T O O U R F R I E N D S A N D C L I E N T S

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Enhanced Foreign Private Issuer Reporting and Disclosure Obligations

The US Securities and Exchange Commission (the "SEC") has amended the reporting and disclosure requirements applicable to foreign private issuers[1] (the "Amendments") under the Securities Act of 1933, as amended (the "Securities Act") and the Securities Exchange Act of 1934, as amended (the "Exchange Act").[2] The Amendments are part of a larger initiative by the SEC to enhance and modernize current reporting and disclosure requirements applicable to such issuers in response to advances in information technology and increased globalization of the securities markets.[3]

Summary of Key Amendments

- Accelerate the deadline for filing annual reports on Form 20-F from six months to four months after the issuer's fiscal year-end for fiscal years ending on or after December 15, 2011;
- Mandate foreign private issuers that are required to provide US GAAP reconciliations to do so pursuant to Item 18 of Form 20-F, eliminating Item 17;
- Enhanced disclosure with respect to:
  - Segment data disclosures;

[1] Exchange Act Rule 3b-4(c) defines a "foreign private issuer" as any foreign issuer (other than a foreign government), except for an issuer meeting the following conditions: (1) more than 50% of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

[2] *See* SEC Release No. 33-8959, available at: http://www.sec.gov/rules/final/2008/33-8959.pdf.

[3] As part of this initiative, on the same day the SEC adopted the Amendments, the SEC adopted amendments to the eligibility criteria for the Exchange Act Rule 12g3-2(b) exemption from registration under the Exchange Act and to the cross-border exemptions for business combination transactions and rights offerings by foreign private issuers. See SEC Press Release No. 2008-183 (August 27, 2008), available at: http://www.sec.gov/news/press/2008/2008-183.htm. The Exchange Act Rule 12g3-2(b) exemption allows a foreign private issuer to have its equity securities traded in the US over-the-counter market without registration under Section 12(g). *See* SEC Release No. 34-58645, available at: http://www.sec.gov/rules/final/2008/34-58465.pdf. For further information on the amendments to Rule 12g3-2(b) of the Exchange Act, see the Fried Frank Memorandum entitled "*SEC Amends Foreign Private Issuer Exemption*," September 24, 2008, available at: http://www.friedfrank.com/index.cfm?pageID=25&itemID=5817. The amendments to the cross-border business combination transaction and rights offering rules modify the procedures used to calculate US ownership and expand the availability and scope of the exemptions. A summary of the cross-border rule changes can be found in SEC Release No. 34-58597, available at: http://www.sec.gov/rules/final/2008/33-8957.pdf.

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- Changes and disagreements with accountants;
- Significant differences between an issuer's corporate governance practices and the requirements of US securities exchanges; and
- Fees and charges related to an issuer's ADR program; and

- Permit a company with shares traded in the US to assess its foreign private issuer status once a year on the last business day of its second fiscal quarter, rather than continuously.

The Amendments will become effective December 6, 2008. The compliance dates vary among the Amendments, as described in this memorandum.

I. Foreign Private Issuer Reporting and Disclosure Enhancements

The Amendments include enhanced disclosure requirements applicable to annual reports on Form 20-F and registration statements filed by foreign private issuers under the Securities Act or the Exchange Act. These reporting and disclosure enhancements consist of the following amendments:

A. Accelerated Deadline for Filing Annual Report on Form 20-F

Beginning with fiscal years ending on or after December 15, 2011, foreign private issuers will be required to file annual reports on Form 20-F within four months of their fiscal year-end, rather than the current requirement to file within six months of their fiscal year-end. This is a modification from the SEC's original proposal, which would have shortened the filing deadline to 90 days after a foreign private issuer's fiscal year-end for accelerated filers[4] and large accelerated filers[5] and 120 days after a foreign private issuer's fiscal year-end for other issuers. Many commenters objected to the originally proposed amended filing deadlines by claiming that issuers needed additional time for preparation of GAAP reconciliations and English translations to their home country annual report and that, with respect to some countries, the SEC would be imposing a filing date in advance of the required filing date for the issuer's home country annual report.

[4] "Accelerated filer" is an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $75 million or more, but less than $700 million, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of § 13(a) or 15(d) of the Act for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to § 13(a) or 15(d) of the Act; and (iv) the issuer is not eligible to use the requirements for smaller reporting companies for its annual and quarterly reports.

[5] "Large accelerated filer" is an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of § 13(a) or 15(d) of the Act for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to § 13(a) or 15(d) of the Act; and (iv) the issuer is not eligible to use the requirements for smaller reporting companies for its annual and quarterly reports.

In deciding upon a four-month filing deadline, the SEC considered that issuers, which prepare their financial statements in accordance with International Financial Reporting Standards ("IFRS"), as adopted by the Independent Accounting Standards Board ("IASB"), are exempt from reconciliation to US GAAP and accordingly should be able to prepare their Form 20-F on a more timely basis. The SEC extended a proposed two-year transition period to a three-year term, which coincides with the 2011 IFRS implementation deadline in many foreign jurisdictions.

This amendment does not change the age of financial statement requirements for registered offering documents. It remains that 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.

B. Required Reconciliation of Financial Statements Under Item 18 of Form 20-F

The SEC eliminated the option for foreign private issuers that prepare their financial statements in accordance with home country accounting standards to provide financial statements according to Item 17 of Form 20-F and adopted the requirement that these issuers comply with Item 18 financial statement presentation in annual reports and registration statements. Under Item 17, a foreign private issuer was not required to provide footnote disclosures required by US GAAP and Regulation S-X, unless these disclosures were otherwise required under the foreign private issuer's home country GAAP. Item 18 of Form 20-F obligates foreign private issuers to provide footnote disclosures as part of the issuer's US GAAP reconciliation disclosure. If a company provides financial statements on a basis other than in accordance with US GAAP or IFRS, it will be required to provide the extensive footnote disclosures required by US GAAP and Regulation S-X under Item 18. Under the former regime, the limited option to provide financial statements according to Item 17 was available to a foreign private issuer that had listed a class of securities on a national securities exchange or a class of securities registered under Exchange Act Section 12(g), but had not conducted a public offering of its securities in the US. The SEC noted that this amendment would eliminate the distinction between disclosure provided to investors in the secondary market and disclosure provided to investors in a primary offering of securities, for which financial statements are required to be prepared according to Item 18.

A foreign private issuer that currently prepares its financial statements according to Item 17 will be required to comply with Item 18 disclosure requirements beginning with its annual report on Form 20-F for its fiscal year ending on or after December 15, 2011. The SEC aligned the implementation date of this amendment with the date on which many countries will be adopting IFRS required reporting. As a result, the SEC expects that the number of companies that will be affected by the amendments will be small.

The SEC is <u>not</u> eliminating the availability of Item 17 disclosure for financial statements for Canadian issuers using the Multijurisdictional Disclosure System ("MJDS") or for financial statements of non-registrants required to be included in an issuer's registration statement or annual report, such as financial statements of significant acquired businesses.

C. Segment Data Disclosure

The SEC amended Item 17 of Form 20-F by removing Instruction 3 to Item 17, which currently permits certain foreign private issuers to omit segment data from their financial statements that are otherwise prepared in accordance with US GAAP and still have a qualified US GAAP audit report as a result of this omission. Beginning with fiscal years ending on or after December 15, 2009, foreign private issuers will no longer be able to rely on this rarely-used accommodation and will be required to present segment data. The SEC views this accommodation as no longer necessary or appropriate in light of the IFRS requirement to present segment data.

D. Disclosure About Changes in or Disagreements with Registrant's Certifying Accountant

In another amendment, the SEC is requiring foreign private issuers to disclose information about changes in their certifying accountant in their annual report and registration statements. While US companies report any changes in and disagreements with their certifying accountant in a current report on Form 8-K, foreign private issuers have not been required to provide similar disclosure to the SEC.[6]

The SEC adopted Item 16F of Form 20-F, which provides that a foreign private issuer, among other things, must disclose: 1) whether an independent accountant has resigned, declined to stand for re-election, or was dismissed, 2) any disagreements or reportable events that occurred within the issuer's latest two fiscal years and any interim period preceding the change of accountant, and 3) 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 of the former accountants. These disclosure requirements are substantially similar to the disclosure required of US issuers in Form 8-K. Unlike US issuers, which disclose this information on a current basis, foreign private issuers will be required to disclose this information on a delayed basis in their annual reports and registration statements.

Foreign private issuers will be required to comply with Item 16F of Form 20-F beginning with fiscal years ending on or after December 15, 2009. Foreign private issuers should establish internal procedures and have discussions with accountants to enable them to comply with the new requirements on a timely basis.

E. Disclosure of Differences in Corporate Governance Practice

The SEC adopted Item 16G to Form 20-F, which requires listed foreign private issuers to provide a summary in their Form 20-F annual reports of the differences between the foreign private issuer's corporate governance practices and those applicable to US companies under the relevant exchange's listing rules. The NYSE, NASDAQ and Amex already require non-US companies listed on their exchange, many of whom

[6] The SEC pointed out that foreign private issuers that are listed on the New York Stock Exchange (the "NYSE") are required by the NYSE to notify the public about a change in their auditors and to furnish this information to the SEC under cover of a Form 6-K. This NYSE requirement does not specify substantive SEC disclosure guidelines. See Section 204.03 of the NYSE Listed Company Manual.

are non-US issuers, to provide this disclosure either in their annual reports, and/or on their websites. The SEC expects that the disclosure provided in response to the new Item 16G requirement will be similar to the disclosure that foreign private issuers currently provide in response to the corporate governance disclosure requirements of the US exchange on which their securities are listed. Foreign private issuers must comply with this requirement beginning with their fiscal year ending on or after December 15, 2008.

F. Annual Disclosure About ADR Fees and Payments

Foreign private issuers will now, in Form 20-F, be required to disclose information about fees and payments that ADR holders are required to pay to the depositary. Currently, limited disclosure about fees and other payments made by ADR holders to the depositary is provided in the Form F-6 that is filed to register the deposited securities under the Exchange Act. This amendment to Form 20-F is in addition to the current disclosure requirements in registration statements relating to ADRs and the underlying deposited securities. The SEC noted that this amendment is intended to provide transparency in light of the new depositary fees that are being charged to ADR holders in connection with sponsored ADR facilities and also in consideration of investors that purchase ADRs in book-entry form and do not have access to the physical certificate that contains these disclosures. Foreign private issuers will also be required to disclose payments made by the depositary to the foreign private issuer whose securities underlie the ADRs. The amended disclosures will be required to be included in the issuer's annual report on Form 20-F beginning with fiscal years ending on or after December 15, 2009.

G. SEC Rejected Proposal to Require Financial Information for Significant, Complete Acquisitions

The SEC tabled the proposal to amend Form 20-F to require foreign private issuers to provide certain Regulation S-X Rule 3-05 financial information in annual reports about significant acquisitions completed during the issuer's most recent fiscal year that are significant at the 50 percent or greater level. In response to commenter concerns about the ability of issuers to perform the required audits on a timely basis and the disparity this amendment would create between information available to investors in the issuer's home country and the United States, the SEC did not adopt this amendment at this time. The SEC indicated that it would continue to consider the proposal in light of the concerns expressed by commenters.

II. Annual Test for Foreign Private Issuer Status

The SEC adopted amendments to permit foreign private issuers to assess their status as a foreign private issuer once a year on the last business day of their second fiscal quarter, rather than on a continuous basis. If a foreign private issuer determines that it no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter (beginning in 2009), it then will be required to comply with the rules and form requirements of US issuers beginning on the first day of the fiscal year following the determination date. This timing will give the issuer six months' advance notice of its transition to the domestic forms and applicable reporting requirements, which include having to report executive compensation and compliance with Section

16 of the Securities Act. A reporting company that qualifies as a foreign private issuer would be able to avail itself of the accommodations associated with that status beginning on the determination date on which it establishes its eligibility as a foreign private issuer.

The amendment also requires Canadian issuers that file registration statements and Exchange Act reports using MJDS to test its status as a foreign private issuer to test their foreign private issuer status on the last business day of their second fiscal quarter. The amendment, however, would not change the responsibility of a Canadian issuer to check its eligibility to use Forms 40-F and 6-K based on all of the other requirements of those forms at the end of its fiscal year, or the requirement that a Canadian issuer test its ability to use the MJDS Securities Act registration statement forms at the time of filing.

III. Amended Exchange Act Rule 13e-3

The SEC amended Exchange Act Rule 13e-3, which pertains to going private transactions by reporting issuers or their affiliates, to add cross-references to the recently adopted deregistration and termination of reporting rules applicable to foreign private issuers. Under the current Rule, any issuer or affiliate that engages in a specified transaction must file a Schedule 13E-3 disclosing its plan to take the company private and provide information about the proposed transaction.[7] Under the amended Rule, the cited effect is deemed to have occurred when a domestic issuer or foreign private issuer becomes eligible under Exchange Act Rule 12g-4 to deregister a class of securities, a foreign private issuer becomes eligible under Exchange Act Rule 12h-6 to deregister a class of securities or terminate a reporting obligation, or the issuer becomes eligible under Exchange Act Rule 12h-3 or Exchange Act Section 15(d) to have a reporting obligation suspended.

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[7] The obligation to file a Schedule 13E-3 is triggered by Rule 13e-3 when an issuer and/or any of its affiliates are engaged in a specified transaction or series of transactions 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) 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.

If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact, or any of the attorneys listed below.

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