

## 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.

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**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 continuous basis that is currently required; (2) Accelerate the filing deadline for annual reports filed on Form 20-F by foreign private issuers

<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.

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 depositary 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.

## 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 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 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 issuers relating to the requirements on internal control over financial reporting<sup>26</sup> and audit committee

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

<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.*

<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

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 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 reporting foreign issuers

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).

<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.

<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.

<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.*

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.

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 accelerate the filing deadline for Form 20-F annual reports by shortening the filing deadline from 6 months to within 90 days after the foreign private issuer's fiscal year-end in the case of large accelerated and accelerated filers, and to within 120 days after a foreign private issuer's fiscal year-end for all other issuers, after a two-year transition period. Commenters expressed concern that many foreign private issuers must prepare financial statements according to local GAAP under their home country's laws and regulations, and would need additional time to prepare their financial statements in accordance with U.S. GAAP or IFRS as issued by the IASB, or to reconcile their financial statements to U.S. GAAP for the Form 20-F. Commenters also noted that many foreign private issuers need additional time to translate information into English for Form 20-F, and to provide the additional non-financial statement disclosures that are required in Form 20-F compared to their home country annual reports. Other commenters noted that the proposed acceleration deadlines could well result in filing dates that override annual report filing deadlines in some issuers' home countries, and that, in any case, foreign private issuers provide their home country annual reports to U.S. investors through the submission of those reports on Form 6-K.

We also received a wide range of responses to our proposed amendments to 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. Although some commenters noted that the proposal to require Item 18 information would provide investors with more complete financial information, others expressed concern about the necessity of the proposed amendments, since many countries are gradually requiring footnote disclosures comparable to U.S. GAAP and Regulation S-X.

#### *C. Summary of Adopted Amendments*

We have carefully considered the comments received regarding the proposed amendments and have concluded that it is appropriate to adopt the amendments, substantially as proposed in the case of most of the amendments. Some of the amendments have been modified to reflect suggestions offered by commenters in response to questions posed in the Proposing Release.

The adopted amendments will:

- Permit reporting foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers once a year on the last business day of their second fiscal quarter, rather than on a continuous basis, which is currently required;
- Accelerate the reporting deadline for annual reports filed on Form 20-F by foreign private issuers from six months to four months after the issuer's fiscal year-end, after a three-year transition period;
- Amend Form 20-F by eliminating an instruction to Item 17 of that Form that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements;
- Amend Exchange Act Rule 13e-3, which pertains to going private transactions by reporting issuers or their affiliates, to reflect the recently adopted deregistration and termination of reporting rules applicable to foreign private issuers;
- Eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17 of Form 20-F for foreign private issuers that are only listing a class of securities on a U.S. national securities exchange, or only registering a class of equity securities under Section 12(g) of the Exchange Act, and not conducting a public offering. We also are eliminating this limited reconciliation option for annual reports filed on Form 20-F, and for certain non-capital raising offerings, such as offerings pursuant to reinvestment plans, offerings upon the

<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.

conversion of securities, or offerings of investment grade securities. Thus, all foreign private issuers that are required to provide a U.S. GAAP reconciliation must do so pursuant to Item 18 of Form 20-F, although required third party financial statements could continue to be prepared pursuant to Item 17 of Form 20-F;

- Amend Form 20-F to require disclosure in annual reports filed on that Form about any changes in the registrant's certifying accountant;
- Amend Form 20-F to require annual disclosure of the fees and other charges paid by holders of ADRs to depositaries, as well as any payments made by depositaries to the foreign private issuers whose securities underlie the ADRs; and
- Amend Form 20-F to require annual disclosure of the 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.

## II. Discussion of the Amendments

### A. Annual Test for Foreign Private Issuer Status

The Commission's longstanding policy of facilitating the access of foreign issuers to the U.S. capital markets is evidenced by the various accommodations to foreign practices and policies it has provided to foreign issuers that qualify as "foreign private issuers."<sup>36</sup> For many companies, the determination of whether they qualify as a foreign private issuer is important because of these accommodations and exemptions.<sup>37</sup> However, to make sure that it qualifies for these accommodations, a foreign private issuer that has close to 50% of its outstanding voting securities held of record by U.S. residents may find that it must monitor on a continuous basis the different factors used to assess foreign private issuer status.<sup>38</sup> This can

<sup>36</sup> See *supra* note 16 for the definition of "foreign private issuer."

<sup>37</sup> For example, Exchange Act Rule 3a12-3(b) [17 CFR 240.3a12-3(b)] exempts foreign private issuers from the Commission's proxy rules [17 CFR 240.14a-1 *et seq.*], and from the insider stock trading reports and short-swing profit recovery provisions under Section 16 [15 U.S.C. 78p] of the Exchange Act. Foreign private issuers also provide any interim reports on the basis of home country regulatory and stock exchange practices, rather than the quarterly reports that are required of U.S. issuers, and executive compensation disclosure on an aggregate basis if the information is reported on such a basis in the issuer's home country. See Item 6.B. of Form 20-F.

<sup>38</sup> See note 16 above for a description of the factors that foreign issuers must monitor. The Commission's staff has taken the position that, for

result in uncertainty for these issuers as to which reporting and regulatory requirements will apply to them within a given period of time, as well as increase their compliance burdens.<sup>39</sup> This also can result in confusion for investors if the issuer needs to switch between foreign and domestic reporting forms within the same fiscal year.

We proposed amendments to permit foreign private issuers to assess their status once a year on the last business day of their second fiscal quarter as a means of providing greater certainty to both issuers and investors as to the status of these foreign issuers within a given period of time. This is the same date used to determine accelerated filer status under Exchange Act Rule 12b-2<sup>40</sup> and smaller reporting company status in Item 10(f)(2)(i)<sup>41</sup> of Regulation S-K.<sup>42</sup>

The vast majority of comments received on the proposed amendments were highly supportive. Commenters noted that the proposed amendments would benefit investors by eliminating confusion in the markets as to an issuer's status if an issuer needs to move between foreign and domestic reporting forms in the same fiscal year. Commenters also noted that the proposed amendments would also eliminate uncertainty for issuers, and possibly reduce accounting, audit and

the purpose of the exemptions contained in Exchange Act Rule 3a12-3(b), foreign private issuers need to assess their status at the end of each fiscal quarter. In addition, they must assess their status at the completion of any purchase or sale by the issuer of its equity securities (other than in connection with an employee benefit plan or compensation arrangement, conversion of outstanding convertible securities, or exercise of outstanding options, warrants or rights), any purchase or sale of assets by the issuer other than in the ordinary course of business, and any purchase of equity securities of the issuer in a public tender offer or exchange offer by a non-affiliate. Foreign Private Issuers Relying on Rule 3a12-3(b) under the Exchange Act, SEC No-Action Letter, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,667 (Mar. 30, 1993). This letter will be superseded by the amendments.

<sup>39</sup> For example, if a foreign issuer concludes that it does not qualify as a foreign private issuer in the middle of its fiscal year, it may find it difficult to change its basis of accounting to U.S. GAAP in order to comply on a timely basis with the reporting requirements applicable to domestic issuers under the Exchange Act. These issuers also face the challenge of modifying their information and processing systems to comply with the domestic reporting and registration regime, as well as the executive compensation disclosure requirements, proxy rules and Section 16 reporting requirements that are applicable to domestic issuers.

<sup>40</sup> 17 CFR 240.12b-2.

<sup>41</sup> 17 CFR 229.10(f)(2)(i).

<sup>42</sup> 17 CFR 229.10 *et seq.* See also Release No. 33-8876 (Dec. 19, 2007) [73 FR 934] (adopting amendments to the disclosure and reporting requirements under the Securities Act and the Exchange Act to expand the number of companies that qualify for the scaled disclosure requirements for smaller reporting companies).

information technology fees that would otherwise result if an issuer changed its status mid-year. They noted that substantial incremental effort is often required to comply with the Commission's domestic issuer requirements. Commenters also pointed out that the proposed amendments would simplify compliance with the Commission's regulations because this approach would be more consistent with our approach to determining accelerated filer and smaller reporting company status. One commenter suggested that the proposal would increase certainty and predictability for foreign companies with respect to their reporting obligations, which should in turn enhance the attractiveness of the U.S. capital markets by removing a disincentive to register with the Commission.<sup>43</sup>

After considering the comments received, we are adopting the amendments as proposed. In addition, we are adopting the proposed amendments that would require a foreign private issuer that determines that it no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter to comply with the reporting requirements and use the forms prescribed for domestic companies beginning on the first day of the fiscal year following the determination date. We proposed this amendment to give these issuers six months' advance notice that they will need to transition to the domestic forms and applicable reporting requirements. All of the comments that we received on this aspect of the proposal were highly supportive. Under the amendments as adopted, a foreign issuer that does not qualify as a foreign private issuer as of the end of its second fiscal quarter in 2009 would file a Form 10-K in 2010 for its 2009 fiscal year. The issuer would also begin complying with the proxy rules and Section 16, and become subject to reporting on Forms 8-K and 10-Q on the first day of its 2010 fiscal year.

We also are adopting amendments to permit a reporting company that qualifies as a foreign private issuer to avail itself of the foreign private issuer accommodations, including use of the foreign private issuer forms and reporting requirements, beginning on the determination date on which it establishes its eligibility as a foreign private issuer. Although the majority of comments received on this aspect of the proposal were positive, one

<sup>43</sup> See comment letter by Organization for International Investment.

commenter<sup>44</sup> contended that the disclosure provided in domestic forms was important enough to require the issuer to file on such forms for the balance of the fiscal year. Nonetheless, we are adopting this distinction because we believe the new foreign private issuer, who would be eligible to file its annual report for that fiscal year on Form 20-F, need not continue to provide reports on Form 8-K and 10-Q for the remainder of that fiscal year. An issuer that qualifies as a foreign private issuer should be allowed to enter the foreign reporting system immediately and furnish reports on Form 6-K,<sup>45</sup> especially because it will be subject to the reporting requirements of its home regulator. Any reports that it files with its home regulator will be available to the Commission and the public through its Form 6-K submission. We note that the approach that we are taking here is consistent with our approach to smaller reporting companies.<sup>46</sup>

A few commenters supported requiring a foreign issuer to notify the market, either in the form of a press release and/or via notification on the issuer's Web site, when it has determined that it has switched its status from domestic issuer to foreign private issuer, or vice versa. Currently, however, foreign private issuers do not provide a notice when they switch from domestic issuer to foreign private issuer status. Moreover, such a notice requirement would be an anomaly in our regulations. In similar contexts, such as with respect to accelerated filers or smaller reporting companies, we do not require issuers to notify the market when they have switched status. Therefore, we are not adopting a notice requirement, although we note that by furnishing a current report on Form 6-K rather than Form 8-K after it changes status, a foreign issuer in essence will be providing notice that it has switched status. Of course, issuers may voluntarily provide explicit notice to

<sup>44</sup> See comment letter from CFA Institute Centre for Financial Market Integrity ("CFA Institute").

<sup>45</sup> Foreign private issuers submit current reports to the Commission on Form 6-K [17 CFR 249.306]. Unlike Form 8-K [17 CFR 249.308], which is the current report form used by domestic issuers, there are no specific substantive disclosures that are required by Form 6-K. Instead, foreign private issuers furnish under cover of Form 6-K whatever information that they (i) make or are required to make public pursuant to the law of the jurisdiction of their domicile or in which they are incorporated or organized, or (ii) file or are required to file with a stock exchange on which their securities are traded and which was made public by that exchange, or (iii) distribute or are required to distribute to their security holders. These reports are required to be furnished promptly after the material contained in the report is made public.

<sup>46</sup> 17 CFR 229.10(f)(2)(i).

the market when they switch from domestic to foreign private issuer status in order to provide enhanced transparency to investors. We note that issuers that lose their foreign private issuer status would be required to file quarterly reports on Form 10-Q or current reports on Form 8-K immediately, thereby effectively providing prompt notice of their new status because of the change in the forms used.

In addition to the amendments noted above, we are adopting amendments requiring a Canadian issuer that files registration statements and Exchange Act reports using the multijurisdictional disclosure system ("MJDS")<sup>47</sup> to test its status as a foreign private issuer only as of the last business day of its second fiscal quarter. Currently, a Canadian issuer that is eligible to file a Form 40-F<sup>48</sup> annual report at the end of a fiscal year is presumed to be eligible to use Form 40-F, as well as Form 6-K, from the date of filing until the end of its next fiscal year.<sup>49</sup> The amendments would require a Canadian issuer that plans to use the MJDS to test its foreign private issuer status earlier in the year. However, it would continue to have to test its eligibility to file annual reports on Form 40-F based on all of the other requirements of that Form, such as public float, at the end of the fiscal year.<sup>50</sup> The amendments would not change the responsibility of the Canadian issuer to check its eligibility to use Forms 40-F and 6-K at the end of its fiscal year.

With respect to MJDS filings made pursuant to the Securities Act, a Canadian issuer must test its ability to use the MJDS registration statement forms at the time of filing. As a result of the amendments, a Canadian MJDS filer that does not qualify as a foreign private issuer on the last day of its second fiscal quarter would immediately not be able use the MJDS forms for Securities Act offerings. However, the issuer would still be able to use the other foreign private issuer registration statement forms, such as Form F-3, until the end of its fiscal year.<sup>51</sup>

Although we received many comments generally supporting this

<sup>47</sup> 17 CFR 239.37 to 17 CFR 239.41 and 17 CFR 249.240f.

<sup>48</sup> 17 CFR 249.240f. MJDS filers file annual reports on Form 40-F and current reports on Form 6-K.

<sup>49</sup> See Release No. 33-6902 (June 21, 1991) [56 FR 30036] (adopting the MJDS system).

<sup>50</sup> See *id.*

<sup>51</sup> Form F-3 permits a foreign private issuer to incorporate by reference its latest Form 40-F. See Item 6(a) of Form F-3.

approach to MJDS filers, several commenters had additional recommendations. A few commenters suggested that a registrant that did not qualify for MJDS status on the testing date should be permitted to use the MJDS registration statement forms until the end of its fiscal year. Some commenters also suggested that MJDS filers be permitted to test their MJDS status on the last business day of their second fiscal quarter, rather than at the end of the year. Other commenters argued that the foreign private issuer eligibility test should be conducted at the end of the year in conjunction with the test for MJDS eligibility, or alternatively, that MJDS filers should be required to test their foreign private issuer eligibility status twice a year.

After carefully considering all of these comments, we have decided to adopt the MJDS-related amendments as proposed because we believe this approach takes into account the substantial accommodations that have been provided to MJDS filers, including significant disclosure accommodations.<sup>52</sup> As a result of the amendments, the new foreign private issuer testing date will provide MJDS filers with advance notice that they may need to switch to the domestic issuer forms after the end of the fiscal year. Even if an MJDS filer determines that it no longer qualifies as a foreign private issuer as of the test date, it will be permitted to use the Securities Act registration statement forms, although not the MJDS forms, available to foreign private issuers for the remainder of that fiscal year. The new date for testing foreign private issuer status will provide a substantial accommodation for MJDS filers because, currently, these filers are required to use the domestic forms as soon as they lose their foreign private issuer status.

#### *B. Accelerating the Reporting Deadline for Form 20-F Annual Reports*

We proposed amendments to the filing due date for Form 20-F to reflect technological and other developments that have occurred in the nearly 30 years that have elapsed since Form 20-

<sup>52</sup> Under the MJDS, eligible Canadian issuers may satisfy certain securities registration and reporting requirements of the Commission by providing disclosure documents prepared in accordance with the requirements of the Canadian securities regulatory authorities. The MJDS also allows certain cash tender and exchange offers for securities of Canadian issuers to proceed in accordance with Canadian and provincial or territorial tender offer requirements, instead of in accordance with the Commission's tender offer requirements. For more specific information about the accommodations provided to MJDS issuers, see Release No. 33-6902, *supra* note 49.

F was first adopted. Our proposed amendments would have accelerated the reporting due date for annual reports filed on Form 20-F by foreign private issuers from six months to 90 days after the issuer's fiscal year-end in the case of large accelerated filers and accelerated filers, and to 120 days after the issuer's fiscal year-end for all other issuers, after a two-year transition period. We also proposed similar conforming amendments for transition reports filed on Form 20-F when a foreign private issuer changes its fiscal year.

In the Proposing Release, we noted that technological advances have made it easier for companies to process and disseminate information quickly. Investors also evaluate and react to information in a shorter timeframe, and many now expect to receive information on a faster basis. Although some information about foreign private issuers is available through their earnings releases and other announcements, investors currently may not have access to the more complete disclosure contained in an issuer's Form 20-F annual report until six months after the end of the issuer's fiscal year. Although the longer filing due date for these reports was initially established as an accommodation to the different disclosure requirements in the foreign private issuers' home jurisdictions,<sup>53</sup> many companies that operate globally gather and evaluate information on a vastly expedited basis compared to almost 30 years ago, when Form 20-F was adopted. As a result, such a delayed filing date for these reports is no longer necessary. In the Proposing Release, we also noted that foreign private issuers in many jurisdictions are expected to file annual reports with their home securities regulator on a faster timetable.<sup>54</sup>

<sup>53</sup> Form 20-F Adopting Release, *supra* note 18 (noting that the Commission decided not to adopt a filing due date for Form 20-F annual reports of four months after the registrant's fiscal year-end in deference to commenters' concerns about the need for more time to comply with applicable foreign regulations, which at that time often permitted annual reports to be furnished to shareholders more than four months after the issuer's fiscal year-end).

<sup>54</sup> For example, the European Union's ("EU") Transparency Directive requires companies listed on an EU regulated market to file their annual financial reports four months after the end of each financial year at the latest. Directive 2004/109/EC of the European Parliament and of the Council (Dec. 15, 2004). All EU member states were required to implement the Transparency Directive by January 20, 2007. Canadian issuers are also required to file their annual financial statements within a similar timeframe. Under *National Instrument 51-102 Continuous Disclosure Obligations*, a reporting Canadian issuer must file its annual financial statements within 90 to 120 days after its most recently completed financial year-end, depending on its status as a "venture issuer". Israeli companies

We received 49 comment letters on the proposed amendments. Some commenters expressed support for the accelerated deadlines as proposed. One of these commenters, a professional association of investment professionals,<sup>55</sup> urged the Commission to move toward requiring the same filing requirements for foreign private issuers as for domestic issuers. This commenter noted that the value of information in financial statements decreases as the gap between the date of the financial statements and the date of their release increases. This commenter also noted that recently the financial position of some companies has deteriorated significantly over relatively short periods of time. Outdated financial information may make it more likely that investors will misjudge both the viability of the issuer and the value of its securities. Another supportive commenter, an accounting firm,<sup>56</sup> noted that accelerating the deadline for Form 20-F would provide investors with timelier and more useful information. It also noted that the overwhelming majority of foreign private issuers' home country securities regulators already have annual report deadlines of either three or four months. However, this commenter pointed out that although a 90-day reporting deadline for accelerated and large accelerated filers would be earlier than their home country deadlines for some issuers, this would still be an accommodation compared to the deadlines of 75 or 60 days faced by their same-sized U.S. counterparts, respectively. This commenter also acknowledged that for foreign private issuers that are still required to reconcile home country GAAP to U.S. GAAP, a 90-day reporting deadline could impose additional, significant burdens. As a result, it recommended accelerating the deadline for these issuers to within 120 days after the foreign private issuer's fiscal year-end. Another commenter, a foreign private issuer,<sup>57</sup> supported the proposed amendments and indicated that it believed that the amendments would not impose any unreasonable burdens on foreign registrants. However, it also expressed concern about accelerating

are required to file their annual reports within three months of the end of their reporting year, provided that the report is submitted 14 days or more before the date fixed for convening the general meeting at which the company's financial statements will be presented, or within three days of the date when the company's accountant signed his audit opinion, whichever is earlier. Regulation 7, Israeli Securities Regulations (Periodic and Immediate Reports).

<sup>55</sup> See comment letter from CFA Institute.

<sup>56</sup> See comment letter from Ernst & Young ("EY").

<sup>57</sup> See comment letter from Vodafone.

the reporting deadline for financial statements of non-registrants that are included in the Form 20-F, especially those required to be filed pursuant to Rule 3-09<sup>58</sup> of Regulation S-X.

We received many more comments expressing concerns about the proposed due dates. Several commenters noted that the burdens faced by foreign issuers in producing Form 20-F was not related to size (*i.e.*, accelerated or non-accelerated filer), but to whether the issuer needs to produce a second set of full financial statements in accordance with U.S. GAAP, or a reconciliation from their home country accounts to U.S. GAAP.<sup>59</sup> Commenters noted that the proposal could create a burden for many issuers that are still required to prepare their financial statements in accordance with local GAAP, especially those from some of the emerging markets.<sup>60</sup> In addition, in certain jurisdictions, bank issuers are required to prepare their primary financial statements in accordance with local GAAP.<sup>61</sup> We also received comments that *Industry Guide 3, Statistical Disclosure by Bank Holding Companies*, calls for additional disclosures, as well as the classification and disclosure of certain information under different standards than required in the foreign private issuer's home country.<sup>62</sup>

Commenters also noted that many foreign private issuers need more time than provided under the proposed amendments to translate local financial information into English for Form 20-F;<sup>63</sup> to provide the additional disclosures of Form 20-F, such as Item 5 (Operating and Financial Review and Prospects) and the Commission's industry guide disclosures; and to satisfy certain requirements of the Sarbanes-Oxley Act.<sup>64</sup> Commenters noted that many foreign private issuers have limited resources, and must use the same staff to comply with both local filing requirements and the Commission's filing requirements. As a result of the proposed amendments, the staff of these issuers would have to

<sup>58</sup> 17 CFR 210.3-09.

<sup>59</sup> See, *e.g.*, comment letters from American Bar Association ("ABA") and Linklaters LLP ("Linklaters").

<sup>60</sup> See, *e.g.*, comment letter from Linklaters.

<sup>61</sup> See comment letters from Mitsubishi UFJ Financial Group, Inc. ("Mitsubishi") and Mizuho.

<sup>62</sup> See comment letter from Institute of International Bankers, Mitsubishi, and Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss").

<sup>63</sup> See, *e.g.*, comment letters from Cleary Gottlieb Steen & Hamilton ("Cleary Gottlieb"), Mitsubishi, Mizuho, and Sociedad Quimica y Minera de Chile S.A.

<sup>64</sup> These requirements, which are generally not required in home country reporting, include the Section 302 and 906 officer certifications and the review of internal controls over financial reporting.

produce financial information for home country purposes on the same timetable as for Form 20-F, rather than in *seriatim*, as is currently the case.

In addition, commenters indicated that in some cases the proposed due dates would require foreign private issuers to file their Form 20-F before they are required to file their annual reports in their home country. The proposed due dates would in effect override domestic filing requirements.<sup>65</sup> Commenters noted that when foreign private issuers complete their annual reports for home country filing purposes, they furnish significant financial information to the Commission on Form 6-K, often within 90 days after their fiscal year-end. These commenters asserted that investors typically make investment decisions based on the fiscal year-end financial results disclosed in Form 6-K or through the issuer's press releases, rather than through the Form 20-F.

Several commenters recommended that the Commission adopt a deadline that was linked to the foreign private issuer's home country requirements for filing annual reports. These commenters suggested that foreign private issuers be required to file Form 20-F annual reports within a specified period after the issuer's home country report is filed.<sup>66</sup> Others, recognizing that such a deadline would be difficult to implement and confusing to investors, recommended that the Commission accelerate the due date for Form 20-F for all foreign private issuers to five months after the issuer's fiscal year-end.<sup>67</sup>

After carefully considering all of the comments, as well as the benefits to investors of timelier annual reports, we are adopting amendments to accelerate the due date for annual reports filed on Form 20-F, but with modifications from the proposed amendments that respond to some of the concerns that were expressed. Under the amendments as

<sup>65</sup> See, e.g., comment letters from Linklaters (noting that the 90-day due date is earlier than the annual report due dates required by the EU Member States, China and Brazil) and Gold Fields Limited (noting that the Johannesburg Stock Exchange requires listed issuers to publish annual financial statements within six months after the end of the issuer's financial year).

<sup>66</sup> See comment letters from The Royal Bank of Scotland Group (recommending a due date two to three weeks after the annual report deadline in the issuer's home jurisdiction), European Issuers (recommending a due date that is one month after the due date for annual reports in the issuer's home country), PetroChina Company Limited (recommending a due date that is two months after the issuer's annual report due date in its home country).

<sup>67</sup> See, e.g., comment letters from Cleary Gottlieb and Mitsubishi.

adopted, all foreign private issuers will be required to file their annual reports on Form 20-F within four months after their fiscal year-end, regardless of their size, after a three-year transition period.<sup>68</sup> As discussed above, commenters indicated that the size of the issuer would not affect its ability to file Form 20-F on an expedited basis. Rather, the issue was whether the foreign private issuer was required to prepare a second set of full financial statements in accordance with U.S. GAAP, or a reconciliation from their home country accounts to U.S. GAAP.<sup>69</sup> In determining that a four-month due date would be appropriate, we note that in 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 issued by the IASB as more countries adopt IFRS as their basis of accounting, or permit companies to use IFRS as issued by the IASB as their basis of accounting. Our recent rule amendments that allow foreign private issuers to file financial statements in accordance with IFRS, as issued by the IASB, without a U.S. GAAP reconciliation should make it easier for many foreign private issuers to prepare their annual reports on Form 20-F.<sup>70</sup> As indicated in the Proposing Release, we did not propose amendments to change the age of financial statement requirements for registration statements under the Securities Act or Exchange Act.<sup>71</sup>

The new due date also reflects our observation that many foreign private issuers registered with the Commission have a three-month due date for filing

<sup>68</sup> We are not adopting a similar acceleration in the filing deadline for annual reports filed on Form 40-F, which is used by eligible Canadian issuers under the MJDS. Under the MJDS, issuers who file annual reports on Form 40-F must comply with the substantive disclosure requirements and filing deadlines established by the relevant Canadian securities regulator. In keeping with the purpose of MJDS, which is to facilitate cross-border capital flows between the United States and Canada by streamlining the registration and periodic reporting process for cross-border issuers, the Form 40-F must continue to be filed with the Commission on the same day that the information is due to be filed with the relevant Canadian securities regulatory authority, as set forth in General Instruction D.(3) of Form 40-F. However, we note that a reporting Canadian issuer that is not a "venture issuer" must file its annual financial statements on or before 90 days after its most recently completed financial year-end, while all other Canadian issuers must file their annual financial statements on or before 120 days after their most recently completed financial year-end. See *supra* note 54.

<sup>69</sup> See, e.g., comment letters from ABA, E&Y, and Linklaters.

<sup>70</sup> Release No. 33-8879, *supra* note 21.

<sup>71</sup> Under Item 8.A.4. of Form 20-F, the last year of audited financial statements may not be older than 15 months at the time of the offering or listing.

annual reports in their home country, and would be accorded an additional month after their home country due dates to prepare the Form 20-F under the new amendments. We note that, based on a review of recent filings, a number of foreign private issuers already file their annual reports on Form 20-F well before the current six-month deadline. In addition, the new due date for Form 20-F will still provide a substantial accommodation to many foreign private issuers, since large accelerated and accelerated domestic filers are required to file annual reports on Form 10-K<sup>72</sup> within 60 days and 75 days, respectively, of their fiscal year-ends.<sup>73</sup> All other domestic issuers are required to file annual reports on Form 10-K within 90 days after their fiscal year-end.<sup>74</sup> We will continue to monitor market developments to consider whether it would be appropriate to accelerate further the due date for Form 20-F annual reports.

The amendments that we are adopting today reflect our view that annual reports that are filed on a faster basis would not only provide investors with more timely access to these filings, but also improve the delivery and flow of reliable information to investors and the capital markets, thereby helping to improve the efficiency of the markets. The accelerated deadline for Form 20-F should enable investors in the U.S. markets to get annual reports on a more current basis. As the Commission noted when it adopted the accelerated filing dates for periodic reports filed by domestic issuers,<sup>75</sup> investors and analysts evaluate the more extensive information provided in periodic reports against the incremental disclosures that are made by an issuer. The accelerated due date will enable this analysis to take place at an earlier time.

Although various commenters recommended that the Form 20-F annual report due date be linked in some manner to the foreign private issuer's annual report due date in its home country, we concluded that this would be confusing for investors and

<sup>72</sup> 17 CFR 249.310.

<sup>73</sup> See General Instructions A.(2)(a) and (b) of Form 10-K. At the time that we first adopted rule and form amendments to accelerate the filing of the quarterly and annual reports of reporting U.S. issuers, we noted that those amendments would increase the discrepancy in the due dates for filing annual reports between foreign private issuers and larger seasoned U.S. issuers, and indicated that we would continue to consider this issue. Release No. 33-8128 (Sept. 5, 2002) [67 FR 58480]

<sup>74</sup> See General Instruction A.(2)(c) of Form 10-K.

<sup>75</sup> See Release No. 33-8128, *supra* note 73.



would be difficult to implement.<sup>76</sup> We also concluded that a due date that is five months after the foreign private issuer's fiscal year-end would not address our concerns about providing more timely information to investors.

As discussed previously, we received several comments about the potential burdens placed on foreign private issuers that provide disclosures under *Industry Guide 3*, which relates to bank holding companies. We note that the Commission's staff will consider what accommodations with regard to *Industry Guide 3* would be appropriate.

When we proposed the amendments, we proposed a two-year transition period for implementation of the accelerated deadline, but also solicited comments on whether a different transition period would be more appropriate. While we received several comments supporting a two-year transition period, several commenters noted that a three-year transition period would ease the burden on many foreign private issuers that will be required to adopt IFRS for home country reporting purposes in 2011. After considering all of the comments received, we have decided to provide a three-year transition period for implementation of the accelerated Form 20-F due date. As adopted, foreign private issuers will be required to file their annual report on Form 20-F within four months after their fiscal year-end for fiscal years ending on or after December 15, 2011. Of course, foreign private issuers may file their Form 20-F annual reports earlier than the current deadline, as numerous issuers now do.

In addition to these amendments, we are adopting amendments that conform the deadline for transition reports filed on Form 20-F, and for the filing of special financial reports<sup>77</sup> pursuant to Rule 15d-2 of the Exchange Act. The deadlines for these reports were based on the annual report deadlines for foreign private issuers.<sup>78</sup> We are amending the due dates for each of these reports so that they are consistent

with the new deadline for annual reports filed on Form 20-F.<sup>79</sup>

#### C. Segment Data Disclosure

Under Item 17 of Form 20-F, foreign private issuers that present financial statements otherwise fully in compliance with U.S. GAAP may omit segment data from their financial statements, and also are permitted to have a qualified U.S. GAAP audit report as a result of this omission. We proposed an amendment to Form 20-F that would eliminate this narrow accommodation.

Most of the comments received on this proposal supported the proposed amendments. However, several commenters suggested permitting a longer transition period to the new rules. For example, a few commenters recommended a three-year transition period, so that the amendment would be effective for fiscal years on or after December 15, 2011 to align the effective date with the timeframe in which many jurisdictions will mandate IFRS reporting.

After considering all of the comments and noting that approximately five foreign private issuers in the past few years have used this accommodation, we have decided to adopt the amendment as proposed. Foreign private issuers will be required to comply with the amendment beginning with their first fiscal years ending on or after December 15, 2009. The delayed compliance date will provide foreign private issuers with sufficient time to establish internal procedures that will enable them to obtain the required information. We are amending Item 17 of Form 20-F by removing Instruction 3 to that Form, which currently permits the omission of segment data from U.S. GAAP financial statements. We believe that an accommodation that permits a few foreign private issuers to present incomplete and non-compliant U.S. GAAP financial statements is no longer necessary or appropriate, especially given recent international developments in financial reporting. For example, in order to file financial statements without reconciliation to U.S. GAAP, foreign private issuers must comply fully with IFRS as issued by the IASB, including presentation of segment data. Accordingly, we have decided not to

provide a longer transition period for the new amendment.

#### D. Exchange Act Rule 13e-3

We are adopting amendments to Exchange Act Rule 13e-3,<sup>80</sup> which pertains to going private transactions by reporting issuers or their affiliates, to reflect the recently adopted rules pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations.<sup>81</sup> Currently, Rule 13e-3 is triggered when an issuer and/or any of its affiliates are engaged in a specified transaction or series of transactions<sup>82</sup> that have either a reasonable likelihood or a purpose of causing (i) any class of equity securities of the issuer that is subject to Section 12(g) or Section 15(d)<sup>83</sup> of the Exchange Act to be held of record by less than 300 persons, or (ii) the securities to be neither listed on any national securities exchange nor authorized to be quoted on an inter-dealer quotation system of any registered national securities association.

Rule 13e-3 requires any issuer or affiliate that engages in a Rule 13e-3 transaction to file a Schedule 13E-3<sup>84</sup> disclosing its plan to take the company private, and to make prompt amendments to reflect certain information about the proposed transaction. In the Schedule 13E-3, the filing party must disclose the purposes for the transaction, whether any alternative means for accomplishing the stated purposes were considered, the reasons for the structure of the transaction and why it was being undertaken at the time, the effects that the transaction would have on the issuer and its unaffiliated security holders, whether or not the filing party believes the transaction is fair to unaffiliated security holders, and the factors considered in determining fairness. Rule 13e-3(f)<sup>85</sup> also requires dissemination of the information required by Schedule 13E-3 to security holders within specified time periods.

When the Commission adopted Rule 13e-3, we emphasized that the Rule would be triggered only if a specified transaction has either the reasonable

<sup>76</sup> This difficulty would be especially evident for foreign private issuers that are listed only in the United States and are not subject to another securities regulatory reporting regime.

<sup>77</sup> Under Exchange Act Rule 15d-2, a special financial report must be filed if a registrant's Securities Act registration statement did not contain certified financial statements for its last full fiscal year preceding the fiscal year in which the registration statement became effective. Currently, foreign private issuers must file this special financial report by the later of 90 days after the date on which the registration statement became effective, or six months after the end of the registrant's latest full fiscal year (consistent with the current due date of Form 20-F annual reports).

<sup>78</sup> See Release No. 33-7026 (Nov. 3, 1993) [58 FR 60304].

<sup>79</sup> We also took this approach when we adopted amendments to accelerate the periodic report filing dates for domestic companies. See Release No. 33-8128, *supra* note 73; Release No. 33-8644 (Dec. 21, 2005) [70 FR 76626] (adopting further refinements to the acceleration rules). See also Release No. 33-6823 (Mar. 13, 1989) [54 FR 10306] (conforming the transition report rules to the periodic report rules).

<sup>80</sup> 17 CFR 240.13e-3.

<sup>81</sup> Release No. 34-55540, *supra* note 28.

<sup>82</sup> A "Rule 13e-3 transaction" is defined as (i) a purchase of any equity security by the issuer of such security or by an affiliate, (ii) a tender offer, (iii) a proxy solicitation or information statement distribution in connection with a merger or similar transaction, (iv) the sale of substantially all the assets of an issuer to its affiliate, or (v) a reverse stock split. 17 CFR 240.13e-3(a)(3)(i).

<sup>83</sup> 15 U.S.C. 78o(d).

<sup>84</sup> 17 CFR 240.13e-100.

<sup>85</sup> 17 CFR 240.13e-3(f).



likelihood or purpose of causing the termination of reporting obligations under the Exchange Act.<sup>86</sup> Recently, we adopted amendments to the deregistration provisions applicable to foreign private issuers that would permit them to terminate their reporting obligations under the Exchange Act by meeting a quantitative benchmark designed to measure relative U.S. market interest for their equity securities that does not depend on a head count of the issuers' U.S. security holders.<sup>87</sup> Although Rule 13e-3 does not reflect the termination of registration and reporting provisions that were previously applicable to foreign private issuers, we proposed to amend the Rule to better reflect the current deregistration provisions.

We received several comments on this proposal supporting our efforts to amend Rule 13e-3 to make it consistent with the recently adopted termination of reporting and deregistration provisions. However, two commenters expressed concern that the Rule could be triggered by securities transactions in the ordinary course of business, such as share repurchases.<sup>88</sup> One commenter also suggested that the disclosures in Schedule 13E-3 regarding fairness to unaffiliated security holders would not apply in the context of deregistration of a foreign private issuer, especially when the applicable corporate law does not require such determinations, and requested an instruction to the Schedule that would recognize this circumstance. We also received two comments suggesting that the Rule should not apply to a foreign private issuer whose shares will be traded on a foreign securities exchange, and hence subject to home country and/or foreign securities exchange reporting obligations, because its home country disclosures will continue to be available and furnished to the Commission pursuant to Rule 12g3-2(b). One commenter also cited concerns that the application of the Rule could deter the entry of foreign private issuers into the U.S. markets.

At this time, we believe that amending Rule 13e-3 as proposed will modernize one of the Rule's two specified going private effects and assure that the Rule operates consistently with an important policy purpose expressed at its initial

<sup>86</sup> Release No. 34-16075 (Aug. 2, 1979) [44 FR 46736].

<sup>87</sup> Release No. 34-55540, *supra* note 28.

<sup>88</sup> See comment letters from Cleary Gottlieb and The Hundred Group of Finance Directors ("Hundred Group").

adoption.<sup>89</sup> By substituting a test foreign private issuers already use to deregister a class of securities in place of the "300 person" test, foreign private issuers will benefit from simplicity and uniformity when making decisions to exit the U.S. reporting system. In addition, adopting the proposed amendment will provide clarity to a Rule that does not distinguish whether the cited effect is triggered when the number of holders of record is projected to fall below 300 persons in the United States or worldwide. Amending Rule 13e-3 will eliminate the need to interpret its indefinite reference to "held of record by less than 300 persons."

We believe that adoption of the proposed amendment to Rule 13e-3(a)(3)(ii)(A) should have a neutral effect on foreign private issuers. As is the case under Rule 13e-3 today, foreign private issuers will remain eligible under the amended Rule to voluntarily take steps to deregister a class of securities without implicating Rule 13e-3. We also do not believe share repurchases made in the ordinary course of an issuer's business are within the scope of Rule 13e-3, as amended, when such transactions are not undertaken with the purpose or reasonable likelihood of producing one of the two going private effects specified in Rule 13e-3.<sup>90</sup> Currently, share repurchases are only required to comply with Rule 13e-3 to the extent undertaken with a purpose or with a reasonable likelihood of producing one of the two going private effects identified in Rule 13e-3.<sup>91</sup> Because the

<sup>89</sup> Release No. 34-16075, *supra* note 86. The Rule 13e-3 adopting release explained that the Rule was intended to apply when one of the transactions identified in the Rule was undertaken with a purpose of or had a reasonable likelihood of terminating the issuer's reporting obligations and consequently depriving security holders of the benefits of public ownership. See subsection (a) under "Discussion."

<sup>90</sup> We understand that a trading market may not exist in the U.S. for the shares of a foreign private issuer. For purposes of the Williams Act, ADRs and similar instruments that represent an ownership interest in a class of securities are not considered a class of securities separate from the foreign private issuer's underlying shares. See Release No. 33-6894 (May 23, 1991) [56 FR 24420] at Section II.D.2.

<sup>91</sup> 17 CFR 240.13e-3(a)(3)(ii). See also Release No. 34-14185 (Nov. 17, 1977) [42 FR 60090]. The Rule 13e-3 proposing release explains, "In his testimony before Congress on the provision that was to become Section 13(e)(1), then Commission Chairman Cohen recognized that, while there might be 'perfectly legitimate corporate purposes' [ ] for a corporation to purchase its own securities, purchases by a corporation of its own securities can be used to affect the control of the corporation. The management may cause the corporation to repurchase shares for the purpose of preserving or improving the management's control position or to counteract the tender offer or other take-over bid." See Hearings on S. 510 Before the Subcomm. on

amendment only seeks to provide regulatory consistency with the new deregistration and termination of reporting provisions, Rule 13e-3, as amended, will continue to govern share repurchases made in the ordinary course of an issuer's business only when such repurchases are executed with the purpose or reasonable likelihood of causing security holders to lose "the benefits of public ownership,"<sup>92</sup> and in this case the benefits of U.S. reporting. Accordingly, we are adopting the amendment to Rule 13e-3(a)(3)(ii)(A)<sup>93</sup> as proposed. Under the amended Rule, the cited effect is deemed to have occurred when: A domestic or foreign private issuer becomes eligible under Exchange Act Rule 12g-4<sup>94</sup> to deregister a class of securities; a foreign private issuer becomes eligible under Exchange Act Rule 12h-6<sup>95</sup> to deregister a class of securities or terminate a reporting obligation; or such issuers become eligible under Exchange Act Rule 12h-3<sup>96</sup> or Exchange Act Section 15(d) to have a reporting obligation suspended.<sup>97</sup>

When a foreign private issuer or domestic issuer engages in a Rule 13e-3 transaction that would cause the termination or suspension of its registration or reporting obligations under the Exchange Act, Rule 13e-3 is intended to provide the issuer's security holders with one last opportunity to obtain information about the issuer and consider their alternatives. This is equally true in the context of a foreign private issuer or domestic issuer that plans to complete one of the transactions specified in Rule 13e-3(a)(3) for purposes of deregistering a class of securities or terminating or suspending a reporting obligation as it is for a foreign private issuer or domestic issuer that has executed one of the specified Rule 13e-3(a)(3) transactions and is ceasing to file reports because the number of its shareholders falls below 300.

Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 37 (1967) ("Senate Hearings") Hearing on H.R. 14475, S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce 15 (1967) ("House Hearings").

<sup>92</sup> Release No. 34-16075, *supra* note 86.

<sup>93</sup> 17 CFR 240.13e-3(a)(3)(ii)(A).

<sup>94</sup> 17 CFR 240.12g-4.

<sup>95</sup> 17 CFR 240.12h-6.

<sup>96</sup> 17 CFR 240.12h-3.

<sup>97</sup> We have made a technical modification to the proposed amendments to Rule 13e-3 to make clear that the Rule may be triggered when a domestic or foreign private issuer's Section 15(d) reporting obligations are suspended pursuant to Section 15(d) or Exchange Act Rule 12h-3.

*E. Requiring Item 18 Reconciliation in Annual Reports and Registration Statements*

We are adopting amendments to eliminate the option to provide financial statements according to Item 17 of Form 20-F in annual reports and registration statements filed on that form. Currently, a foreign private issuer that is only listing a class of securities on a national securities exchange, or only registering a class of securities under Exchange Act Section 12(g), without conducting a public offering of those securities may provide financial statements according to Item 17 of Form 20-F. In addition, foreign private issuers may provide financial statements according to Item 17 for their annual reports on Form 20-F. Under Item 17, a foreign private issuer must prepare its financial statements and schedules in accordance with U.S. GAAP, or IFRS as issued by the IASB. If its financial statements and schedules are prepared in accordance with another basis of accounting, the issuer must include a reconciliation to U.S. GAAP. This reconciliation must include a narrative discussion of reconciling differences, a reconciliation of net income for each year and any interim periods presented, a reconciliation of major balance sheet captions for each year and any interim periods, and a reconciliation of cash flows for each year and any interim periods.<sup>98</sup> In contrast, if a foreign private issuer that presents its financial statements on a basis other than U.S. GAAP, or IFRS as issued by the IASB, provides financial statements under Item 18 of Form 20-F, it must provide all the information required by U.S. GAAP and Regulation S-X, in addition to the reconciling information for the line items specified in Item 17.

To eliminate this distinction between the disclosure provided to the primary and secondary markets, we proposed amendments to require Item 18 information for foreign private issuers that are only listing a class of securities on an exchange, or only registering a class of securities under Exchange Act Section 12(g), without conducting a public offering. We also proposed amendments to require Item 18 information for foreign private issuers that file annual reports on Form 20-F.

In addition, foreign private issuers that are making certain non-capital raising offerings, such as offerings pursuant to reinvestment plans, offerings upon the conversion of securities or offerings of investment

grade securities,<sup>99</sup> currently are permitted to provide Item 17 financial statements in their registration statements under the Securities Act. To ensure that the same type of financial information is provided regardless of the type of offering that is being made, we proposed amendments to require foreign private issuers to file financial statements that comply with Item 18 when registering these types of offerings under the Securities Act.

Many commenters supported the proposals as useful to investors. Commenters noted that the amendments would help ensure that investors receive the complete financial information required by U.S. GAAP and Regulation S-X.<sup>100</sup> However, several other commenters expressed concern about the benefits of the amendments in light of the potential compliance burdens. They also asserted that other countries are gradually requiring footnote disclosures comparable in scope to U.S. GAAP and Regulation S-X, such that the proposed amendments are not necessary.<sup>101</sup>

After carefully considering all of the comments, we are adopting the amendments as proposed. We believe that a reconciliation that includes the footnote disclosures required by U.S. GAAP and Regulation S-X<sup>102</sup> can provide important additional information.<sup>103</sup> We also note that the majority of foreign private issuers who do not prepare financial statements in accordance with U.S. GAAP elect to provide financial information pursuant to Item 18, rather than Item 17, of Form

<sup>99</sup> The Commission recently proposed amendments permitting foreign private issuers to comply with the less extensive U.S. GAAP reconciliation requirements under Item 17 in a registration statement or private offering document if the issuer met the proposed new Form F-3 transaction eligibility criteria for registering primary offerings of non-convertible securities. The proposed eligibility criteria would eliminate the current requirement in Form F-3 of an investment grade rating by a nationally recognized statistical rating agency. Release No. 33-8940 (July 1, 2008) [73 FR 40106]. We requested comment on whether, if we decided not to eliminate the option of providing Item 17 financial disclosure, we should revise the Form F-3 eligibility requirements as proposed. *Id.* at Section II.B.2.

<sup>100</sup> *See, e.g.*, comment letter from the CFA Institute.

<sup>101</sup> *See, e.g.*, comment letter from Cleary Gottlieb.

<sup>102</sup> 17 CFR Part 210.1-01 *et seq.*

<sup>103</sup> Under Item 17, an issuer is not required to provide the footnote disclosures required by U.S. GAAP and Regulation S-X, unless these disclosures are otherwise required under its home country GAAP. For example, the footnote disclosures related to pension assets, obligations and assumptions, lease commitments, business segments, tax attributes, stock compensation awards, financial instruments and derivatives, among many others, are not required under Item 17 unless they are otherwise required by the issuer's home country GAAP.

20-F.<sup>104</sup> Under the amendments, Form 20-F and the registration statement forms available to foreign private issuers under the Securities Act (Forms F-1, F-3 and F-4) will require the disclosure of financial information according to Item 18 of Form 20-F for registration statements filed under both the Exchange Act and the Securities Act, as well as for annual reports.

When we proposed the amendments, we did not propose eliminating the availability of Item 17 disclosures for Canadian MJDS filers in light of the special recognition accorded to MJDS filings. We also noted that more countries, including Canada, are expected to adopt IFRS as their basis of accounting, or to permit companies to use IFRS as issued by the IASB as their basis of accounting in the next few years. As a result, we concluded that it would not be appropriate to eliminate the availability of Item 17 in MJDS registration statements. We also proposed maintaining the availability of Item 17 for financial statements of non-registrants that are required to be included in a foreign or domestic issuer's registration statement, annual report or other Exchange Act report. These include significant acquired businesses under Rule 3-05<sup>105</sup> of Regulation S-X, significant equity method investees under Rule 3-09 of Regulation S-X, and exempt guarantors<sup>106</sup> under Rule 3-10(i)<sup>107</sup> of Regulation S-X. The commenters who commented on these accommodations supported them, so the amendments as adopted will not apply to MJDS filers or to the financial statements of non-registrants.

Several commenters who supported the proposed amendments recommended that we establish a compliance date that would provide foreign private issuers with a longer transition period before they would be required to prepare financial statements pursuant to Item 18.<sup>108</sup> Among other

<sup>104</sup> A foreign private issuer's latest annual report filed on Form 20-F and all subsequent Form 20-F annual reports are incorporated by reference into its Form F-3 shelf registration statement. See Item 6 (Incorporation of Certain Information by Reference) in Form F-3. General Instruction I.B.1. of Form F-3 requires foreign private issuers to provide financial statements that comply with Item 18 for primary offerings.

<sup>105</sup> 17 CFR 210.3-05.

<sup>106</sup> A guarantor that is required to file separate financial statements must comply with Item 18.

<sup>107</sup> 17 CFR 210.3-10(i).

<sup>108</sup> *See* comment letters from BDO Seidman, LLP ("BDO"), Center for Audit Quality ("CAQ"), Deloitte Touche Tohmatsu ("Deloitte"), E&Y, Grant Thornton LLP ("Grant Thornton"), KPMG IFRG Limited ("KPMG"), and PricewaterhouseCoopers LLP ("PricewaterhouseCoopers").

<sup>98</sup> *See* Item 17(c)(2) of Form 20-F.

things, these commenters noted that the foreign private issuers that provide the Item 17 reconciliation in their annual reports tend to be smaller companies, and that these companies would face significant burdens on their financial accounting and reporting systems if they are required to provide the additional Item 18 disclosures, as well as comply with the accelerated due date for Form 20-F, at the same time. In addition, they noted that many countries, such as Canada, will be adopting IFRS in 2011. Aligning the compliance date for the adopted amendments with the date on which many countries will be adopting IFRS would reduce the potential burdens on these issuers.

For the reasons enumerated above, we are establishing a compliance date that should provide foreign private issuers with sufficient time to transition to the Item 18 requirements when preparing their financial statements. A foreign private issuer that currently prepares its financial statements according to Item 17 of Form 20-F will not be required to prepare financial statements pursuant to Item 18 until it files an annual report for its first fiscal year ending on or after December 15, 2011. The longer transition period should reduce the impact of these amendments on many of the affected issuers. In addition, because foreign private issuers that prepare financial statements in accordance with IFRS, as issued by the IASB, are not required to prepare a reconciliation to U.S. GAAP, we expect that the number of companies that will be affected by the amendments will be small.

#### *F. Disclosure About Changes in a Registrant's Certifying Accountant*

Domestic companies currently report any changes in and disagreements with their certifying accountant in a current report on Form 8-K and in a registration statement on Form 10<sup>109</sup> under the Exchange Act,<sup>110</sup> as well as in their registration statements filed on Forms S-1<sup>111</sup> and S-4<sup>112</sup> under the Securities Act. Among other things, this disclosure provides information about potential opinion shopping situations by issuers. "Opinion shopping" generally refers to the search for an auditor that is willing to support a proposed accounting treatment that is designed to help a

company achieve its reporting objectives, even though that treatment could frustrate reliable reporting.<sup>113</sup>

Foreign private issuers have not been required to provide this disclosure.<sup>114</sup> However, the issues underlying the need for this disclosure also apply to foreign private issuers, and the relationship between issuers and their auditors in this area would seem to be as important for investors. Moreover, foreign private issuers that are listed on the New York Stock Exchange ("NYSE") are already required by that Exchange to notify the public about a change in their auditors,<sup>115</sup> although this information is required to be furnished under cover of Form 6-K, which does not have the substantive disclosure requirements of Form 8-K.<sup>116</sup> As a result, we proposed amendments that would require substantially the same types of disclosures currently provided by domestic issuers about changes in and disagreements with their certifying accountant. After reviewing the comment letters received on these proposed amendments, most of which were generally supportive, we are adopting the amendments substantially as proposed. As discussed below, in response to a question on this point in the Proposing Release, several commenters suggested that we extend this disclosure requirement to all registration statements, not just initial registration statements filed by foreign private issuers. We have modified the proposal accordingly.

The few commenters who expressed opposition to the proposed amendments, either in whole or in part, expressed concern that foreign private issuers may be required to disclose more information about their former auditors in their Form 20-F annual reports than is required under their home country law.<sup>117</sup> In addition, some commenters encouraged the Commission to research and evaluate whether compliance with the proposed requirements would be frustrated or precluded when the

disclosure pertains to a foreign-based certifying accountant because of home-country legal requirements, such as privacy laws. Other commenters recommended that we consider mechanisms to require foreign private issuers to provide the disclosure on a timelier basis than proposed.

After considering all of the comments received, we believe that the amendments as proposed achieve an appropriate balance among all of the views that were expressed. Given the usefulness of the information to investors, we believe that foreign private issuers should be required to disclose substantially the same information provided by domestic issuers. Several commenters believed the value of the information to investors would be diminished by the potential time between the change in accountants and the proposed disclosure.<sup>118</sup> We recognize that foreign private issuers will be disclosing the information on a delayed basis in their annual reports and registration statements, compared to the current basis required by domestic issuers. However, we do not believe it would be appropriate to adopt a separate current report requirement for foreign private issuers to report this information because they are already required to furnish to the Commission on Form 6-K the material information that they provide to their home country regulator, to their security holders and to the public. To the extent that information about a change in certifying accountant is required by the foreign private issuer's home country, the information would be disclosed in a Form 6-K. Introducing an additional U.S. current report requirement outside of the traditional Form 6-K reporting requirements does not seem appropriate at this time. In addition, because the new disclosure requirement may require a foreign private issuer to disclose more information about its former auditors than may be required by its home country law, permitting foreign private issuers to prepare and provide the disclosure in their annual reports may help reduce the burdens of reporting this information.

With respect to the concern expressed by some commenters regarding potential conflicts between the proposed disclosure and home country legal requirements, we note that we asked commenters to provide details of any restrictions under the foreign issuer's home country law or regulations that

<sup>113</sup> See Release No. 33-6766 (Apr. 7, 1988) (adopting amendments to Form 8-K, Regulation S-K and Schedule 14A [17 CFR 240.14a-101] related to disclosure concerning a change in a registrant's certifying accountant).

<sup>114</sup> When we proposed the adoption of Form 20-F, we proposed a disclosure requirement soliciting information about changes in the registrant's certifying accountant. Release No. 34-14128 (Nov. 2, 1977) [42 FR 58684] (contained in proposed Item 24). The disclosure item was not included in Form 20-F. Form 20-F Adopting Release, *supra* note 18.

<sup>115</sup> Section 204.03 of the NYSE Listed Company Manual.

<sup>116</sup> See *supra* note 45 for a discussion of the differences between Forms 6-K and 8-K.

<sup>117</sup> See comment letters from CAQ, Deloitte, Hundred Group, Linklaters, and Sullivan & Cromwell LLP.

<sup>118</sup> See comment letters from AngloGold Ashanti Limited; BDO; CAQ; Deloitte; E&Y; Grant Thornton; Harmony Gold Mining Company Limited and PricewaterhouseCoopers.

<sup>109</sup> 17 CFR 249.210.

<sup>110</sup> In their annual reports on Form 10-K, domestic issuers do not provide the same type of change of accountant disclosure, since they should have reported this information on a more current basis on Form 8-K. However, they do provide the disclosures required by Item 304(b) of Regulation S-K [17 CFR 229.304(b)].

<sup>111</sup> 17 CFR 239.11.

<sup>112</sup> 17 CFR 239.25.

would prohibit an auditor from reporting to a foreign regulator about disagreements with the issuer. Most of the commenters did not provide any examples of home country law or regulations that would prohibit such disclosure, but suggested that we conduct further research about possible conflicts.<sup>119</sup>

As adopted, Item 16F of Form 20-F will elicit the same types of change of accountant disclosures obtained in Item 4.01 (Changes in Registrant's Certifying Accountant) of Form 8-K,<sup>120</sup> including the disclosure requirements of Item 304(a) of Regulation S-K,<sup>121</sup> which are referenced in Form 8-K, and Item 9 (Changes in and Disagreements with Accountants on Accounting and Financial Disclosure) of Form 10-K,<sup>122</sup> which refers to the disclosure requirements of Item 304(b) of Regulation S-K. However, because foreign private issuers do not file Forms 8-K and 10-K and are not otherwise subject to Item 304 of Regulation S-K, we are adopting amendments requiring them to provide disclosure about changes in and disagreements with their certifying accountants in their annual reports on Form 20-F, as well as in their registration statements filed on Forms 20-F, F-1, F-3 and F-4.

We are also adopting amendments to Forms F-1, F-3 and F-4, which are used to register public offerings of securities by foreign private issuers under the Securities Act, to require the new Item 16F disclosure requirement about the issuer's changes in and disagreements with their certifying accountant. Although we had not proposed requiring Item 16F disclosure for repeat registrants, we solicited comments on whether this was disclosure that should be provided in connection with all registration statements filed by a foreign private issuer under the Securities Act. Some commenters supported this approach. They noted that this information would be useful in Securities Act registration statements filed by repeat issuers, especially if the change in accountant or disagreement occurred after the filing of the Form 20-F annual report and before the filing of the next Securities Act registration statement.<sup>123</sup> As a result, we

are adopting amendments to Forms F-1, F-3 and F-4 that will require Item 16F disclosure by all registrants, including repeat issuers. We are also amending Form F-3 so that Item 16F disclosure will be provided in a registration statement at effectiveness, as well as in a prospectus used in connection with a shelf offering.

New Item 16F requires substantially the same information required by Item 304 of Regulation S-K, which contains the disclosure requirements applicable to domestic issuers. Among other things, Item 16F requires an issuer to disclose whether an independent accountant that was previously engaged as the principal accountant to audit the issuer's financial statements, or a significant subsidiary on which the accountant expressed reliance in its report, has resigned, declined to stand for re-election, or was dismissed. Item 16F also requires an issuer to disclose any disagreements or reportable events that occurred within the issuer's latest two fiscal years and any interim period preceding the change of accountant. Item 16F(b) solicits disclosure about whether, during the fiscal year in which the change of accountants took place or during the subsequent year, the issuer had similar, material transactions to those which led to the disagreements with the former accountants, and whether such transactions were accounted for or disclosed in a manner different from that which the former accountants would have concluded was required. If so, Item 16F(b) requires the issuer to disclose the existence and nature of the disagreement or reportable event, and also to disclose the effect on the financial statements if the method that would have been required by the former accountants had been followed.

Although the disclosure requirements contained in Item 16F are substantially similar to the disclosure requirements applicable to domestic issuers in Item 304 of Regulation S-K, as proposed, we have eliminated or modified some of the due dates described in Item 304(a)(3) of Regulation S-K because the disclosure is being made on an annual, rather than on a current, basis. For example, although Item 16F would require the issuer to provide a copy of the disclosures that it is making in response to Item 16F to the former accountant, it would not require the issuer to provide the disclosures within the timeframe specified in Item 304(a)(3) of Regulation S-K.<sup>124</sup> In addition, we expect that the

former accountant would be able to furnish the issuer with a letter stating whether it agrees with the statements made by the issuer in response to Item 16F and, if not, stating the respects in which it does not agree, and that the issuer would be able to file the former accountant's letter as an exhibit to the annual report or registration statement that contains this disclosure at the time that the annual report or registration statement is due. Item 304(a)(3) provides that if the former accountant's letter is not available at the time that the report or registration statement is filed, then the issuer can file the letter with the Commission within ten business days after the filing of the report or registration statement. Because foreign private issuers would be permitted to provide the disclosure in their annual reports, we believe that this accommodation would not be necessary unless the change in accountant occurred less than 30 days prior to the filing of the annual report<sup>125</sup> or registration statement. As adopted, Item 16F would permit a delayed filing of the former accountant's letter in an annual report or registration statement only if the change in accountant occurred within this 30-day timeframe.

Foreign private issuers will be required to comply with the amendments beginning with their first fiscal year ending on or after December 15, 2009. The delayed compliance date should provide these issuers and their accountants with sufficient time to establish internal procedures that will enable them to comply with the new requirements.

#### *G. Annual Disclosure About ADR Fees and Payments*

We are adopting amendments that will require foreign private issuers to disclose information about the fees and other charges paid in connection with ADR facilities in their annual reports on Form 20-F.<sup>126</sup> We proposed these amendments because we believe that ADR holders can benefit from enhanced disclosure in this area, especially in light of new depositary fees that are being charged to ADR holders in connection with sponsored ADR facilities. These new fees include an

<sup>119</sup> One commenter suggested that South African law may preclude such disclosures, *see* comment letter from Deloitte, but the four South African issuers that commented on the Proposing Release did not cite specific restrictions under South African law.

<sup>120</sup> Item 4.01 of Form 8-K.

<sup>121</sup> 17 CFR 229.304(a).

<sup>122</sup> Item 9 of Form 10-K.

<sup>123</sup> *See* comment letters submitted by CAQ, the CFA Institute, and KPMG.

<sup>124</sup> Item 304(a)(3) of Regulation S-K requires the issuer to provide a copy of the disclosures to the former accountant no later than the day that the disclosures are filed with the Commission. 17 CFR 229.304(a)(3).

<sup>125</sup> Under General Instruction C.(b) of Form 20-F, the information provided in a Form 20-F annual report should be as of the latest practicable date, unless a disclosure item in the Form explicitly directs otherwise. As a result, changes in the foreign private issuer's certifying accountant that occur after the issuer's fiscal year-end, but before the Form 20-F is filed, would be disclosed in the issuer's Form 20-F annual report.

<sup>126</sup> We noted the importance of transparency in fee disclosures in our 1991 ADR concept release, Release No. 33-6894, *supra* note 90.

annual fee for general depository services, a fee that was formerly prohibited by some exchanges.<sup>127</sup> Although ADR fees are disclosed in the ADR itself,<sup>128</sup> ADR holders frequently purchase their ADRs in bookentry form and do not see the disclosures provided in the physical certificate.

Many commenters on the proposed amendments supported the disclosure of the ADR fees paid by ADR holders, noting that complete and regular disclosure of these fees is important in light of their impact on investors. A few, however, noted that these fees are already disclosed in the deposit agreement, on the Form F-6 registration statement filed to register the ADRs with the Commission under the Securities Act, as well as in the Form 20-F that is filed to register the deposited securities under the Exchange Act.<sup>129</sup> After considering these comments, we have concluded these ADR fees are significant enough to warrant enhanced transparency to investors on an annual basis and will present a minimal additional disclosure burden on foreign private issuers.

We received a variety of comments in reaction to the proposed disclosure requirement regarding payments made by depository banks to the foreign private issuers whose securities underlie the ADRs. Some commenters expressed concern that the disclosure would have a detrimental effect on the ADR market, would constitute commercially sensitive proprietary information, and would be immaterial to investors.<sup>130</sup> Other commenters, however, noted that disclosure of such payments would limit the risk that depository banks would attempt to defray the incentive payments through increased charges to ADR holders.<sup>131</sup> One commenter suggested that disclosure of the aggregate amount of incentive payments made to issuers by depositories, rather than detailed disclosure of each payment, would

<sup>127</sup> See Release No. 34-53978 (June 13, 2006) [71 FR 35474] (notice of NYSE rule change to eliminate the requirement that certain services be provided without charge to ADR holders).

<sup>128</sup> As a technical matter, an ADR is the physical certificate that evidences American Depository Shares ("ADS"), and an ADS is the security that represents an ownership interest in deposited securities. However, the terms are often used interchangeably by market participants.

<sup>129</sup> Rule 12a-8 [17 CFR 240.12a-8] exempts depository shares registered on Form F-6 [17 CFR 239.36] under the Securities Act, but not the underlying deposited securities, from the operation of Section 12(a) of the Exchange Act [15 U.S.C. 78(a)].

<sup>130</sup> See, e.g., comment letters from the ABA, The Bank of New York Mellon, and Deutsche Bank.

<sup>131</sup> See, e.g., the comment letter from Depository Management Corporation.

avoid undermining competition among depositories.<sup>132</sup>

After considering all of these comments, we are adopting the amendments to Form 20-F as proposed. The amendments to Form 20-F revise Item 12.D.3. and the Instructions to Item 12 to solicit disclosure of the fees paid by ADR holders on an annual basis, including the annual fee for general depository services. In addition, foreign private issuers will be required to disclose the payments that they have received from depositories in connection with their ADR programs. Because we believe that the value of the information provided would be diminished if it was provided only on an aggregate basis, issuers must disclose the information on a per payment basis. We believe that information about the types of payments made by depositories to issuers would be useful to investors because it would enable them to understand the purpose of the payments. The amendments to Item 12.D.3. and the Instructions to Item 12 of Form 20-F will require disclosure of these payments in the registration statement on Form 20-F that is filed for the deposited securities, as well as in the annual report, for sponsored ADR facilities.

To address the concerns about the disclosure of incentive payments made by depositories to foreign issuers, a foreign private issuer will not be required to disclose this information until it files its annual report for its first fiscal year ending on or after December 15, 2009. This should permit depository banks and foreign issuers to make appropriate contractual arrangements, as necessary, in light of the new disclosure requirements.

#### *H. Disclosure About Differences in Corporate Governance Practices*

We proposed amendments that would require listed foreign private issuers to disclose in their Form 20-F annual reports the significant ways in which their corporate governance practices differ from the practices followed by domestic companies listed on the same exchange. This proposal recognized that foreign private issuers are subject to different legal and regulatory requirements in their home jurisdictions, and as a result frequently follow different corporate governance practices from domestic companies. Many U.S. securities exchanges exempt listed foreign private issuers from many of their corporate governance

requirements,<sup>133</sup> but require these issuers to disclose the significant ways in which their corporate governance practices differ from those followed by domestic companies under the relevant exchange's listing standards. Foreign private issuers may provide this disclosure either in their annual reports, and/or on their Web sites,<sup>134</sup> and many foreign private issuers opt to provide this disclosure on their Web sites, rather than in their annual reports.

We reiterate, as we stated when we proposed the amendments, that this disclosure does not imply a preference for any particular type of corporate governance regime. Again, we note that the disclosure should be useful to investors by facilitating their ability to monitor the issuer's corporate governance practices.

The vast majority of comments received on this proposal were supportive. Commenters noted that the proposed amendment would benefit investors by enabling them to access all of the corporate governance information about a foreign private issuer in one location. They also noted that the information would provide investors with relevant disclosure of any updates on a foreign private issuer's corporate governance practices.

After considering these comments, we are adopting amendments as proposed to require disclosure of this information in the Form 20-F annual reports filed by all foreign private issuers whose securities are listed on a U.S. exchange. New Item 16G would require foreign private issuers to provide a concise summary in their annual reports of the significant ways in which the foreign private issuer's corporate governance practices differ from the corporate governance practices followed by domestic companies under the relevant exchange's listing standards.

Several commenters expressed the view that the new disclosure item should not require disclosure of more

<sup>133</sup> See Section 303A.00 of the NYSE Listed Company Manual (noting that foreign private issuers are permitted to follow home country practice instead of the applicable corporate governance provisions of the NYSE Listed Company Manual, except for the requirements pertaining to audit committees, certain certifications, and certain corporate governance disclosures); Section 4350(a)(1) of the Nasdaq Manual (noting that requirements pertaining to audit committees and audit opinions apply, among other things); and Section 110 of the Amex Company Guide (stating that in evaluating the listing application of a foreign private issuer, "the Exchange will consider the laws, customs and practices of the applicant's country of domicile, to the extent not contrary to the federal securities laws").

<sup>134</sup> See Section 303A.11 of the NYSE Listed Company Manual; Section 4350(a)(1) of the Nasdaq Manual; and Section 110 of the Amex Company Guide.

<sup>132</sup> See *id.*

information than foreign issuers currently provide to the exchanges upon which their securities are listed.<sup>135</sup> Another commenter proposed modifications to the proposed text of Item 16G out of concern that the proposed requirement would inadvertently result in long, boilerplate disclosures.<sup>136</sup> Other commenters supported presentation of the information in a tabular format, while others expressed concern that requiring a particular type of presentation could encourage a “tick box” approach to corporate governance.<sup>137</sup> In response to these comments, we have revised new Item 16G to more exactly track the analogous disclosure requirements of some of the exchanges,<sup>138</sup> without specifying a particular format for the presentation of this information. We expect that the disclosure provided in response to new Item 16G will be similar, if not the same, as the disclosure that foreign private issuers currently provide in response to the corporate governance disclosure requirements of the exchange on which their securities are listed. Issuers should assess, and in the future re-assess, the format that they believe is most appropriate in their circumstances.

### III. Other Matters Considered

At the time that we proposed the amendments discussed above, we also proposed to amend Item 17(a) of Form 20-F to require foreign private issuers to provide, in certain circumstances, the financial information required by Rule 3-05 and Article 11<sup>139</sup> of Regulation S-X. These rules pertain, respectively, to the financial statements that must be provided for significant, completed acquisitions and the preparation of pro forma financial statements. Although domestic companies must present the financial statements of significant acquired businesses and pro forma financial information in their registration statements under both the Securities Act and the Exchange Act, as well in a Form 8-K current report,<sup>140</sup>

foreign private issuers only provide this information in the registration statements that they file under the Securities Act and the Exchange Act.

We proposed amendments to require foreign private issuers to provide the financial information elicited by Rule 3-05 and Article 11 of Regulation S-X in their Exchange Act annual reports. Because foreign private issuers do not file current reports on Form 8-K, we did not propose imposing a requirement that this financial information be presented on a more current basis than annually. We proposed requiring foreign private issuers to provide financial information in their annual reports on Form 20-F about highly significant acquisitions completed during the most recent fiscal year covered by their annual report on that Form. As proposed, the disclosure requirement would have been triggered at the 50% or greater level of significance,<sup>141</sup> and would have required the provision of financial statements for three fiscal years as prescribed by Rule 3-05(b)(2)(iv) of Regulation S-X.

We received several comments on this proposal. Although many commenters supported the proposal, several also expressed concern about the timeliness of the information that would be provided, since it would be provided in the foreign private issuer’s periodic reports (*i.e.*, its annual report), rather than on a current basis. Other commenters questioned the value of requiring foreign private issuers to provide historical financial statements of significant acquirees for three fiscal years. One commenter recommended that foreign private issuers be afforded the flexibility to include financial information based on the relevant IFRS and local auditing standards, and to omit financial information when it cannot be produced without unreasonable burden or expense.<sup>142</sup> Another commenter suggested that we should defer to home country disclosure requirements, and require financial

statements only with respect to the most recently completed fiscal year, unless home country law requires more.<sup>143</sup> This commenter suggested that this approach would avoid the imposition of unnecessary burdens on foreign private issuers, as well as inconsistent disclosure obligations on the issuer, and would avoid creating a disparity in the information available to investors in the issuer’s home country and the United States. We are not adopting these amendments at this time, but will continue to consider the proposal in light of the concerns expressed.

## IV. Paperwork Reduction Act

### A. Background

The final amendments contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>144</sup> We have submitted the proposed amendments to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.<sup>145</sup> The titles for the affected collections of information are:

- (1) “Form 20-F” (OMB Control No. 3235-0288);
- (2) “Form F-1” (OMB Control No. 3235-0258);
- (3) “Form F-3” (OMB Control No. 3235-0256); and
- (4) “Form F-4” (OMB Control No. 3235-0325).

Form 20-F sets forth the disclosure requirements for annual reports and registration statements filed by foreign private issuers under the Exchange Act, as well as many of the disclosure requirements for registration statements filed by foreign private issuers under the Securities Act. Forms F-1, F-3 and F-4 were adopted pursuant to the Securities Act, and set forth the disclosure requirements for registration statements filed by foreign private issuers to offer securities to the public.

The hours and costs associated with preparing, filing and sending these forms and complying with these rules constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The information collection requirements related to Forms 20-F, F-1, F-3 and F-4 are mandatory. There is no mandatory retention period for the information disclosed, and the information disclosed would be made publicly available on

<sup>135</sup> See, e.g., the comment letters from the ABA, CAQ, Deloitte, and E&Y.

<sup>136</sup> See comment letter from Cleary Gottlieb.

<sup>137</sup> See, e.g., comment letter from the British Bankers’ Association.

<sup>138</sup> See Section 303A.11 of the NYSE Listed Company Manual; Section 110 of the Amex Company Guide.

<sup>139</sup> 17 CFR 210.11 *et seq.*

<sup>140</sup> Item 2.01 of Form 8-K requires domestic issuers to disclose certain information when they or one of their majority-owned subsidiaries complete an acquisition or disposition of a significant amount of assets, other than in the ordinary course of business. The Form 8-K filed to report this acquisition or disposition must be filed within four business days after the event has occurred. See General Instruction B.1. of Form 8-K. For a

business acquisition significant at the 20% or greater level that must be disclosed pursuant to Item 2.01, Item 9.01 of Form 8-K requires the financial statements of the acquired business to be filed with the initial report of the acquisition on Form 8-K, or by amendment no later than 71 calendar days after the date that the initial report on Form 8-K is due.

<sup>141</sup> The significance of an acquired business is measured by the comparison of: (1) The registrant’s investment in the acquired business (acquisition price) to the registrant’s total assets, (2) the acquired business’ total assets to the total assets of the registrant, or (3) the acquired business’ pre-tax income to the pre-tax income of the registrant. See Rule 1-02(w) [17 CFR 210.1-02] of Regulation S-X.

<sup>142</sup> See comment letter from the New York City Bar.

<sup>143</sup> See comment letter from the ABA.

<sup>144</sup> 44 U.S.C. 3501 *et seq.*

<sup>145</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

the EDGAR filing system. We have based our estimates of the effect that the adopted rule and form amendments would have on those collections of information primarily on our review of the most recently completed PRA submissions for the affected rules and forms.

The amendments will: (1) Amend Rule 405 of Regulation C under the Securities Act and Exchange Act Rule 3b-4 to 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 continuous basis that is currently required; (2) Amend Form 20-F to accelerate the filing deadline for annual reports filed by foreign private issuers on Form 20-F, subject to a three-year transition period; and amend Exchange Act Rules 13a-10 and 15d-10, which pertains to transition reports filed by foreign private issuers on Form 20-F, and Exchange Act Rule 15d-2, which pertains to special financial reports filed by foreign private issuers, to conform the due dates for those reports with the due date for annual reports filed on Form 20-F; (3) Amend Form 20-F by eliminating an instruction to Item 17 of that Form, which permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; (4) Amend Rule 13e-3, which pertains to going private transactions by reporting issuers or their affiliate, to reflect the recently adopted rules pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations; (5) Amend Form 20-F and Forms F-1, F-3 and F-4 to 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; (6) Amend Form 20-F, Forms F-1, F-3 and F-4 to require foreign private issuers to disclose information about a change in the issuer's certifying accountant; and (7) Amend Form 20-F to require foreign private issuers to disclose the fees and charges paid by ADR holders, 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.

We have based the annual burden and cost estimates of the adopted amendments on the following estimates and assumptions:

- A foreign private issuer incurs or will incur 25% of the annual burden required to produce each Form 20-F, Form F-1, Form F-3, or Form F-4; and

- Outside firms, including legal counsel, accountants and other advisors, incur or will incur 75% of the burden required to produce each Form 20-F, Form F-1, Form F-3, or Form F-4 at an average cost of \$400 per hour.<sup>146</sup>

We estimated the average number of hours each entity spends completing the forms and the average hourly rate for outside professionals. That estimate includes the time and the cost of in-house preparers, reviews by executive officers, in-house counsel, outside counsel, independent auditors and members of the audit committee.

We published a notice requesting comment on the collection of information requirements in the Proposing Release and submitted these requirements to OMB for review in accordance with the PRA. Although we received many comment letters on the proposed rule amendments, none specifically addressed the estimated effects of these proposed amendments on the collection of information requirements. In response to the comments received, we have made certain modifications to the proposals. We have decided not to adopt the proposal to require disclosure of significant, completed acquisitions in the Form 20-F annual report, which will reduce our previous estimates of the reporting and cost burdens of preparing Form 20-F. As a result of comments received, we are also adopting a requirement that repeat registrants, rather than only first-time registrants, provide information about changes in and disagreements with their certifying accountant in their Securities Act registration statements. Because such an event occurs very rarely, this amendment will not significantly affect our estimate of the incremental reporting and cost burdens of this amendment. We are revising our estimates for Forms 20-F and Form F-3 accordingly. Other modifications that we have made to the proposed amendments do not affect our estimate of the incremental burden of the amendments because they will not change the amount of information required to be included by registrants in any of the affected Forms. These amendments include certain modifications to Rule 13e-3 to address technical concerns, a different

<sup>146</sup> In connection with other recent rulemakings, we have had discussions with several law firms to estimate an hourly rate of \$400 as the cost to companies for the services of outside professionals retained to assist in the preparation of these disclosures. For Securities Act registration statements, we also consider additional reviews of the disclosure by underwriter's counsel and underwriters.

accelerated due date for Form 20-F annual reports than proposed, and a longer transition period for certain amendments than originally proposed.

#### *B. Burden and Cost Estimates Related to the Amendments*

##### 1. Form 20-F

We estimate that currently foreign private issuers file 942 Form 20-Fs each year. We assume that 25% of the burden required to produce the Form 20-Fs is borne internally by foreign private issuers, resulting in 614,891 annual burden hours borne by foreign private issuers out of a total of 2,459,564 annual burden hours. Thus, we estimate that 2,611 total burden hours per response are currently required to prepare the Form 20-F. We further assume that 75% of the burden to produce the Form 20-Fs is carried by outside professionals retained by foreign private issuers at an average cost of \$400 per hour, for a total cost of \$737,868,600.

The amendment to amend Form 20-F to accelerate the filing deadline for annual reports and transition reports filed on that Form will not change the amount of information required to be included in Exchange Act reports. In connection with this amendment, we are also adopting amendments to Exchange Act Rules 13a-10 and 15d-10, which pertain to transition reports filed on Form 20-F, and to Exchange Act Rule 15d-2, which pertains to special financial reports filed by foreign private issuers. Our amendments will conform the deadlines for transition reports filed on Form 20-F and for the special financial reports filed by foreign private issuers with the new deadline for annual reports filed on Form 20-F. These amendments also will not change the amount of information required to be included in Exchange Act reports. Therefore, these amendments will neither increase nor decrease the amount of burden hours necessary to prepare annual reports on Form 20-F for the purposes of the PRA.

With respect to our amendment to 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, we estimate that approximately 200 companies that file Form 20-F will be impacted by the amendment. We expect that the amendment will cause those foreign private issuers to have more burden hours. We estimate that for each of the companies affected by the amendment, there will occur an increase of 2% (52.22 hours) in the number of burden hours required to prepare their Form 20-F, for a total increase of 10,444 hours



as a result of this amendment. We expect that 25% of those increased burden hours (2,611 hours) will be incurred by foreign private issuers. We further expect that 75% of these increased burden hours (7,833 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$3,133,200 in increased costs to the respondents of the information collection as a result of this amendment.

With respect to our amendment to require disclosure about a change in the issuer's certifying accountant in annual reports and registration statements filed on Form 20-F, we estimate that approximately 90 companies that file Form 20-F will be impacted by the amendment. The amendment will cause those foreign private issuers to have more burden hours. We estimate that for each of the companies affected by the amendment, there will occur an increase of .75% (19.58 hours) in the number of burden hours required to prepare their Form 20-F, for a total increase of 1,762.2 hours. We expect that 25% of those increased burden hours (440.55 hours) will be incurred by foreign private issuers. We further expect that 75% of these increased burden hours (1,321.65 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$528,660 in increased costs to the respondents of the information collection as a result of the amendment.

Our amendment to require disclosure about ADR fees and payments on an annual basis, we estimate that approximately 442 companies that file Form 20-F will be impacted by the amendment. The amendment will cause those foreign private issuers to have more burden hours. We estimate that for each of the companies affected by the amendment, there will occur an increase of .25% (6.53 hours) in the number of burden hours required to prepare their Form 20-F, for a total increase of 2,886.26 hours. We expect that 25% of those increased burden hours (721.57 hours) will be incurred by foreign private issuers. We further expect that 75% of these increased burden hours (2,164.71 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$865,884 in increased costs to the respondents of the information collection as a result of the amendment.

With respect to our amendment to require annual disclosure about differences in a listed foreign private issuer's corporate practices and those applicable to domestic companies under the relevant exchange's listing rule, we estimate that approximately 783 companies that file Form 20-F will be

impacted by the amendment. The amendment will not cause a significant change in the burden hours for those foreign private issuers because they already prepare this information for the exchanges on which they are listed.

Our amendment to eliminate an instruction to Item 17 of Form 20-F, which permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements, we estimate that approximately 5 companies that file Form 20-F will be currently impacted by the amendment. The amendment will cause those foreign private issuers to have more burden hours. We estimate that for each of the companies affected by the amendment, there will occur an increase of 2% (52.22 hours) in the number of burden hours required to prepare their Form 20-F, for a total increase of 261.1 hours. We expect that 25% of those increased burden hours (65.3 hours) will be incurred by foreign private issuers. We further expect that 75% of these increased burden hours (195.83 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$78,332 in increased costs to the respondents of the information collection as a result of the amendment.

Because we have decided not to adopt the proposal to amend Form 20-F to require foreign private issuers to provide certain financial information in their annual reports on that Form about a significant, completed acquisition that is significant at the 50% or greater level, we have reduced the estimated burdens and costs associated with preparing Form 20-F.

Thus, we estimate that the amendments to Form 20-F will increase the annual burden borne by foreign private issuers in the preparation of Form 20-F from 614,891 hours to 618,729.5 hours. We further estimate that the amendments will increase the total annual burden associated with Form 20-F preparation to 2,474,918 burden hours, which will increase the average number of burden hours per response to 2627. We further estimate that the amendments will increase the total annual costs attributed to the preparation of Form 20-F by outside firms to \$742,475,400.

## 2. Form F-1

We estimate that currently foreign private issuers file 42 registration statements on Form F-1 each year. We assume that 25% of the burden required to produce a Form F-1 is borne by foreign private issuers, resulting in 18,890 annual burden hours incurred by foreign private issuers out of a total of 75,560 annual burden hours. Thus, we

estimate that 1,799 total burden hours per response are currently required to prepare a registration statement on Form F-1. We further assume that 75% of the burden to produce a Form F-1 is carried by outside professionals retained by foreign private issuers at an average cost of \$400 per hour, for a total cost of \$22,667,400.

We estimate that currently approximately 4 companies that file registration statements on Form F-1 will be impacted by the amendment to require foreign private issuers to provide disclosure about a change in their certifying accountant in their initial registration statements. The amendment will cause those foreign private issuers to have more burden hours. We estimate that each company affected by the amendment will have a .75% increase (13.49 hours) in the number of burden hours required to prepare their registration statements on Form F-1, for a total increase of 54 hours. We expect that 25% of these increased burden hours (13.5 hours) will be incurred by foreign private issuers. We further expect that 75% of the increased burden hours (40.5 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$16,200 in increased costs to the respondents of the information collection as a result of the amendment.

We estimate that none of the companies that file registration statements on Form F-1 will be impacted by the amendment to 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. In our experience, the companies that use Form F-1 are engaging in capital raising transactions, so that all registrants have been providing financial information according to Item 18. The amendment will be a technical change to the Form without any expected impact on the companies using that Form for collection of information purposes.

Thus, we estimate that the amendments to Form F-1 will increase the annual burden incurred by foreign private issuers in the preparation of Form F-1 from 18,890 hours to 18,904 hours. We further estimate that the amendments will increase the total annual burden associated with Form F-1 preparation to 75,614 burden hours, which will increase the average number of burden hours per response to 1800. We further estimate that the amendments will increase the total annual costs attributed to the preparation of Form F-1 by outside firms to \$22,683,600.

### 3. Form F-3

We estimate that currently foreign private issuers file 106 registration statements on Form F-3 each year. We assume that 25% of the burden required to produce a Form F-3 is borne by foreign private issuers, resulting in 4,399 annual burden hours incurred by foreign private issuers out of a total of 17,596 annual burden hours. Thus, we estimate that 166 total burden hours per response are currently required to prepare a registration statement on Form F-3. We further assume that 75% of the burden to produce a Form F-3 is carried by outside professionals retained by foreign private issuers at an average cost of \$400 per hour, for a total cost of \$5,278,800.

We estimate that currently approximately 20 companies that file registration statements on Form F-3 will be impacted by the amendment to 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. The amendment will cause those foreign private issuers to have more burden hours. We estimate that each company affected by the amendment will have a 2% increase (3.32 hours) in the number of burden hours required to prepare their registration statements on Form F-3, for a total increase of 66.4 hours. We expect that 25% of these increased burden hours (16.6 hours) will be incurred by foreign private issuers. We further expect that 75% of the increased burden hours (49.8 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$19,920 in increased costs to the respondents of the information collection as a result of the amendment.

In response to comments received, we have amended F-3 to require foreign private issuers that are repeat registrants to disclose a change in or disagreement with their certifying accountant in their registration statements filed on Form F-3. As proposed, this amendment would have applied only to registration statements used in initial public offerings, and would not have been reflected in our collection of information estimates for Form F-3, since Form F-3 is not available for initial public offerings. We estimate that currently approximately 10 companies that file registration statements on Form F-3 will be impacted by this amendment. The amendment will cause those foreign private issuers to have more burden hours. We estimate that each company affected by the amendment will have a .75% increase (1.245 hours) in the number of burden

hours required to prepare their registration statements on Form F-3, for a total increase of 12.45 hours. We expect that 25% of these increased burden hours (3.11 hours) will be incurred by foreign private issuers. We further expect that 75% of the increased burden hours (9.34 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$3,736 in increased costs to the respondents of the information collection as a result of the amendment.

Thus, we estimate that the amendments to Form F-3 will increase the annual burden incurred by foreign private issuers in the preparation of Form F-3 from 4,399 hours to 4,418.71 hours. We further estimate that the amendments will increase the total annual burden associated with Form F-3 preparation to 17,674.85 burden hours, which will increase the average number of burden hours per response to 167. We further estimate that the amendments will increase the total annual costs attributed to the preparation of Form F-3 by outside firms to \$5,302,455.

### 4. Form F-4

We estimate that currently foreign private issuers file 68 registration statements on Form F-4 each year. We assume that 25% of the burden required to produce a Form F-4 is borne internally by foreign private issuers, resulting in 24,497 annual burden hours incurred by foreign private issuers out of a total of 97,988 annual burden hours. Thus, we estimate that 1,441 total burden hours per response are currently required to prepare a registration statement on Form F-4. We further assume that 75% of the burden to produce a Form F-4 is carried by outside professionals retained by foreign private issuers at an average cost of \$400 per hour, for a total cost of \$29,396,400.

We estimate that currently approximately none of the companies that file registration statements on Form F-4 will be impacted by the amendment to 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. In our experience, the companies that use Form F-4 have all been providing financial information according to Item 18 because of the types of transactions that are registered on that Form, so the amendment will be a technical change to the Form without any expected impact on the companies using it.

We estimate that currently approximately 5 companies that file registration statements on Form F-4 will be impacted by the amendment to

require foreign private issuers to provide disclosure about a change in their certifying accountant in their initial registration statements. The amendment will cause those foreign private issuers to have more burden hours. We estimate that each company affected by the amendment will have a .75% increase (10.81 hours) in the number of burden hours required to prepare their registration statements on Form F-1, for a total increase of 54 hours. We expect that 25% of these increased burden hours (13.5 hours) will be incurred by foreign private issuers. We further expect that 75% of the increased burden hours (40.5 hours) will be incurred by outside firms, at an average cost of \$400 per hour, for a total of \$16,200 in increased costs to the respondents of the information collection as a result of the amendment.

Thus, we estimate that the amendments to Form F-4 will increase the annual burden incurred by foreign private issuers in the preparation of Form F-4 from 24,497 hours to 24,511 hours. We further estimate that the amendments will increase the total annual burden associated with Form F-4 preparation to 98,042 burden hours, which will decrease the average number of burden hours per response to 1,442. We further estimate that the amendments will increase the total annual costs attributed to the preparation of Form F-4 by outside firms to \$29,412,600.

### 5. Other Amendments

The amendments to Securities Act Rule 405 and Exchange Act Rule 3b-4 will revise the definition of "foreign private issuer" to permit foreign issuers to test their status as "foreign private issuers" on the last business day of their second fiscal quarter, rather than continuously, as is currently the case. Our amendments will not change the amount of information required to be included in Securities Act registration statements or Exchange Act reports. Therefore, they will neither increase nor decrease the amount of burden hours necessary to prepare documents under either of those Acts for the purposes of the PRA.

In addition, we do not expect a change in the number of foreign private issuers who will be required to comply with Rule 13e-3, or the burden hours required to prepare a Schedule 13E-3. With respect to domestic issuers, although we do not expect the number of domestic issuers affected by the amendments to Rule 13e-3 to decrease, we also expect that the Rule amendments will have a negligible effect on these issuers because the

smaller reporting companies that will be affected by the amendments could voluntarily deregister and thus avoid any requirement to comply with that Rule.

## V. Cost-Benefit Analysis

We are adopting amendments to our rules and forms relating to foreign private issuers that are intended to enhance the information that is available to investors, promote investor protection and facilitate cross-border capital flows.

### A. Annual Test for Foreign Private Issuer Status

#### 1. Expected Benefits

The amendments to the definition of "foreign private issuer" contained in Securities Act Rule 405 and Exchange Act Rule 3b-4 will permit reporting foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers once a year on the last business day of their second fiscal quarter, rather than continuously, as is currently the case. This is the same date used to determine accelerated filer status under Exchange Act Rule 12b-2 and smaller reporting company status in Item 10(f)(2)(i) of Regulation S-K. As a result, these adopted amendments should simplify compliance with the Commission's regulations by establishing one date that is used to ascertain an issuer's status. Foreign issuers should benefit as a result of this simplification of their compliance requirements, which could make the U.S. markets more attractive to them as a source of capital and thereby enhance the competitiveness of the U.S. markets compared to other markets. The amendments are expected to reduce the cost for foreign issuers of monitoring whether they qualify as foreign private issuers, including the time spent by management in tracking this information. If more foreign issuers are encouraged to remain in the U.S. markets and to make public offerings, investors should also benefit because this will enhance their ability to invest in the securities of foreign issuers that have been registered with the Commission, and that are thus subject to the disclosure requirements and investor protections provided by the federal securities laws.

Once a foreign issuer determines that it no longer qualifies as a foreign private issuer, the amendments will provide the issuer with at least six months' advance notice that it must comply with the domestic issuer forms and rules. This will provide these issuers with more time to comply with the reporting

requirements applicable to domestic issuers under the Exchange Act, and to modify their information and processing systems to comply with the domestic reporting and registration regime. This includes the requirements to comply with the more extensive executive compensation disclosure requirements that apply to domestic issuers, as well as the proxy rules and Section 16 reporting requirements under the Exchange Act, which do not apply to foreign private issuers. Because the amendments will provide foreign issuers with advance notice when their status changes, more foreign issuers may be encouraged to remain in the U.S. markets, and investors should benefit from the increased opportunities to invest in foreign securities in the United States.

The amendments should mitigate a burden on foreign issuers by reducing the amount of time and the resources they expend to determine their status pursuant to the four-factor test set forth in the definition of "foreign private issuer." In this respect, the amendments will be most beneficial to reporting foreign private issuers that have close to 50% of their outstanding voting securities held of record by U.S. residents, since they are most at risk of no longer qualifying as foreign private issuers. The current requirement that foreign issuers continuously test their status can result in confusion for investors if a foreign issuer needs to move between foreign and domestic reporting forms in the same fiscal year. For example, investors may be confused if a foreign issuer determines that it no longer qualifies as a foreign private issuer, and then switches from the foreign private issuer forms (Form 6-K and Form 20-F) to the domestic forms (e.g., quarterly reports on Form 10-Q) in the same fiscal year. In the case of a foreign issuer that loses its foreign private issuer status, the amendments will benefit U.S. investors by eliminating the confusion that could result if the foreign issuer switched forms in the middle of the year. However, the amendments may not be as helpful in reducing investor confusion with respect to foreign private issuers that have been reporting under the domestic regime and that will now be permitted to switch immediately to the foreign private issuer reporting regime upon the determination of their eligibility to do so.

At the same time, foreign issuers that previously did not qualify as foreign private issuers, but that determine that they will qualify as foreign private issuers, will be able to use the foreign private issuer rules and forms

immediately under the amendments. This accommodation could encourage more foreign issuers to enter the U.S. markets and to make public offerings, and should benefit investors by enhancing their ability to invest in foreign securities that have been registered with the Commission.

#### 2. Expected Costs

Investors could incur costs from the amendments if foreign issuers that have been reporting under the domestic reporting regime immediately switch over to the foreign private issuer forms once they qualify as foreign private issuers. Because foreign private issuers have different Exchange Act reporting obligations than domestic issuers and file on different forms, some investors may find it confusing if a foreign issuer that had been reporting under the domestic reporting regime switches reporting regimes mid-year. In addition, once a foreign issuer switches status from a domestic issuer to a foreign private issuer, investors will no longer have the benefit of the disclosures that were once provided by the foreign issuer on the domestic forms.

Currently, when a foreign issuer no longer qualifies as a foreign private issuer, it must immediately file quarterly reports on Form 10-Q and current reports on Form 8-K. It must also comply with the Commission's proxy rules and the Section 16 insider stock trading and short-swing profit recovery provisions. Under the amendments, when a foreign issuer determines that it no longer qualifies as a foreign issuer, for the six months following the test date, the foreign issuer will be permitted to continue relying on the rules applicable to foreign private issuers, such as the exemption from the proxy rules and Section 16. The foreign issuer will also be allowed to use the forms reserved for foreign private issuers, and to provide current reports on Form 6-K, rather than Exchange Act reports on Forms 10-Q and 8-K. During that period, investors will not have the benefit of the additional disclosures that the foreign issuer would otherwise be required to provide.

### B. Amendments to Form 20-F

The amendments will make several changes to annual reports filed on Form 20-F. We are adopting amendments to accelerate the deadline for annual reports filed on Form 20-F by foreign private issuers. We are also adopting amendments to Form 20-F to require certain additional disclosures in annual reports on that Form. The adopted amendments will require issuers to

disclose any changes in and disagreements with the registrant's certifying accountant in their Form 20-F annual reports, as well as in the Securities Act registration statements filed by registrants with the Commission. The amendments will also require disclosure of the fees and other charges paid by ADR holders to depositaries, and any payments made by depositaries to the foreign issuers whose securities underlie the ADRs. In addition, we are adopting amendments to Form 20-F to require disclosure in the annual report about the 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. Another adopted amendment will eliminate an instruction to Item 17 of Form 20-F that permits certain foreign private issuers to omit segment data from the U.S. GAAP financial statements.

In addition to these amendments, we are adopting amendments to eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17 of Form 20-F for foreign private issuers that are only listing a class of securities on a U.S. national securities exchange, or only registering a class of equity securities under Section 12(g) of the Exchange Act, and not conducting a public offering. The amendments will apply not only to registration statements filed on Form 20-F in the circumstances described above, but also to annual reports filed on that Form. Related to this adopted amendment, we are adopting amendments to eliminate the Item 17 limited reconciliation option for certain non-capital raising offerings, such as offerings pursuant to dividend reinvestment plans, offerings upon the conversion of securities, or offerings of investment grade securities. The Securities Act registration statement forms available to foreign private issuers (Form F-1, F-3 and F-4) are amended accordingly.

#### 1. Expected Benefits

We anticipate that the adopted amendments to Form 20-F and the related amendments to the Securities Act registration statement forms available to foreign private issuers will provide a significant benefit to U.S. investors by providing them with enhanced disclosure that is more similar to the disclosures provided by domestic issuers, as well as disclosure on an accelerated basis that is more comparable to the timeframe within which domestic issuers file annual

reports. Because of the Commission's integrated disclosure system, in which approximately the same information is provided in both the primary and secondary markets, the disclosure requirements contained in Form 20-F are often more comprehensive than the disclosures required by foreign securities regulators. For example, although many foreign regulators require audited financial statements and a form of management's report in annual reports, they do not require disclosure about executive compensation, description about the issuer's business, or a Management's Discussion and Analysis.<sup>147</sup> These additional disclosures are required in the Form 20-F annual reports that foreign private issuers file with the Commission.

Based on a sample of Form 20-F annual reports filed with the Commission in the past few years, we estimate that approximately one-third of all such filers currently file Form 20-F annual reports with us within 120 days after their fiscal year-end. The adopted amendment to accelerate the due date for Form 20-F annual reports will thus affect a majority of the foreign private issuers that file on Form 20-F. As a result of the accelerated deadline, investors may be better able to compare the performance of foreign and domestic issuers, since information about both will be provided on a more contemporaneous basis.

The adopted amendments to require additional disclosure in Form 20-F annual reports should help investors better compare foreign and domestic issuers. Currently, domestic issuers provide disclosure about changes in and disagreements with their certifying accountant on a Form 8-K current report. Listed domestic issuers are also required to comply with the corporate governance requirements of the U.S. exchange on which their securities are listed, although foreign private issuers whose securities are listed on the same exchange are exempt. The adopted amendments will provide investors with more comparable information about foreign private issuers regarding possible audit opinion shopping and corporate governance practices.

The adopted amendments to require disclosure about ADR fees and payments made by depositaries to the foreign issuers whose securities underlie the ADRs will make this information more readily available to investors. The placement of this disclosure in annual reports and Form

20-F registration statements should assist investors in determining the fees related to their investments in ADRs, including indirect costs that may be imposed on them if the depositary bank passes along the cost of its payments to foreign issuers to ADR holders. This should better enable investors to determine whether to invest in the ADRs of foreign issuers.

Several of the adopted amendments to Item 17 of Form 20-F may also help ensure that all foreign private issuers provide the same level of financial information, thereby facilitating a readier comparison across all issuers. This could, as a consequence, increase the attractiveness of these companies to investors. For example, the adopted amendments will eliminate the availability of the limited U.S. GAAP reconciliation option in Item 17 of Form 20-F for annual reports, registration statements on Form 20-F that do not involve a public offering, and Securities Act registration statements for certain non-capital raising transactions. Currently, most foreign private issuers that provide U.S. GAAP reconciliation disclose financial information according to Item 18 of Form 20-F. The adopted amendment will require that all foreign private issuers provide this level of disclosure. Another adopted amendment will eliminate the 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. Although we estimate that less than 10 foreign private issuers use this instruction, the instruction creates an anomaly whereby an issuer is permitted to provide a qualified U.S. GAAP audit report.

#### 2. Expected Costs

Foreign private issuers could incur costs from the adopted amendments to Form 20-F, and the related amendments to the Securities Act registration statements available to foreign private issuers. In order to comply with the adopted accelerated due dates, many foreign private issuers will likely have to implement new systems for preparing information during the transition period to the new rules. They could be required to prepare annual reports on a dual track, one for the annual report filed with their home country regulator and the Form 20-F annual report. According to a sample of Form 20-F annual reports filed with us, approximately one-third of all such filers file their Form 20-F annual reports within 120 days of their fiscal year-end. The cost of preparing filings on an accelerated basis may therefore vary among issuers. In addition, because of the Commission's

<sup>147</sup> In Form 20-F, this disclosure item is contained in Item 5 (Operating and Financial Review and Prospects).

integrated disclosure system, in which issuers provide approximately the same disclosures to both the primary and secondary markets, the disclosures required in Form 20-F are more substantial than the information required for annual reports in many foreign jurisdictions. The amendments could thus result in increased costs for foreign private issuers.

The amendments to provide additional disclosures in Form 20-F may also impose additional costs on foreign private issuers. With respect to the adopted disclosure regarding ADR fees and payments made by depositaries, we note that the information about ADR fees is provided in the deposit agreement and form of receipt that are attached as exhibits to the Form F-6 used to register the ADRs under the Securities Act, as well as in the Securities Act registration statement related to the offering of the securities underlying the ADRs. Because the information is already required by the Commission, albeit in filings that most retail investors are not familiar with, we do not believe that the requirement to include this information in the foreign private issuer's annual report on Form 20-F will involve significant compliance costs.

In addition, the information about the payments made by depositaries to foreign private issuers will provide important new information to investors about incentives used by depositaries that may encourage foreign private issuers to sell their securities in ADR form and with a particular depositary bank. If foreign issuers are reluctant to disclose this information, they could be discouraged from entering the U.S. markets, or, if they already have established ADR facilities in the United States, from maintaining their ADR facilities. This could reduce the opportunities for investors to invest in foreign securities in the United States.

Foreign private issuers could incur some costs related to the proposal to include information about differences in corporate governance practices for listed foreign private issuers. However, the U.S. exchanges already require that this information be prepared. For foreign private issuers that are listed on U.S. exchanges, the amendment will not involve the collection of new information or preparation of new disclosure, but will simply require that the information also be made available in the annual report, where many investors may expect to see it. As a result, we believe the compliance costs of this amendment will be relatively small. Corporate governance information elicited by the amendment

will not be required for issuers that are not listed on a U.S. exchange.

The amendments to eliminate the availability of the limited U.S. GAAP reconciliation contained in Item 17 of Form 20-F could result in costs for the affected foreign private issuers because they will now need to collect this information and to prepare additional disclosure in their Form 20-F annual reports. Some commenters expressed concern about the potential compliance burdens associated with the amendment to eliminate the availability of the Item 17 reconciliation, especially because they believe that other countries are gradually requiring footnote disclosures comparable in scope to U.S. GAAP and Regulation S-X. However, based on our review of Form 20-F annual report filings made with us for fiscal year 2006, we estimate that most foreign private issuers already provide financial information according to Item 18 of Form 20-F. In addition, we believe that a reconciliation that includes the footnote disclosures required by U.S. GAAP and Regulation S-X can provide important additional information to investors. Some commenters also noted that foreign private issuers that provide the Item 17 reconciliation in their annual reports tend to be smaller companies, and that these companies would face significant burdens on their financial accounting and reporting system if they are required to provide the additional Item 18 disclosures and also comply with the accelerated due date for filing Form 20-F annual reports at the same time. To reduce the potential burdens on these issuers, we are providing a three-year transition period before the amendment takes effect, which will align the compliance date for the adopted amendments with the date on which many countries will be adopting IFRS.

The amendment to require segment data in U.S. GAAP financial statements could also result in costs for the affected foreign private issuers because of the need to collect this information and to prepare additional disclosure in their Form 20-F annual reports. However, we note that approximately five foreign private issuers will be affected by the requirement to provide segment data.

Foreign private issuers will also incur costs in connection with the amendment to require disclosure about any changes in and disagreements with the registrant's certifying accountant in Form 20-F annual reports and in Securities Act registration statements filed by registrants. In addition to the preparation costs of including this information in the Form 20-F, the foreign private issuer could also incur

certain costs associated with the requirement to obtain a letter from its former accountant stating whether it agrees with the disclosure provided by the issuer in the document filed with the Commission.

Investors may incur costs to the extent that the amendments to Form 20-F discourage foreign private issuers from registering or maintaining their registration with the Commission. If foreign private issuers deregister or do not register their securities under the Securities Act or the Exchange Act, there may be reduced opportunities for investment by U.S. investors in the securities of foreign issuers. Although each of the adopted amendments will affect a different number of foreign private issuers, for purposes of the Paperwork Reduction Act, we estimate that these new disclosures will result in an increased paperwork burden of 25 hours for all respondents and \$4,606,800 for Form 20-F.

### *C. Exchange Act Rule 13e-3*

#### 1. Expected Benefits

We believe that the amendment to Exchange Act Rule 13e-3, which pertains to going private transactions by reporting issuers or their affiliates, to reflect the recently adopted rules pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations will benefit investors. By amending this Rule, the test for determining when a domestic issuer undertakes a going private transaction will also change. The amendment will help ensure that Rule 13e-3 covered the types of transactions that were intended when the Commission first adopted the Rule. Investors will benefit because more foreign private issuers are expected to be able to terminate their registration and reporting obligations under the Exchange Act as a result of these recently adopted amendments. If more foreign private issuers decide to conduct going private transactions to terminate their registration or reporting obligations, the amendment to Rule 13e-3 will require more foreign private issuers to comply with that Rule and to file a Schedule 13E-3, as required by that Rule. Similarly, modernizing Rule 13e-3 to apply equally to domestic issuers when a transaction identified in the Rule results in the issuer becoming eligible to terminate or suspend its reporting obligations is consistent with the policy purpose supporting the Rule's initial adoption. Investors will benefit from the additional disclosures that will be provided.

## 2. Expected Costs

Foreign private issuers and domestic issuers may incur additional costs in connection with the adopted amendment to Rule 13e-3(a)(3)(ii)(A) if Rule 13e-3 is more easily triggered because of the reference to the new termination of registration and reporting requirements that apply to foreign private issuers. These costs will include, for example, the cost of preparing, filing and disseminating a Schedule 13E-3, as well as any required amendments to that Schedule, with the Commission.

## VI. Consideration of Impact on the Economy, Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

When engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, Section 2(b) of the Securities Act<sup>148</sup> and Section 3(f) of the Exchange Act<sup>149</sup> require us to consider whether the action will promote efficiency, competition and capital formation. When adopting rules under the Exchange Act, Section 23(a)(2) of the Exchange Act<sup>150</sup> requires us to consider the impact that any new rule will have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that will impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

In the Proposing Release, we considered the proposed amendments in light of the standards set forth in the above referenced statutory sections. We solicited comment on whether, if adopted, the proposed rule amendments would result in any anti-competitive effect or would promote efficiency, competition and capital formation. In addition, we encouraged commenters to provide empirical data or other facts to support their views on any anti-competitive effects or any burdens on efficiency, competition or capital formation that may result from adoption of the proposed amendments.

We did not receive any empirical data in this regard concerning the proposed amendments. However, with respect to our amendment to require more disclosure about payments made by depositaries in connection with ADR facilities, one commenter suggested that disclosure of the aggregate amount of incentive payments made by depositaries to foreign private issuers whose securities underlie the ADRs,

rather than disclosure about each payment, would avoid undermining competition among depositaries. We believe that information about the types of payments made by depositaries to issuers would be useful to investors because it would enable them to understand the purpose of the payments, and that the disclosure of that information on an aggregate basis would undercut the value of the disclosure. Accordingly, we continue to believe the new rules will contribute to efficiency, competition and capital formation.

The purpose of the amendments to Securities Act Rule 405 and Exchange Act Rule 3b-4, which will permit foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers once a year, are expected to facilitate capital formation by foreign issuers in the U.S. capital markets. The adopted amendments should reduce regulatory compliance burdens for foreign private issuers that rely on the adopted amendments because of the reduction in monitoring costs. Reduced compliance burdens are expected to lower the cost of raising capital in the United States for those issuers. In addition, the competitiveness of the U.S. markets may be enhanced because the reduced monitoring costs may make the markets more attractive to them. The reduction in compliance burdens may also promote efficiency because foreign issuers will no longer need to continuously test their qualification as foreign private issuers.

The amendments to Form 20-F will accelerate the reporting deadline for annual reports on Form 20-F. The amendments to Exchange Act Rules 13a-10 and 15d-10, which pertain to transition reports filed on Form 20-F, and the amendments to Exchange Act Rule 15d-2, which pertain to special financial reports filed by foreign private issuers, will conform the due dates for these reports with the new due date for annual reports on Form 20-F. Several of the adopted amendments to Form 20-F will require more disclosure in the annual reports filed by foreign private issuers. The disclosures required will include information about any changes in and disagreements with the registrant's certifying accountant, ADR fees and payments made by depositaries to the foreign issuers whose securities underlie the ADR, and information about corporate governance. In addition, the amendments will eliminate the availability of the limited U.S. GAAP reconciliation option contained in Item 17 of Form 20-F, and will eliminate an instruction to Item 17 of that Form,

which permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements.

These amendments will create a more level playing field between foreign private issuers and U.S. issuers because they will require disclosures from foreign private issuers that are currently required of domestic issuers. Foreign private issuers that file annual reports on Form 20-F will also be required to provide these annual reports in a timeframe that is closer to the annual report due dates imposed on domestic issuers. As a result, the amendments should put foreign private issuers and domestic issuers in a more similar position with respect to their compliance obligations under the Commission's regulations, although the incremental costs of complying with these amendments may also create a disincentive for some foreign private issuers to enter the U.S. capital markets.

The amendments may also facilitate capital formation by foreign companies in the U.S. capital markets by enabling investors to obtain more information about these companies in a timeframe that will make the information useful to them and in a manner that will allow for greater comparability to domestic issuers. This could affect the allocation of capital between foreign private issuers and domestic issuers.

The amendments to Exchange Act Rule 13e-3, which reflect the newly adopted rules pertaining to the termination and deregistration of the reporting obligations of foreign private issuers, could require more foreign private issuers and domestic issuers to comply with that Rule and to file a Schedule 13E-3 as a result if more issuers decide to conduct going private transactions to terminate their registration and reporting obligations. This additional compliance obligation could create a disincentive for foreign private issuers to enter the U.S. markets.

## VII. Regulatory Flexibility Act Certification

Under Section 605(b) of the Regulatory Flexibility Act,<sup>151</sup> the Commission certified that the proposed amendments to Rule 405 of Regulation C, Form F-1, Form F-3, and Form F-4 under the Securities Act, and Form 20-F, Rule 3b-4, Rule 13a-10, Rule 13e-3 and Rule 15d-10 under the Exchange Act contained in this release, if adopted, will not have a significant economic impact on a substantial number of small entities. It included this certification in Part VIII of the Proposing Release. While the Commission encouraged written

<sup>148</sup> 15 U.S.C. 77b(b).

<sup>149</sup> 15 U.S.C. 78c(f).

<sup>150</sup> 15 U.S.C. 78w(a)(2).

<sup>151</sup> 5 U.S.C. 605(b).

comments regarding this certification, no commenters responded to this request.

**VIII. Statutory Authority and Text of Final Amendments**

We are adopting amendments to the rules and forms pursuant to the authority set forth in Sections 6, 7, 10 and 19 of the Securities Act, as amended, and Sections 3, 12, 13, 15, 23 and 36 of the Exchange Act, as amended.

**List of Subjects in 17 CFR Parts 230, 239, 240 and 249**

Reporting and recordkeeping requirements, Securities.

**Text of the Amendments**

■ For the reasons set out in the preamble, the Commission is amending Title 17, Chapter II of the Code of Federal Regulations as follows:

**PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

■ 1. The authority citation for Part 230 continues to read in part as follows:

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

■ 2. Section 230.405 is amended by revising the definition of “foreign private issuer” to read as follows:

**§ 230.405 Definition of terms.**

\* \* \* \* \*

*Foreign private issuer.* (1) The term *foreign private issuer* means any foreign issuer other than a foreign government except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

(i) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and

(ii) Any of the following:

(A) The majority of the executive officers or directors are United States citizens or residents;

(B) More than 50 percent of the assets of the issuer are located in the United States; or

(C) The business of the issuer is administered principally in the United States.

(2) In the case of a new registrant with the Commission, the determination of whether an issuer is a foreign private issuer shall be made as of a date within

30 days prior to the issuer’s filing of an initial registration statement under either the Act or the Securities Exchange Act of 1934.

(3) Once an issuer qualifies as a foreign private issuer, it will immediately be able to use the forms and rules designated for foreign private issuers until it fails to qualify for this status at the end of its most recently completed second fiscal quarter. An issuer’s determination that it fails to qualify as a foreign private issuer governs its eligibility to use the forms and rules designated for foreign private issuers beginning on the first day of the fiscal year following the determination date. Once an issuer fails to qualify for foreign private issuer status, it will remain unqualified unless it meets the requirements for foreign private issuer status as of the last business day of its second fiscal quarter.

\* \* \* \* \*

**PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

■ 3. The authority citation for part 239 continues to read in part as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

■ 4. Form F-1 (referenced in § 239.31) Part I is amended by:

- a. Revising paragraph (c) of Item 4;
- b. Adding paragraph (d) to Item 4; and
- c. Revising the Instruction to Item 4A.

The revisions and addition read as follows:

**Note:** The text of Form F-1 does not, and the amendments thereto will not, appear in the Code of Federal Regulations.]

FORM F-1

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

\* \* \* \* \*

PART I

\* \* \* \* \*

Item 4. Information with Respect to the Registrant and the Offering.

Furnish the following information with respect to the Registrant.

\* \* \* \* \*

(c) For the registrant’s fiscal years ending before December 15, 2011, information required by Item 17 of Form 20-F may be furnished in lieu of the information specified by Item 18 thereof if the only securities being registered are non-convertible securities that are

“investment grade securities,” as defined below, or the only securities to be registered are to be offered:

1. upon the exercise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted on a pro rata basis to all existing security holders of the class of securities to which the rights attach and there is no standby underwriting in the United States or similar arrangement; or

2. pursuant to a dividend or interest reinvestment plan; or

3. upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer of the securities to be offered, or by an affiliate of such issuer.

(d) For the registrant’s fiscal years ending on or after December 15, 2009, information required by Item 16F of Form 20-F.

\* \* \* \* \*

Item 4A. Material Changes.

\* \* \* \* \*

*Instruction.*

For the registrant’s fiscal years ending before December 15, 2011, financial statements or information required to be furnished by this Item shall be reconciled pursuant to either Item 17 or Item 18 of Form 20-F, whichever is applicable to the primary financial statements. For the registrant’s fiscal years ending on or after December 15, 2011, financial statements or information required to be furnished by this Item shall be reconciled pursuant to Item 18 of Form 20-F.

■ 5. Form F-3 (referenced in § 239.33) is amended by:

- a. Revising General Instruction I.B.2.;
- b. Revising General Instruction I.B.3.;
- c. Revising General Instruction I.B.4.;
- and
- d. Revising the Instruction to Item 5.

The revisions read as follows:

**Note:** The text of Form F-3 does not, and the amendments thereto will not, appear in the Code of Federal Regulations.

FORM F-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

\* \* \* \* \*

GENERAL INSTRUCTIONS

I. \* \* \*

\* \* \* \* \*

B. Transaction Requirements

\* \* \* \* \*

2. *Primary Offerings of Non-convertible Investment Grade Securities.* Non-convertible securities to be offered



for cash if such securities are "investment grade securities." A non-convertible security is an "investment grade security" if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in Rule 15c3-1(c)(2)(vi)(F) under the Exchange Act (§ 240.15c3-1(c)(2)(vi)(F) of this chapter) has rated the security in one of its generic rating categories that signifies investment grade; typically, the four highest rating categories (within which there may be subcategories or gradations indicating relative standing) signify investment grade. For the registrant's fiscal years ending before December 15, 2011, in the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement may comply with Item 17 or 18 of Form 20-F. For the registrant's fiscal years ending on or after December 15, 2011, in the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement must comply with Item 18 of Form 20-F.

3. *Transactions Involving Secondary Offerings.* Outstanding securities to be offered for the account of any person other than the issuer, including securities acquired by standby underwriters in connection with the call or redemption by the issuer of warrants or a class of convertible securities. In the case of such securities, the financial statements included in this registration statement may comply with Item 17 or 18 of Form 20-F for a registrant's fiscal years ending before December 15, 2011; and for the registrant's fiscal years ending on or after December 15, 2011, the financial statements included in this registration statement must comply with Item 18 of Form 20-F. In addition, Form F-3 may be used by affiliates to register securities for resale pursuant to the conditions specified in General Instruction C to Form S-8 (§ 239.16b of this chapter). In the case of such securities, the financial statements included in this registration statement must comply with Item 18 of Form 20-F (§ 249.220f of this chapter).

4. *Rights Offerings, Dividend or Interest Reinvestment Plans, and Conversions or Warrants.* Securities to be offered: (a) Upon the exercise of outstanding rights granted by the issuer of the securities to be offered, if such rights are granted pro rata to all existing security holders of the class of securities to which the rights attach; or (b) pursuant to a dividend or interest reinvestment plan; or (c) upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued

by the issuer of the securities to be offered, or by an affiliate of such issuer. In the case of securities registered pursuant to this paragraph, the financial statements included in this registration statement may comply with Item 17 or 18 of Form 20-F for the registrant's fiscal years ending before December 15, 2011; and for the registrant's fiscal years ending on or after December 15, 2011, the financial statements included in this registration statement must comply with Item 18 of Form 20-F. The registration of securities to be offered or sold in a standby underwriting in the United States or similar arrangement is not permitted pursuant to this paragraph. See paragraphs B.1., B.2., and B.3. of this Instruction.

\* \* \* \* \*

#### Item 5. Material Changes

\* \* \* \* \*

##### *Instructions.*

1. For a registrant's fiscal years ending before December 15, 2011, financial statements or information required to be furnished by this Item shall be reconciled pursuant to either Item 17 or 18 of Form 20-F, whichever is applicable to the primary financial statements. For a registrant's fiscal years ending on or after December 15, 2011, financial statements or information required to be furnished by this Item shall be reconciled pursuant to Item 18 of Form 20-F.

2. Material changes to be disclosed pursuant to Item 5(a) include changes in and disagreements with registrant's certifying accountant. For the registrant's fiscal years ending on or after December 15, 2009, disclosure pursuant to Item 16F of Form 20-F should be provided as of the date of the registration statement or prospectus.

\* \* \* \* \*

■ 6. Form F-4 (referenced in § 239.34) is amended by:

- a. Revising Instruction 1 to Item 11;
- b. Revising Item 12(b)(2) introductory text;
- c. In Item 12(b)(3)(vi)(B), removing the period and adding in its place a semicolon;
- d. Revising Item 12(b)(3)(vii);
- e. In Item 12(b)(3)(viii), removing the period and adding in its place ";" and adding Item 12(b)(3)(ix);
- f. Revising Instruction 1 to Item 13;
- g. Revising Item 14(h);
- h. In Item 14(i), removing the period and adding in its place ";" and";
- i. Adding Item 14(j); and
- j. In Item 17(b)(5)(ii), removing the period and adding in its place ";" and"; and adding Item 17(b)(6).

The revisions and additions read as follows:

[**Note:** The text of Form F-4 does not, and the amendments thereto will not, appear in the Code of Federal Regulations.]

#### FORM F-4

#### REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

\* \* \* \* \*

#### Item 11. Incorporation of Certain Information by Reference

\* \* \* \* \*

##### *Instructions*

1. For the registrant's fiscal years ending before December 15, 2011, all annual reports or registration statements incorporated by reference pursuant to Item 11 of this Form shall contain financial statements that comply with Item 18 of Form 20-F, except that financial statements of the registrants may comply with Item 17 of Form 20-F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F-3. For the registrant's fiscal years ending on or after December 15, 2011, all annual reports or registration statements incorporated by reference pursuant to Item 11 of this Form shall contain financial statements that comply with Item 18 of Form 20-F.

\* \* \* \* \*

#### Item 12. Information With Respect to F-3 Registrants

\* \* \* \* \*

##### (b) \* \* \*

(2) For the registrant's fiscal years ending before December 15, 2011, include financial statements and information as required by Item 18 of Form 20-F, except that financial statements of the registrant may comply with Item 17 of Form 20-F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F-3. For the registrant's fiscal years ending on or after December 15, 2011, include financial statements and information as required by Item 18 of Form 20-F. In addition, provide:

##### (3) \* \* \*

(vii) For the registrant's fiscal years ending before December 15, 2011, financial statements required by Item 18 of Form 20-F, except that financial statements of the registrant may comply with Item 17 of Form 20-F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F-3, and financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be

issued. (Schedules required under Regulation S-X shall be filed as "Financial Statement Schedules" pursuant to Item 21 of this Form, but need not be provided with respect to the company being acquired if information is being furnished pursuant to Item 17(a) of this Form.) For the registrant's fiscal years ending on or after December 15, 2011, financial statements required by Item 18 of Form 20-F, and financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued;

(ix) For the registrant's fiscal years ending on or after December 15, 2009, Item 16F of Form 20-F, change in registrant's certifying accountant.

Item 13. Incorporation of Certain Information by Reference

#### Instructions

1. For the registrant's fiscal years ending before December 15, 2011, all annual reports incorporated by reference pursuant to Item 13 of this Form shall contain financial statements that comply with Item 18 of Form 20-F, except that financial statements of the registrants may comply with Item 17 of Form 20-F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F-3. For the registrant's fiscal years ending on or after December 15, 2011, all annual reports incorporated by reference pursuant to Item 13 of this Form shall contain financial statements that comply with Item 18 of Form 20-F.

Item 14. Information With Respect to Foreign Registrants Other Than F-3 Registrants

(h) For the registrant's fiscal years ending before December 15, 2011, financial statements required by Item 18 of Form 20-F, except that financial statements of the registrants may comply with Item 17 of Form 20-F if the only securities being registered are investment grade securities as defined in the General Instructions to Form F-1; and for the registrant's fiscal years ending on or after December 15, 2011, financial statements required by Item 18 of Form 20-F. In addition, financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued. (Schedules

required by Regulation S-X shall be filed as "Financial Statement Schedules" pursuant to Item 21 of this Form.);

(j) For the registrant's fiscal years ending on or after December 15, 2009, Item 16F of Form 20-F, change in registrant's certifying accountant.

Item 17. Information With Respect to Foreign Companies Other Than F-3 Companies

(6) For the registrant's fiscal years ending on or after December 15, 2009, Item 16F of Form 20-F, change in registrant's certifying accountant.

### PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 7. The authority citation for Part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

■ 8. Section 240.3b-4 is amended by:  
 ■ a. Revising paragraph (c) introductory text;  
 ■ b. Adding paragraphs (d) and (e); and  
 ■ c. Removing the authority citations following the section.

The revision and addition read as follows:

**§ 240.3b-4 Definition of "foreign government," "foreign issuer" and "foreign private issuer".**

(c) The term *foreign private issuer* means any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

(d) Notwithstanding paragraph (c) of this section, in the case of a new registrant with the Commission, the determination of whether an issuer is a foreign private issuer will be made as of a date within 30 days prior to the issuer's filing of an initial registration statement under either the Act or the Securities Act of 1933.

(e) Once an issuer qualifies as a foreign private issuer, it will immediately be able to use the forms

and rules designated for foreign private issuers until it fails to qualify for this status at the end of its most recently completed second fiscal quarter. An issuer's determination that it fails to qualify as a foreign private issuer governs its eligibility to use the forms and rules designated for foreign private issuers beginning on the first day of the fiscal year following the determination date. Once an issuer fails to qualify for foreign private issuer status, it will remain unqualified unless it meets the requirements for foreign private issuer status as of the last business day of its second fiscal quarter.

■ 9. Section 240.13a-10 is amended by revising paragraph (g)(3) to read as follows:

**§ 240.13a-10 Transition reports.**

(3) The report for the transition period shall be filed on Form 20-F responding to all items to which such issuer is required to respond when Form 20-F is used as an annual report. The financial statements for the transition period filed therewith shall be audited. The report shall be filed within the following period:

(i) Within six months after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later, for new fiscal years ending before December 15, 2011; and

(ii) Within four months after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later, for new fiscal years ending on or after December 15, 2011.

■ 10. Section 240.13e-3 is amended by revising paragraph (a)(3)(ii)(A) to read as follows:

**§ 240.13e-3 Going private transactions by certain issuers or their affiliates.**

(A) Causing any class of equity securities of the issuer which is subject to section 12(g) or section 15(d) of the Act to become eligible for termination of registration under Rule 12g-4 (§ 240.12g-4) or Rule 12h-6 (§ 240.12h-6), or causing the reporting obligations with respect to such class to become eligible for termination under Rule 12h-6 (§ 240.12h-6); or suspension under Rule 12h-3 (§ 240.12h-3) or section 15(d); or

■ 11. Section 240.15d-2 is amended by revising paragraph (a) and removing the authority citations following the section to read as follows:

§ 240.15d-2 Special financial report.

(a) If the registration statement under the Securities Act of 1933 did not contain certified financial statements for the registrant's last full fiscal year (or for the life of the registrant if less than a full fiscal year) preceding the fiscal year in which the registration statement became effective, the registrant shall, within 90 days after the effective date of the registration statement, file a special report furnishing certified financial statements for such last full fiscal year or other period, as the case may be, meeting the requirements of the form appropriate for annual reports of the registrant. If the registrant is a foreign private issuer as defined in § 230.405 of this chapter, then the special financial report shall be filed on the appropriate form for annual reports of the registrant and shall be filed within the following period:

(1) By the later of 90 days after the date on which the registration statement became effective, or six months following the end of the registrant's full fiscal year, for fiscal years ending before December 15, 2011; and

(2) By the later of 90 days after the date on which the registration statement became effective, or four months following the end of the registrant's latest full fiscal year, for fiscal years ending on or after December 15, 2011.

■ 12. Section 240.15d-10 is amended by revising paragraph (g)(3) to read as follows:

§ 240.15d-10 Transition reports.

(g) (3) The report for the transition period shall be filed on Form 20-F responding to all items to which such issuer is required to respond when Form 20-F is used as an annual report. The financial statements for the transition period filed therewith shall be audited. The report shall be filed within the following period:

(i) Within six months after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later, for new fiscal years ending before December 15, 2011; and

(ii) Within four months after either the close of the transition period or the date on which the issuer made the determination to change the fiscal closing date, whichever is later, for new

fiscal years ending on or after December 15, 2011.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 13. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

- 14. Form 20-F (referenced in § 249.220f) is amended by:
■ a. Revising General Instructions A.(b) and E.(c);
■ b. Revising Item 12.D introductory text, Item 12.D.3, and Instruction 1 to Item 12;
■ c. Revising Item 12.D to revise the phrase "American depository receipts" to read "American Depository Receipts" and adding Item 12.D.4;
■ d. Adding Item 16F and Instructions to Item 16F;
■ e. Adding Item 16G and an Instruction to Item 16G;
■ f. Revising Instruction 3 to Item 17; and
■ g. Revising Instruction 1 to Item 18.

The additions and revisions read as follows:

[Note: The text of Form 20-F does not, and the amendments thereto will not, appear in the Code of Federal Regulations.]

FORM 20-F

GENERAL INSTRUCTIONS

A. Who May Use Form 20-F and When It Must Be Filed.

(b) A foreign private issuer must file its annual report on this Form within the following period:

(1) Within six months after the end of the fiscal year covered by the report for fiscal years ending before December 15, 2011; and

(2) Within four months after the end of the fiscal year covered by the report for fiscal years ending on or after December 15, 2011.

E. Which Items to Respond to in Registration Statements and Annual Reports.

(c) Financial Statements.

(1) For an issuer's fiscal years ending before December 15, 2011, an Exchange Act registration statement or annual report filed on this Form must contain the financial statements and related

information specified in Item 17 of this Form. We encourage you to provide the financial statements and related information specified in Item 18 of this Form in lieu of Item 17, but the Item 18 statements and information are not required. In certain circumstances, Forms F-1, F-3 or F-4 for the registration of securities under the Securities Act require that you provide the financial statements and related information specified in Item 18 in your annual report on Form 20-F. Consult those Securities Act forms for the specific requirements and consider the potential advantages of complying with Item 18 instead of Item 17 of this Form. Note that Items 17 and 18 may require you to file financial statements of other entities in certain circumstances. These circumstances are described in Regulation S-X.

(2) For the issuer's fiscal years ending on or after December 15, 2011, an Exchange Act registration statement or annual report filed on this Form must contain the financial statements and related information specified in Item 18 of this Form. Note that Items 17 and 18 may require you to file the financial statements of other entities in certain circumstances. These circumstances are described in Regulation S-X.

(3) The financial statements must be audited in accordance with U.S. generally accepted auditing standards, and the auditor must comply with the U.S. standards for auditor independence. If you have any questions about these requirements, contact the Office of Chief Accountant in the Division of Corporation Finance at (202) 551-3400.

Item 12. Description of Securities Other than Equity Securities.

D. American Depositary Shares. If you are registering securities represented by American Depositary Receipts in a sponsored facility, provide the following information.

3. Describe all fees and charges that a holder of American Depositary Receipts may have to pay, either directly or indirectly. Indicate the type of service, the amount of the fees or charges and to whom the fees or charges are paid. In particular, provide information about any fees or charges in connection with (a) depositing or substituting the underlying shares; (b) receiving or distributing dividends; (c) selling or exercising rights; (d) withdrawing an underlying security; (e) transferring, splitting or grouping receipts; and (f)

general depositary services, particularly those charged on an annual basis. Provide information about the depositary's right, if any, to collect fees and charges by offsetting them against dividends received and deposited securities.

4. In addition, describe all fees and other direct and indirect payments made by the depositary to the foreign issuer of the deposited securities.

*Instructions to Item 12:*

1. You do not need to provide the information called for by this Item if you are using the form as an annual report for your fiscal years ending before December 15, 2009. For your fiscal years ending on or after December 15, 2009, *except for Item 12.D.3. and Item 12.D.4., you do not need to provide the information called for by this Item if you are using this form as an annual report.*

\* \* \* \* \*

**Item 16F. Change in Registrant's Certifying Accountant.**

(a)(1) If during the registrant's two most recent fiscal years or any subsequent interim period, an independent accountant who was previously engaged as the principal accountant to audit the registrant's financial statements, or an independent accountant who was previously engaged to audit a significant subsidiary and on whom the principal accountant expressed reliance in its report, has resigned (or indicated it has declined to stand for re-election after the completion of the current audit) or was dismissed, then the registrant shall:

(i) State whether the former accountant resigned, declined to stand for re-election or was dismissed and the date thereof.

(ii) State whether the principal accountant's report on the financial statements for either of the past two years contained an adverse opinion or a disclaimer of opinion, or was qualified or modified as to uncertainty, audit scope, or accounting principles; and also describe the nature of each such adverse opinion, disclaimer of opinion, modification, or qualification.

(iii) State whether the decision to change accountants was recommended or approved by:

(A) Any audit or similar committee of the board of directors, if the issuer has such a committee; or

(B) The board of directors, if the issuer has no such committee.

(iv) State whether during the registrant's two most recent fiscal years and any subsequent interim period preceding such resignation, declination or dismissal there were any disagreements with the former

accountant on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreement(s), if not resolved to the satisfaction of the former accountant, would have caused it to make reference to the subject matter of the disagreement(s) in connection with its report. The disagreements required to be reported in response to this Item include both those resolved to the former accountant's satisfaction and those not resolved to the former accountant's satisfaction. Disagreements contemplated by this Item are those that occur at the decision-making level, *i.e.*, between personnel of the registrant responsible for presentation of its financial statements and personnel of the accounting firm responsible for rendering its report. Also:

(A) Describe each such disagreement;

(B) State whether any audit or similar committee of the board of directors, or the board of directors, discussed the subject matter of each of such disagreements with the former accountant; and

(C) State whether the registrant has authorized the former accountant to respond fully to the inquiries of the successor accountant concerning the subject matter of each of such disagreements and, if not, describe the nature of any limitation thereon and the reason therefor.

(v) Provide the information required by paragraph (a)(1)(iv) of this Item for each of the kinds of events (even though the registrant and the former accountant did not express a difference of opinion regarding the event) listed in paragraphs (a)(1)(v) (A) through (D) of this Item, that occurred within the registrant's two most recent fiscal years and any subsequent interim period preceding the former accountant's resignation, declination to stand for re-election, or dismissal ("reportable events"). If the event led to a disagreement or difference of opinion, then the event should be reported as a disagreement under paragraph (a)(1)(iv) of this Item and need not be repeated under this paragraph.

(A) The accountant's having advised the registrant that the internal controls necessary for the registrant to develop reliable financial statements do not exist;

(B) The accountant's having advised the registrant that information has come to the accountant's attention that has led it to no longer be able to rely on management's representations, or that has made it unwilling to be associated with the financial statements prepared by management;

(C)(1) The accountant's having advised the registrant of the need to expand significantly the scope of its audit, or that information has come to the accountant's attention during the time period covered by Item 16F(a)(1)(iv), that if further investigated may:

(i) Materially impact the fairness or reliability of either: a previously issued audit report or the underlying financial statements; or the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit report (including information that may prevent it from rendering an unqualified audit report on those financial statements); or

(ii) Cause it to be unwilling to rely on management's representations or be associated with the registrant's financial statements; and

(2) Due to the accountant's resignation (due to audit scope limitations or otherwise) or dismissal, or for any other reason, the accountant did not so expand the scope of its audit or conduct such further investigation; or

(D)(1) The accountant's having advised the registrant that information has come to the accountant's attention that it has concluded materially impacts the fairness or reliability of either (i) a previously issued audit report or the underlying financial statements, or (ii) the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit report (including information that, unless resolved to the accountant's satisfaction, would prevent it from rendering an unqualified audit report on those financial statements); and

(2) Due to the accountant's resignation, dismissal or declination to stand for re-election, or for any other reason, the issue has not been resolved to the accountant's satisfaction prior to its resignation, dismissal or declination to stand for re-election.

(2) If during the registrant's two most recent fiscal years or any subsequent interim period, a new independent accountant has been engaged as either the principal accountant to audit the registrant's financial statements, or as an independent accountant to audit a significant subsidiary and on whom the principal accountant is expected to express reliance in its report, then the registrant shall identify the newly engaged accountant and indicate the date of such accountant's engagement. In addition, if during the registrant's two most recent fiscal years, and any subsequent interim period prior to engaging that accountant, the registrant

(or someone on its behalf) consulted the newly engaged accountant regarding:

(i) Either: The application of accounting principles to a specified transaction, either completed or proposed; or the type of audit opinion that might be rendered on the registrant's financial statements, and either a written report was provided to the registrant or oral advice was provided that the new accountant concluded was an important factor considered by the registrant in reaching a decision as to the accounting, auditing or financial reporting issue; or

(ii) Any matter that was either the subject of a disagreement (as defined in Item 16F(a)(1)(iv) and the related instructions to this Item) or a reportable event (as described in Item 16F(a)(1)(v)), then the registrant shall:

(A) So state and identify the issues that were the subjects of those consultations;

(B) Briefly describe the views of the newly engaged accountant as expressed orally or in writing to the registrant on each such issue and, if written views were received by the registrant, file them as an exhibit to the annual report requiring compliance with this Item 16F(a);

(C) State whether the former accountant was consulted by the registrant regarding any such issues, and if so, provide a summary of the former accountant's views; and

(D) Request the newly engaged accountant to review the disclosure required by this Item 16F(a) before it is filed with the Commission and provide the new accountant the opportunity to furnish the registrant with a letter addressed to the Commission containing any new information, clarification of the registrant's expression of its views, or the respects in which it does not agree with the statements made by the registrant in response to Item 16F(a). The registrant shall file any such letter as an exhibit to the annual report containing the disclosure required by this Item.

(3) The registrant shall provide the former accountant with a copy of the disclosures it is making in response to this Item 16F(a). The registrant shall request the former accountant to furnish the registrant with a letter addressed to the Commission stating whether it agrees with the statements made by the registrant in response to this Item 16F(a) and, if not, stating the respects in which it does not agree. The registrant shall file the former accountant's letter as an exhibit to the annual report or registration statement containing this disclosure. If the change in accountants occurred less than 30 days prior to the

filing of the annual report or registration statement and the former accountant's letter is unavailable at the time of the filing, then the registrant shall request the former accountant to provide the letter as promptly as possible so that the registrant can file the letter with the Commission within ten business days after the filing of the annual report or registration statement. In either case, the former accountant may provide the registrant with an interim letter highlighting specific areas of concern and indicating that a more detailed letter will be forthcoming. If not filed with the annual report or registration statement containing the registrant's disclosure under this Item 16F(a), then the interim letter, if any, shall be filed by the registrant by amendment promptly.

(b) If: (1) In connection with a change in accountants subject to paragraph (a) of this Item 16F, there was any disagreement of the type described in paragraph (a)(1)(iv) or any reportable event as described in paragraph (a)(1)(v) of this Item;

(2) During the fiscal year in which the change in accountants took place or during the subsequent fiscal year, there have been any transactions or events similar to those which involved such disagreement or reportable event; and

(3) Such transactions or events were material and were accounted for or disclosed in a manner different from that which the former accountants apparently would have concluded was required, the registrant shall state the existence and nature of the disagreement or reportable event and also state the effect on the financial statements if the method had been followed which the former accountants apparently would have concluded was required. These disclosures need not be made if the method asserted by the former accountants ceases to be generally accepted because of authoritative standards or interpretations subsequently issued.

*Instructions to Item 16F:*

1. Item 16F applies to all annual reports and registration statements filed on Form 20-F for the issuer's fiscal years ending on or after December 15, 2009.

2. The disclosure called for by paragraph (a) of this Item need not be provided if it has been previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (§ 240.12b-2 of this chapter). The disclosure called for by paragraph (b) of this Item must be furnished, where required, notwithstanding any prior disclosure about accountant changes or disagreements.

3. The information required by paragraph (a) of this Item need not be provided for a company being acquired by the registrant in a transaction being registered on Form F-4 that is not subject to the filing requirements of either Section 13(a) or 15(d) of the Exchange Act.

4. The term "disagreements" as used in this Item shall be interpreted broadly to include any difference of opinion concerning any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure which (if not resolved to the satisfaction of the former accountant) would have caused it to make reference to the subject matter of the disagreement in connection with its report. It is not necessary for there to have been an argument to have had a disagreement, merely a difference of opinion. For purposes of this Item, however, the term "disagreements" does not include initial differences of opinion based on incomplete facts or preliminary information that were later resolved to the former accountant's satisfaction by, and providing the registrant and the accountant do not continue to have a difference of opinion upon, obtaining additional relevant facts or information.

5. In determining whether any disagreement or reportable event has occurred, an oral communication from the engagement partner or another person responsible for rendering the accounting firm's opinion (or his/her designee) will generally suffice as the accountant advising the registrant of a reportable event or as a statement of a disagreement at the "decision-making level" within the accounting firm and require disclosure under this Item.

6. The term "board of directors" as used in this Item 16F has the meaning set forth in § 240.10A-3(e)(2).

**Item 16G. Corporate Governance**

If the registrant's securities are listed on a national securities exchange, provide a concise summary of any significant ways in which its corporate governance practices differ from those followed by domestic companies under the listing standards of that exchange.

*Instruction to Item 16G:*

A registrant must provide the information required in Item 16G beginning with the annual report that its files for its first fiscal year ending on or after December 15, 2008. Item 16G only applies to annual reports, and not to registration statements on Form 20-F. Registrants should provide a brief and general discussion, rather than a detailed, item-by-item analysis.

Item 17. Financial Statements

\* \* \* \* \*

*Instructions:*

\* \* \* \* \*

3. For its fiscal years ending before December 15, 2009, if the registrant presents its financial statements according to generally accepted accounting principles in the United States except for SFAS No. 131 and if it furnishes the information relating to categories of activity required by Items 4.B.1. and 4.B.2. of this Form, then such

*financial statements will be considered to comply with this Item, even if the auditor's report is qualified for noncompliance with SFAS No. 131. Such report and financial statements, however, must comply with all other applicable requirements.*

\* \* \* \* \*

Item 18. Financial Statements

\* \* \* \* \*

*Instruction to Item 18:*

1. For fiscal years ending before December 15, 2009, all of the

instructions to Item 17 also apply to this Item, except Instruction 3 to Item 17, which does not apply. For all fiscal years ending on or after December 15, 2009, all of the instructions to Item 17 also apply to this Item.

\* \* \* \* \*

Dated: September 23, 2008.

By the Commission.

**Florence E. Harmon,**

*Acting Secretary.*

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**BILLING CODE 8011-01-P**