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CLIENT ADVISORY

SEC Mandates EDGAR Filings for Foreign Issuers and Revises Rules for Foreign Language Documents

On May 14, 2002, the U.S. Securities and Exchange Commission (the "SEC") adopted final rules that require foreign private issuers and foreign governments, among others, to file electronically through the Electronic Data Gathering, Analysis, and Retrieval (the "EDGAR") system most of their securities documents, including registration statements, reports and other documents required to be filed under the Securities Act of 1933, as amended (the "Securities Act"), and the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The final rules also revise the requirements which allow foreign private issuers to provide an English summary of documents written in foreign languages and filed as exhibits or otherwise with Securities Act or Exchange Act registration statements, reports and other filings. The SEC expects several benefits to be realized by requiring foreign private issuers to file their documents via EDGAR, including: more rapid dissemination to, and access by, investors of issuer information; enhancement of foreign private issuers' exposure to investors; improved efficiencies in the filing process for foreign private issuers; and more efficient storage, retrieval and analysis of information by the SEC.

Documents That Must Be Filed Electronically

Under the new SEC rules, the following documents filed on or after November 4, 2002 must be filed electronically through the EDGAR system:

- foreign private issuers' Securities Act registration statements on Forms F-1, F-2, F-3, F-4, F-6 (pertaining to registration of ADRs) and S-8;
- foreign private issuers' Exchange Act registration statements and reports, including annual reports and registration statements on Form 20-F and current or periodic reports on Form 6-K;
- foreign governments' Securities Act and Exchange Act registration statements, including registration statements on Schedule B and Form 18 and annual reports on Form 18-K;
- Securities Act registration statements of Canadian issuers that choose to use the Multijurisdictional Disclosure System (the "MJDS"), including Forms F-7, F-8, F-9, F-10 and F-80;
- Exchange Act registration statements and annual reports of MJDS issuers on Form 40-F and tender offer documents under the MJDS on Schedules 13E-4F, 14D-1F and 14D-9F;
- statements of beneficial ownership on Schedules 13D and 13G filed by third parties, as well as tender offer documents filed on Schedules TO and 14D-9, each pertaining to the securities of foreign private issuers (whether filed by a foreign or domestic person);
- Form CB, which is used for cross-border rights offers, exchange offers and business combinations that are exempt from the tender offer rules or Securities Act registration, provided that either (1) the party filing or submitting the form is an Exchange Act reporting company or (2) the subject company of the Form CB transaction is an Exchange Act reporting company;
- most forms required under the Trust Indenture Act of 1939, as amended (the "Trust Indenture Act"), relating to trustee eligibility and indenture qualification, including Forms T-1, T-2, T-3 and T-6; and

- Forms F-X¹ and F-N, which are used for designating a U.S. agent for service of process, subject to limited exceptions.

There are several exceptions to the rules requiring electronic filings via EDGAR. The following documents may still be submitted in paper format at the filer's option:

- Form 6-Ks containing a "glossy" annual report to security holders attached as an exhibit, if the sole purpose of the Form 6-K is to deposit a copy of this report with the SEC; and
- Form 6-Ks containing "home country reports" or other documents, as long as the report or other documents (1) are not press releases; (2) are not required to be and have not been distributed to the foreign private issuer's security holders; and (3) if discussing a material event (including disclosure of annual audited or interim consolidated financial results), such event or information has already been disclosed by submission of a Form 6-K or other SEC filing.

Any documents submitted to the SEC pursuant to Rule 12g3-2(b) of the Exchange Act, which exempts certain foreign private issuers from the registration requirements of Section 12(a) of the Exchange Act, must continue to be filed in paper format only.

Despite the new rules, a foreign private issuer will continue to be permitted, upon request, to submit paper drafts of its initial Securities Act or Exchange Act registration statements for staff review on a confidential basis. When the foreign private issuer makes its initial public filing of a registration statement under the Securities Act or Exchange Act, however, the public filing must be submitted electronically, as well as any letters responding to SEC comments or related correspondence (response letters and other related correspondence will not be publicly available). Although the SEC is encouraging foreign private issuers to begin filing all documents electronically immediately, as a means of transition, the SEC is permitting foreign private issuers who have filed registration statements in paper format prior to November 4, 2002 to continue to file in paper format their pre-effective amendments and prospectuses until December 31, 2002; after such date, all filings relating to registration statements must be made electronically.

Translation of Foreign Language Documents

The SEC has also revised its rules concerning the translation of documents written in foreign languages. Under the new rules, foreign private issuers may provide a summary in English of documents filed as exhibits or otherwise with Securities Act or Exchange Act registration statements, reports and other filings so long as the English summary fairly and accurately summarizes the material provisions of the foreign language document and the terms and provisions that have been omitted or abridged.

As exceptions to the general rule permitting English summaries of documents, several documents must be fully, fairly and accurately translated into English. The documents (and their amendments) that must be a full, fair and accurate English translation are:

- Form 6-Ks containing press releases (whether filed electronically or in paper format);
- Form 6-Ks containing communications and other documents distributed directly to security holders for each class of securities for which a reporting obligation under the Exchange Act exists, except for offering circulars and prospectuses that relate to entirely foreign offerings² (whether filed electronically or in paper format);

¹ Form F-X should be filed in paper form whenever the filer is not an Exchange Act reporting company or whenever the filer is a Canadian issuer qualifying an offering statement pursuant to the provisions of Regulation A.

² The final SEC rules have also amended Form 6-K to provide that foreign private issuers are not required to submit under cover of Form 6-K an offering circular or prospectus that pertains solely to a foreign offering, even when an English translation or summary is available, if the issuer has already submitted to the SEC under Form 6-K, Form 20-F or any other filing on EDGAR the material information disclosed in the offering circular or prospectus.

- Form 6-Ks containing documents disclosing annual audited or interim consolidated financial information (whether filed electronically or in paper format);
- articles of incorporation, memoranda of association, bylaws, and other comparable documents, whether original or restated;
- instruments defining the rights of security holders, including indentures qualified or to be qualified under the Trust Indenture Act;
- voting agreements, including voting trust agreements;
- contracts to which directors, officers, promoters, voting trustees or security holders named in a registration statement are parties;
- contracts upon which a filer's business is substantially dependent;
- audited annual and interim consolidated financial information; and
- any document that is or will be the subject of a confidential treatment request under the Securities Act or the Exchange Act.

The new SEC rules also eliminate the requirement that an officer of a foreign private issuer filing an English translation electronically certify in writing that such translation is fair and accurate.

Foreign private issuers may concurrently submit a paper copy of the unabridged foreign language document under Form SE, and the SEC recommends that foreign private issuers post their foreign language documents on their corporate web sites for investor access. Nevertheless, a paper filing or web site posting will not correct an incomplete or inaccurate English summary or translation filed or submitted to the SEC electronically.

Finally, the new SEC rules permit Canadian issuers filing under the MJDS to use both French and English in electronic filings provided that the document is electronically formatted as an HTML document and that the use of dual language is necessary to comply with the requirements of the Canadian securities administrator and other authorities.

Exhibits and Documents Incorporated by Reference

The SEC's new rules do not require a filer (whether domestic or foreign) to file electronically an exhibit previously filed in paper format that is being incorporated by reference into an electronically filed document. However, if a foreign private issuer amends its charter or bylaws, these documents will have to be restated in their entirety in electronic format. Also, under the new rules, any portion of an annual or other report to security holders or Form 6-K report filed in paper format that is incorporated by reference into an electronic filing must be filed electronically as an exhibit to the filing.

Making Electronic Filings

Before a foreign private issuer can use the EDGAR system, it must register as an EDGAR filer by faxing a Form ID³ signed by a person authorized by the foreign private issuer. After the SEC processes the completed form, the foreign private issuer will receive access codes and related passwords. Documents filed with EDGAR must be formatted into either HTML or ASCII and must contain certain codes and be sent in specific ways to a specific electronic depository. In addition to these formats, a filer can submit an unofficial copy of the filing in Portable Document Format (PDF). It is important to note that generally an EDGAR filing is considered filed on a specific date only if the filing was received by the SEC before 5:30 p.m. U.S. eastern standard time on such date. Also, any applicable registration fees must be received in advance of the filing (preferably 24 hours in advance) for the SEC

³ Electronic copies of the various EDGAR-related forms can be obtained from ZAG/S&W, or can be downloaded from the SEC's web site, www.sec.gov.

to accept the filing (in most cases, EDGAR filing does not require a payment of additional filing fees). Nevertheless, the aforementioned description is not a complete summary of the elements and process of making an EDGAR filing, and before making your first EDGAR filing you should contact the lawyer with whom you regularly consult, or the undersigned. ZAG/S&W LLP or any financial printer can assist with the EDGAR filing process. After foreign private issuers have made an electronic filing once or twice, they usually find the process relatively straightforward and more administratively convenient, particularly where voluminous documents are included.

Conclusion

Although foreign private issuers may initially find compliance with the new SEC rules burdensome, the benefits expected to be realized by investors, the SEC and ultimately foreign private issuers, such as speed, convenience and exposure, should outweigh associated burdens. For a more comprehensive discussion of the topics covered in this Client Advisory or for assistance in preparing an EDGAR filing, please contact the lawyer at ZAG/S&W LLP with whom you regularly consult, or the undersigned.

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