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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Short-Form Reporting Of Securities Ownership By Non-US Institutional Investors

The US Securities and Exchange Commission (the "SEC") has amended the beneficial ownership reporting requirements to permit qualifying non-US institutional investors to report their 5% equity securities holdings in the same way as comparable US institutions currently do.[1] The SEC made corresponding revisions to the rules under Section 16 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), with the result that qualifying non-US institutional investors, like their US counterparts, will not be deemed to be beneficial owners of securities held for the benefit of third parties or in customer or fiduciary accounts for purposes of determining the 10% holders captured otherwise by the short-swing profits rules and other requirements of Section 16. These amendments generally codify current SEC staff no-action relief and become effective December 8, 2008, in time for the February 2009 filing season.

Schedule 13G

The beneficial ownership rules under Sections 13(d) and 13(g) of the Exchange Act require that, subject to certain exceptions, any person that acquires, directly or indirectly, beneficial ownership of more than 5% of a class of voting equity securities registered under Section 12 of the Exchange Act must report the acquisition on Schedule 13D within ten days of such acquisition. The purpose of this beneficial ownership reporting is to provide investors and the issuer with information about accumulations of voting equity securities that may have the potential to change or influence control of the issuer. Pursuant to Exchange Act Rule 13d-1(b), certain institutional investors that hold more than 5% of such a class as of the end of the year may, in lieu of filing a Schedule 13D, file a short-form statement on Schedule 13G within 45 days after December 31. This short form substantially lessens their compliance burden, as Schedule 13D requires detailed disclosure and must be amended promptly after any material change in ownership, whereas Schedule 13G is a brief form that in general must be amended only once a year.

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[1] *See* Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions SEC Release No. 34-58597 (September 19, 2008); 73 FR 60050. We have also prepared a client memorandum available on our website that discusses the amendments made to the cross-border business combinations transaction exemptions.

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To be eligible to file on Schedule 13G under this rule, the institutional investor must hold such securities in the ordinary course of business and not with the purpose or effect of changing or influencing control of the issuer, and must be one of the specific types of institutional investor listed in the rule. Currently, this list includes only certain US-regulated entities, such as broker-dealers, insurance companies, banks and pension plans,[2] and does not include institutions that perform comparable functions in non-US jurisdictions. Non-US institutional investors wishing to file on Schedule 13G in reliance upon the exception for institutional investors in Exchange Act Rule 13d-1(b) have had to obtain individual no-action relief from the SEC staff. The staff's current practice on granting such no-action relief is to require that the non-US institutional investor be subject to a non-US regulatory scheme comparable to that of its US counterpart and also undertake to grant the staff access to information that would otherwise be disclosed in a Schedule 13D.

The amendments codify this current staff practice in new Exchange Act Rule 13d-1(b)(ii)(J), allowing a non-US institutional investor to report its holdings on Schedule 13G so long as such investor:

(1) is, and it certifies on its Schedule 13G that it is, subject to a non-US regulatory scheme substantially comparable to the scheme applicable to its US counterpart; and

(2) undertakes to furnish the SEC staff, upon request, with information that it otherwise would be required to report on Schedule 13D.

The adopting release provides scant guidance on what constitutes a "substantially comparable" regulatory scheme, although prior no-action letters (under which relief has been granted to investment advisers, banks, pension funds and insurance companies in such jurisdictions as Australia, Bermuda, Canada, Hong Kong, Japan, and Singapore, as well as a variety of European countries) may be helpful. Notably, the amendments do not limit the use of Schedule 13G to non-US institutional investors from jurisdictions that have a bilateral enforcement memorandum with

[2] The current list of qualified institutions in Exchange Act Rule 13d-1(b)(1)(ii) eligible to file on Schedule 13G, in lieu of Schedule 13D, consists of: (A) a broker or dealer registered under section 15 of the Exchange Act; (B) a bank as defined in section 3(a)(6) of the Exchange Act; (C) an insurance company as defined in section 3(a)(19) of the Exchange Act; (D) an investment company registered under section 8 of the Investment Company Act of 1940; (E) any person registered as an investment adviser under section 203 of the Investment Advisers Act of 1940 or under the laws of any state; (F) an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, as amended, ("ERISA") that is subject to the provisions of ERISA, or any such plan that is not subject to ERISA that is maintained primarily for the benefit of the employees of a state or local government or instrumentality, or an endowment fund; (G) a parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in Exchange Act Rule 13d-1(b)(1)(ii)(A) through (I), does not exceed one percent of the securities of the subject class; (H) a savings association as defined in section 3(b) of the Federal Deposit Insurance Act; (I) a church plan that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940; and (J) a group, provided that all the members are persons specified in Exchange Act Rule 13d-1(b)(1)(ii)(A) through (I).

the SEC or institutions that are signatories to the IOSCO Multilateral Memorandum of Understanding concerning consultation, cooperation, and the exchange of information.

In addition, a non-US institutional investor will need to monitor its eligibility to file on Schedule 13G pursuant to Exchange Act Rule 13d-1(b). If the non-US institutional investor determines at any time that it no longer qualifies to file on Schedule 13G under that rule, it will be required to file on Schedule 13D (absent any other exception). As is currently the case, a non-US institutional investor also may rely on the "passive investor" provision in Exchange Act Rule 13d–1(c) to the extent it meets the conditions to do so and may then file a Schedule 13G rather than a Schedule 13D.

Section 16 Filings

Section 16 of the Exchange Act and rules thereunder impose certain reporting obligations and other requirements on persons that are beneficial owners of more than 10% of any class of equity securities registered pursuant to Section 12 of the Exchange Act. Exchange Act Rule 16a-1(a)(1) provides that certain institutional investors are not deemed to be beneficial owners of securities held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business as long as such securities are acquired by such institutions without the purpose or effect of changing or influencing control of the issuer. The amendments revise Exchange Act Rule 16a-1(a)(1) to include certain types of non-US institutional investors within the list of persons that are not deemed to be the beneficial owner of securities held for the benefit of third parties or in customer or fiduciary accounts. As a result, such non-US institutional investors will be less likely to become 10% holders and thus "insiders" subject to Section 16(a) reporting requirements (Forms 3, 4 and 5), Section 16(b) short-swing profit recovery, and Section 16(c)'s restriction on short sales.

Transitional matters

A non-US institutional investor that files on Schedule 13G pursuant to a previously obtained no-action letter may continue to rely upon the no-action letter, to the extent that it continues to meet the conditions upon which the no-action relief was granted. With respect to any amendment to the Schedule 13G, however, the non-US institutional investor will be required to provide the new certification to continue to file on Schedule 13G. A non-US institutional investor that currently does not have a no-action letter may rely on the revised rule to file on Schedule 13G, if the filing deadline for the Schedule 13D it would otherwise be required to file falls after December 8, 2008.

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