

## SEC'S PROPOSED RULE REQUIRING EDGAR FILINGS BY FOREIGN ISSUERS

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### SUMMARY

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On September 27, 2001, the United States Securities and Exchange Commission (the "SEC") issued a proposed rule that would require all foreign private issuers and foreign governments to file documents electronically via the SEC's Electronic Data Gathering, Analysis and Retrieval system ("EDGAR") instead of by paper filings, permanently, beginning sometime in mid-2002. The new requirement would apply to both registration statements under the Securities Act of 1933 (the "Securities Act") and registration statements, periodic reports and other documents under the Securities Exchange Act of 1934 (the "Exchange Act"), including, but not limited to: Forms F-1, F-2, F-3, F-4, F-6, 20-F, 6-K, Schedule B and Forms 18 and 18-K.

The proposed rule, if adopted, would also:

- **Exhibits and Documents:** require the full text of all documents, including exhibits, filed with or submitted to the SEC to be in the English language (eliminating the current option for foreign companies filing on paper to provide an English-language summary of certain foreign language documents), subject to limited exemptions.
- **Annual Reports:** permit, but not require, a foreign issuer to electronically submit on Form 6-K via EDGAR any English-language annual report provided to its security holders (in addition to the 20-F required to be filed via EDGAR with the SEC).
- **Tender Offer Forms:** require electronic filing via EDGAR of third-party tender offer-related forms, whether on behalf of a U.S. or foreign person, with regard to a foreign private issuer, including Schedules 13D (for large security holders), 13G, TO and 14D-9.
- **Rights and Exchange Offer Forms:** require electronic filing via EDGAR of Form CB in certain rights offerings, exchange offers and business combinations with respect to a foreign private issuer.

- **Service of Process Agent Forms:** require foreign private issuers, with some exceptions, to file electronically via EDGAR auxiliary forms Form F-X and Form F-N for designation of a U.S. agent for service of process by foreign banks and insurance companies.
- **Trust Indenture Act Forms:** require, in cases involving a foreign issuer or trustee, electronic filings via EDGAR for statements and applications regarding trustee eligibility and indenture qualification under the Trust Indenture Act of 1939 (the "Trust Indenture Act"), including Forms T-1, T-2, T-3 and T-6.

The proposed rule would *not* require electronic filing by foreign private issues that are exempt from registration with the SEC pursuant to Rule 12g3-2(b).

The final rule is expected to be released by the SEC in early January 2002, with a four-month phase-in period during which electronic filings via EDGAR will be optional for foreign filers. *The SEC is seeking comments on, among other things, whether the phase-in period should terminate before or after June 30, 2002, the deadline for foreign companies with a December 31 fiscal year to file with the SEC their annual reports on Form 20-F in fulfillment of their reporting requirements under the Exchange Act. Comments must be received by December 3, 2001.*

The full text of the proposed rule (Release Nos. 33-8016, 34-44868) can be found on the SEC's website at <http://www.sec.gov/rules/proposed/33-8016.htm>.

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#### WHAT IS EDGAR?

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EDGAR is a system that enables U.S. registered companies and other persons to file their securities documents with the SEC in electronic format. Filings submitted on EDGAR are available to the public on the SEC's website, as well as through other information providers, such as [www.FreeEDGAR.com](http://www.FreeEDGAR.com).

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#### RATIONALE FOR THE PROPOSED RULE

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Currently, foreign issuers are permitted, but not required, to submit filings with the SEC via EDGAR. The SEC reports that approximately 18% of the 1,310 foreign private issuers that currently file reports with the SEC voluntarily do so via EDGAR. According to one financial printer, approximately 37% of the 114 foreign private issuers in Asia that currently file reports with the SEC voluntarily do so via EDGAR. Originally it was believed that the costs of filing on EDGAR would be too high for foreign issuers, but because of the now widespread use of the

Internet and the modernization of EDGAR, the SEC now believes that the costs would be comparable to those incurred by U.S. issuers.

The SEC believes that, if adopted, the proposed rule would facilitate both the SEC's review of registration statements as well as the dissemination of financial information about foreign issuers. The SEC expects the enactment of the proposed rule to result in greater market exposure for a foreign filer's securities, more dependable delivery of securities documents and a faster completion of the SEC review process. It would also ensure that a uniform standard for the dissemination of all material information about a foreign company is available, as well as allow investors to gather information about a foreign issuer in a more efficient manner.

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**CERTAIN SIGNIFICANT ASPECTS OF  
THE PROPOSED RULE**

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**Securities Act and Exchange Act Registration Statements and Periodic Reports.**

Currently, Rules 100 and 601 of Regulation S-T, the regulation governing EDGAR filing, exclude foreign private issuers and foreign governments from the SEC's electronic filing requirements. The proposed rule would revise Rule 100 and eliminate Rule 601 to result in the application of Regulation S-T to all registrants. This would require foreign issuers to file their Securities Act and Exchange Act registration statements and annual reports on Form 20-F electronically via EDGAR. The proposed rule would also require that Form F-6, the registration statement pertaining to American Depositary Shares ("ADSs"), be filed electronically via EDGAR as well. Finally, the amendments would require the electronic submission via EDGAR of reports on Form 6-K, the form used by foreign issuers to submit periodic and current reports with the SEC pursuant to the Exchange Act.

**Foreign Governments.** Under the proposed rule, foreign governments would have to file electronically via EDGAR their Securities Act registration statements on Schedule B. Foreign governments would also have to file electronically their Exchange Act registration statements on Form 18 and their annual reports on Form 18-K.

**Schedules 13D and 13G and Tender Offer Schedules.** Because third-party filers will no longer be able to claim an exemption from EDGAR filing based on the underlying exemption of the subject foreign private issuer, third-party filers would also be required to file electronically via EDGAR under the amended rules. With regard to third-party forms, a U.S. or foreign person which is a large holder of a foreign private issuer's equity securities would have to file a Schedule 13D or Schedule 13G electronically via EDGAR. Likewise, U.S. and foreign bidders will be required to file Schedule TO, which pertains to a tender offer for securities of a foreign private issuer, electronically via EDGAR. A foreign private issuer that is subject to a tender offer by a U.S. or foreign company would also have to file its Schedule 14D-9 electronically via EDGAR.

**Form CB.** Currently, both foreign and U.S. persons are required to file with the SEC Form CB to utilize an available exemption from U.S. registration requirements when engaging in specified rights offerings, exchange offers or business combinations with respect to a foreign private issuer. If adopted, the proposed rule would require Form CB to be filed electronically via EDGAR in two instances: (1) if the foreign or U.S. company filing a Form CB is a reporting company under the Exchange Act, or (2) if the foreign company that is the subject of a transaction covered by a Form CB is a reporting company under the Exchange Act (even if the acquiror is not a reporting company). The proposed rule would permit, but not require the electronic filing of Form CB in all other instances where Form CB is required to be filed. A company that electronically files a Form CB would have to file electronically via EDGAR the home jurisdiction documents that are attached to the Form CB as well.

**Exhibits.** The proposed rule would apply to foreign filers the same treatment given to U.S. domestic filers regarding exhibits under Rule 102 of Regulation S-T. U.S. domestic filers are not required to file electronically an exhibit previously filed in paper that is being incorporated by reference into the electronically filed document. As under the current rules, a foreign filer could voluntarily refile the exhibit on EDGAR. Upon amending its articles of incorporation or bylaws, a foreign filer would have to refile these documents in electronic format. In addition, the proposed rule would amend Rule 303(b) of Regulation S-T to provide that if a foreign issuer incorporates by reference into any electronic filing any portion of an annual or other report to security holders, it must file the portion of the annual or other report to security holders in electronic format as an exhibit to the filing.

**Forms T-1, T-2, T-3 and T-6.** With regard to trust indentures, the proposed rule would require electronic filing via EDGAR for the following:

- Forms T-1 and T-2, regarding trustee eligibility, in cases where a foreign issuer is the obligor;
- Form T-3, which is needed to qualify an indenture covering a foreign issuer's securities sold in offerings that are exempt from registration under the Securities Act; and
- Form T-6, which is used by foreign corporations and other foreign business entities to obtain authorization to act as a sole trustee under an indenture qualified or to be qualified under the Trust Indenture Act.

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**ENGLISH LANGUAGE REQUIREMENT**

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Under the proposed rule, all electronic submissions as well as filings with the SEC must be in English. Currently, the SEC's paper filing rules allow the filing of a foreign language document as an exhibit, or as another part of a registration statement or report, so long as the

foreign language document is accompanied by a “summary, version or translation in the English-language.” The proposed rule would eliminate this completely, forbidding the filing of any foreign language document in electronic format. Thus, if the proposed rule is adopted, the body of a registration statement, prospectus, schedule or report *as well as all exhibits or other documents filed* must be in the English language. If a required document is in a foreign language, a company or other party must file instead electronically via EDGAR a fair and accurate English translation of the foreign language document. Filers must also include in each English language translation a written representation signed by a designated officer that the English version is a fair and accurate representation of the foreign language document. This rule would also apply to forms, such as Form 6-K and Form CB, that are submitted to the SEC, but not deemed to be filed with the SEC under the Exchange Act.

With regard to English translation requirements for documents submitted on Form 6-K, the current rule is that a filer must provide an English translation, version or summary of press releases, communications or other materials distributed to holders of securities for which it has a reporting obligation under the Exchange Act. A filer is not currently required to furnish any other documents, including offering circulars relating solely to foreign offerings, unless it has prepared an English translation, version or summary, but if it chooses to do so, it may submit a brief description of the document. Under the proposed rule, a filer would be required to provide an English translation of any foreign language document that is the subject of a Form 6-K report.

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#### LIMITED EXEMPTIONS

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Under the proposed rule, a filer would only be allowed to submit documents on paper pursuant to a hardship exemption under Regulation S-T Rules 201 and 202 or the limited circumstances noted in Rules 101(b) or 101(c). For those filers seeking the temporary exemption allowed under Rule 201 which allows such an exemption if a filer is experiencing unanticipated technical difficulties that prevent the timely preparation and submission of an electronic filing, it must file a legended paper copy of the filing on Form TH pursuant to Rule 201. Such filers may also apply to the SEC for a continuing hardship exemption if it cannot file all or part of a filing without undue burden or expense pursuant to Rule 202. The elimination of the English-language summary option would also extend to filers who qualify for paper filing under these exemptions.

The proposed rule would not alter the SEC’s current practice of requiring foreign private issuers to submit on paper their applications and supporting documents for the exemption provided by Rule 12g3-2(b) under the Exchange Act. That rule allows foreign private issuers that choose not to access the U.S. capital markets, but that have more than 300 U.S. shareholders, from Exchange Act reporting, provided that such issuers furnish, on an ongoing basis, securities documents that they are required to furnish, or which they furnish voluntarily, in their home country to the SEC.

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**TRANSITION PERIOD**

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The proposed rule is expected to become effective for filings made four months from their date of adoption. This four-month transition period is intended to give foreign issuers ample time to become familiar with the SEC's rules and procedures regarding EDGAR. For registrants that have filed their registration statements on paper before the proposed rule becomes effective, they will be allowed to continue to file their pre-effective amendments on paper for a limited period of time (for example, one month following the proposed rules' effective date until the filer's registration statement becomes effective). If the registration statement becomes effective before this limited period has expired, a filer may also file its prospectus submitted pursuant to Securities Act Rule 430A on paper. However, once the limited period has ended, a filer would have to submit any amendment, whether pre-effective or post-effective, or prospectus supplement in electronic format.

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**EXPECTED COSTS**

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Although the SEC states that the costs incurred by foreign filers would be comparable to those incurred by U.S. domestic filers, there are some costs to consider. First, there are the requisite start-up costs of time and money, including the training of personnel to be EDGAR proficient as well as other costs regarding electronic filing, depending on a particular company's level of electronic filing readiness. Such costs may include the purchase of compatible computer equipment and software, subscription to an Internet service provider and costs associated with formatting and transmitting documents, including financial statements, to be filed via EDGAR, which only accepts documents in HTML 3.2 or in ASCII format (but does not accept documents in PDF format). The extent of such costs will depend upon the technological proficiency of a foreign company as well as its level of familiarity with EDGAR filing requirements.

The new English language requirement described above may cause some foreign issuers to incur additional expenses with regard to translation and other related activities.

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If you have questions regarding any of the foregoing, including the proposed rule and the legal and technical requirements of filing electronically via EDGAR, please feel free to contact Stephan Feder, Richard Garvey, Chris Lin or Jin Park of our Hong Kong office at (852) 2514-7600, Alan Brenner of our Singapore office at (65) 430-5100 or David Sneider or Alan Cannon of our Tokyo office at (81-3) 5562-8601.

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