropriately budget for the new fees.

6. *Substantive Changes in Disclosure Requirements.* A key point to remember is that while the proposed EDGAR amendments change the *method* of filing SEC documents for foreign issuers, they do not require any different *substantive* disclosure. Nevertheless, while we are not aware of any current formal initiatives by the SEC to separately change the actual disclosure requirements for foreign issuers, several securities law experts have within the past few weeks suggested that the SEC might consider enhancing the disclosure requirements for foreign issuers so that they are more similar to those for U.S. issuers. We will continue monitoring developments in this area for the benefit of our clients and contacts.

Conclusion

Assuming a December 2001 adoption of final rules and a four month Transition Period, foreign issuers are expected to have to comply with EDGAR requirements beginning in the second quarter of 2002. Filers will need to prepare themselves for the additional lead-time, logistical issues and costs in preparing their SEC filings. However, foreign issuers have the benefit of utilizing the experience of U.S. issuers, law and accounting firms, and financial printers who worked together closely in 1996 to ensure a relatively problem-free transition for U.S. issuers.