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Advisory

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SECURITIES LAW

SEC Adopts New EDGAR Filing Rules For Foreign Issuers

On May 14, 2002, the United States Securities and Exchange Commission (SEC) published amendments to its EDGAR rules and forms relating to foreign issuers.¹ Under the new EDGAR rules, foreign private issuers and foreign governments will be required to file most Securities Act and Exchange Act documents electronically through the SEC's EDGAR system. Previously, the EDGAR rules permitted, but did not require, foreign issuers to file their documents on EDGAR.

Background

The primary goal of the EDGAR system is to facilitate and accelerate the dissemination, receipt and analysis by the investing public of time-sensitive financial and business information filed with the SEC. Since the SEC's adoption of EDGAR filing requirements for U.S. companies in 1996, there have been considerable technological advances which have transformed the Internet into a principal means for information gathering and dissemination. As a result, the SEC believes that the investing public has come to expect to be able to access information about all public companies and governments electronically, regardless of their country of origin.

Effective Date

The new EDGAR rules will go into effect on November 4, 2002. In the interim, the SEC is encouraging foreign issuers to submit test filings and to begin electronic filings on a voluntary basis.

Foreign Issuers' Forms and Documents Affected by the New EDGAR Rules

Mandatory EDGAR Filings:

The new EDGAR rules will require the following SEC documents to be filed by foreign issuers on EDGAR.

- Registration statements on Forms F-1, F-2 and F-3, for securities offered and sold in the United States; Form F-4, for mergers and exchange offers; and Form F-6, relating to American Depositary Receipt programs;
- Registration statements and annual reports on Form 20-F;
- Except as discussed below, Exchange Act reports on Form 6-K, the form used by foreign issuers for submitting current and periodic reports to the SEC;
- Form CB, which is used for certain cross-border rights offerings, exchange offers, and business combinations that are exempt from the tender offer

¹ The proposed EDGAR rules were discussed in a Mintz Levin Client Advisory entitled "SEC Proposes That Foreign Issuers File Electronically On Edgar", dated November 2001. EDGAR is the SEC's Electronic Data Gathering, Analysis, and Retrieval system. EDGAR allows the electronic transmission of filings to the SEC, which has been the required method of filing for all U.S. companies since 1996.

rules or Securities Act registration, if the filer is an Exchange Act reporting company;

- Third party forms relating to non-United States issuers, such as Schedules TO (tender offers) and beneficial ownership reports on Schedules 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, registration statements and annual reports on 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; and
- Form F-N, which foreign banks and insurance companies will be required to electronically file to designate a United States agent for service of process upon filing of a registration statement under the Securities Act.

Optional EDGAR Filings:

Under the new rules, the following documents may be filed either on paper or via EDGAR.

- Form 6-K reports containing annual reports to security holders if the sole purpose of the Form 6-K is to submit to the SEC the foreign private issuer's annual report to security holders;
- Form 6-K reports containing a required home country report or other document, as long as the document is not a press release, is not required to be and has not been distributed to the foreign private issuer's security holders and, if discussing a material event, the information has already been the subject of a Form 6-K submission or other SEC filing on EDGAR; and
- Form CB, where neither the bidder nor the target company is subject to United States periodic reporting requirements.

Required Paper Filings:

Applications and supporting documents for exemption from United States regis-

tration 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 *must* continue to be filed by foreign private issuers in paper format only.

Changes from Proposed Rules Relating to Translation of Documents

In the proposed EDGAR rules, the SEC had suggested that it would:

- eliminate the option to provide an English summary in lieu of a full English translation of a foreign language document that is required as an exhibit or other attachment to a filing; and
- require that an officer of an issuer, whether foreign or domestic, certify in writing that an English translation of a document is a fair and accurate one.

In response to many negative comments on these proposals, the SEC decided to (1) keep the option to provide an English summary for most foreign language documents and (2) eliminate the proposed written certification requirement. The categories of documents which may not be summarized, and for which a full English translation must be provided, are:

- articles of incorporation, bylaws and other comparable documents;
- instruments defining the rights of security holders;
- voting agreements, including voting trust agreements;
- contracts to which directors, officers, promoters, voting trustees or security holders who are named in a registration statement are parties;
- contracts upon which a filer's business substantially depends;
- audited annual and interim consolidated financial information; and
- any document that is or will be the subject of a confidential treatment request.

Additional Changes to Form 6-K Filing Requirements

Foreign issuers use Form 6-K to file material information with the SEC

regarding their businesses which they (a) make or are required to make public by the laws of their home jurisdictions, (b) file or are required to file with the stock exchange on which their securities are traded, if the information is made public by that exchange, or (c) distribute or are required to distribute to their security holders.

The new EDGAR rules provide that foreign private issuers are not required to submit on a Form 6-K an offering circular or prospectus that relates solely to a foreign offering if the issuer has already submitted via EDGAR another filing that included the material information that is disclosed in the offering circular or prospectus. This may significantly reduce the filing burden for foreign private issuers that conduct overseas-only offerings but who also summarize the material aspects of those offerings in other SEC-filed documents.

In addition, the new rules require that foreign private issuers submit a full English translation of the following documents filed on Form 6-K, whether the form is submitted electronically or on paper.

- Press releases;
- Communications and other documents distributed directly to security holders, except for offering circulars and prospectuses relating solely to foreign offerings; and
- Documents disclosing annual audited or interim consolidated financial information.

The new rules also eliminate the requirement for both domestic and foreign filers to submit to the SEC a paper copy of their first electronic filings.

For practical considerations as to how EDGAR filing will affect foreign issuers, please see our November 2001 Client Advisory, referenced in footnote 1, for a discussion of this topic.

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Please contact the Mintz Levin attorney who handles your corporate and securities law matters if you have any questions regarding the new EDGAR filing rules for foreign issuers.