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SEC Proposes Amendments to Rule 12g3-2(b) and Foreign Issuer Reporting Requirements

April 1, 2008

On February 19, 2008, the U.S. Securities and Exchange Commission proposed amendments to Rule 12g3-2(b) under the U.S. Securities Exchange Act of 1934, as amended.[1] These proposed amendments would, among other things:

- automatically grant the Rule 12g3-2(b) exemption to foreign private issuers[2] that meet specified conditions; and
- require all foreign private issuers which claim the Rule 12g3-2(b) exemption to publish electronically in English specified non-U.S. disclosure documents, eliminating the option of submitting paper copies of such documents to the SEC.

In addition, on February 29, 2008, the SEC proposed amendments to Forms F-1, F-3 and F-4 and Rule 405 under the U.S. Securities Act of 1933, as amended, and Form 20-F and Rules 3b-4, 13a-10, 13e-3 and 15d-10 under the Exchange Act.[3] These proposed amendments would, among other things:

- accelerate the filing deadline for annual reports on Form 20-F of foreign private issuers;
- permit foreign issuers to test their qualification to use forms and rules available to foreign private issuers once a year, rather than on a continuous basis;
- eliminate an option that permits certain foreign private issuers to omit segment data from U.S. GAAP financial statements;

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1 "Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers," Release No. 34-57350 (February 19, 2008) [17 CFR 239, 240 and 249].

2 As defined in Rule 405 under the Securities Act and Rule 3b-4(c) under the Exchange Act, a "foreign private issuer" is a corporation or other organization incorporated or organized in a foreign country that either has 50% or less of its outstanding voting securities held of record by U.S. residents or, if more than 50% of its voting securities are held by U.S. residents, about which none of the following are true: (1) a majority of its executive officers or directors are U.S. citizens or residents; (2) more than 50% of its assets are located in the United States; and (3) its business is administered principally in the United States.

3 "Foreign Issuer Reporting Enhancements," Release No. 33-8900; 34-57409 (February 29, 2008) [17 CFR 230, 239, 240 and 249].

- amend Exchange Act Rule 13e-3 pertaining to going private transactions to reflect the new rules governing termination of reporting obligations and deregistration by foreign private issuers; and

- revise the annual report and registration statement forms used by foreign private issuers to enhance the level of disclosure required by those forms.

PROPOSED RULE 12g3-2(b) AMENDMENTS

Background

Under Section 12(g) of the Exchange Act and Rule 12g-1 thereunder, an issuer that has 500 or more record holders of a class of its equity securities and assets in excess of US$10 million at the end of its most recently completed fiscal year must register that class of equity securities under the Exchange Act, absent an available exemption from registration. Rule 12g3-2 provides exemptions from the registration requirements of Section 12(g) for foreign private issuers.

Rule 12g3-2(a) exempts foreign private issuers without further conditions if the class of equity securities has fewer than 300 holders resident in the United States at the previous fiscal year end. The SEC has not proposed any change to this exemption.

Rule 12g3-2(b) allows a foreign private issuer to exceed the above shareholder thresholds without being required to register with the SEC.

Currently, in order to obtain the Rule 12g3-2(b) exemption, a non-reporting foreign private issuer must initially submit to the SEC, in hard copy form, a list of the issuer's non-U.S. disclosure obligations as well as English-language versions of information that the issuer:

- has made, or is required to make, public under the laws of its jurisdiction of organization;

- has made public pursuant to its non-U.S. stock exchange filing requirements; and

- has distributed, or is required to distribute, to its securityholders (collectively, the "non-U.S. disclosure documents"),

in each case since the beginning of its last fiscal year. The initial hard copy submission to the SEC must also include the number of U.S. holders of the issuer's equity securities and the percentage of those securities held by them, as well as a brief description of how those holders are believed to have acquired those securities. The initial submission to the SEC must be made before the date that a registration statement would otherwise become due under Section 12(g), which is 120 days after the fiscal year end on which the number of holders of the class of equity securities resident in the United States exceeds 300. After obtaining the Rule 12g3-2(b) exemption, an issuer must furnish to the SEC on an ongoing basis English-language versions of all non-U.S. disclosure documents.

In March 2007, the SEC adopted amendments that permit a foreign private issuer to claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of its termination of Exchange Act registration and reporting obligations pursuant to newly-adopted Rule 12h-6 under the Exchange Act, provided that it publishes English-language versions of its non-U.S. disclosure documents on an ongoing basis on its Internet website or through an electronic information delivery system generally available to the public in its primary trading market.[4] In addition, the March 2007 amendments permit a foreign private issuer that has previously established the Rule 12g3-2(b) exemption to elect to publish its non-U.S. disclosure documents electronically in lieu of continuing to make paper submissions of those documents to the SEC. Under the March 2007 amendments, an issuer that publishes its non-U.S. disclosure documents electronically must, at a minimum, publish English translations of:

- its annual report, including or accompanied by annual financial statements;
- its interim reports that include financial statements;
- its press releases; and
- all other communications and documents distributed directly to securityholders of each class of securities to which the Rule 12g3-2(b) exemption relates.

For a foreign private issuer that publishes its non-U.S. disclosure documents electronically, the Rule 12g3-2(b) exemption remains in effect for as long as the issuer fulfills its ongoing disclosure requirements or until it registers a class of securities under Section 12 of the Exchange Act or incurs reporting obligations under Section 15(d) of the Exchange Act.

Proposed Amendments

The proposed amendments to Rule 12g3-2(b) would eliminate the written application requirement for the Rule 12g3-2(b) exemption and, instead, make the exemption available automatically to foreign private issuers that meet specified conditions, including the electronic publication in English of specified non-U.S. disclosure documents.

In order to be eligible to claim the Rule 12g3-2(b) exemption under the proposed amendments:

- an issuer must not have any Exchange Act reporting obligations under Section 13(a) or Section 15(d) of the Exchange Act;
- an issuer must maintain a listing of the subject securities on one or more exchanges in one or two foreign jurisdictions comprising its primary trading market;

[4] Foreign private issuers that have terminated their Exchange Act reporting obligations under Rule 12g-4 or 12h-3 are required to wait at least 18 months prior to taking advantage of the Rule 12g3-2(b) exemption.

- either
    - the average daily U.S. trading volume for the subject securities for the most recently completed fiscal year must be no greater than 20% of the average daily worldwide trading volume for the same period; or
    - the issuer has terminated its registration of a class of securities under Section 12(g) of the Exchange Act or terminated its obligation to file or furnish reports under Section 15(d) of the Exchange Act pursuant to Rule 12h-6; and
- the issuer must publish specified non-U.S. disclosure documents in English, required since the beginning of its most recently completed fiscal year, on its Internet website or through an electronic information delivery system that is generally available to the public in its primary trading market, unless claiming the exemption in connection with, or recently following, its deregistration.

All foreign private issuers that meet the above requirements would be immediately exempt from Exchange Act registration under Rule 12g3-2(b) without having to apply to, or otherwise notify, the SEC concerning the exemption. A foreign private issuer could also immediately claim the Rule 12g3-2(b) exemption upon the effectiveness of its Exchange Act deregistration, whether pursuant to Rule 12g-4, 12h-3 or 12h-6, or the suspension of its reporting obligations under Section 15(d), if it met the foregoing requirements (other than the electronic publication requirement for its most recently completed fiscal year).

In order to maintain the Rule 12g3-2(b) exemption, as proposed to be amended, a foreign private issuer:

- must electronically publish specified non-U.S. disclosure documents in English for each subsequent fiscal year on an ongoing basis;
- must continue to maintain a listing of the subject securities on one or more exchanges in its primary trading market;
- must continue to meet the trading volume limitation for its most recently completed fiscal year (other than the year in which it first claims the exemption); and
- may not otherwise trigger any Exchange Act reporting obligations (*e.g.*, by conducting a registered offering or listing securities on a U.S. national securities exchange).

The proposed electronic publishing requirements would require, at a minimum, full translations of the same documents mandated by the electronic publishing option included in the March 2007 amendments and thus would eliminate the current ability of foreign private issuers to provide English summaries of certain items.

The proposed amendments to Rule 12g3-2(b) would establish a three-year transition period to accommodate issuers that are currently exempt, but that would lose their 12g3-2(b) exemption upon the effective date of the proposed rule changes because of the new trading volume limitation. An issuer that loses its 12g3-2(b) exemption would have to register under Section 12 of the Exchange Act no later than three years from the effective date of the proposed rule changes.

The proposed amendments would also establish a three-month transition period following the effective date of the proposed rule changes, during which the SEC staff would continue to process paper submissions of non-U.S. disclosure documents under Rule 12g3-2(b).

A foreign private issuer that qualifies for the Rule 12g3-2(b) exemption following the proposed rule changes would be required to evaluate its U.S. and worldwide trading volumes once a year to determine whether it continued to meet the ongoing trading volume limitation requirement. If an issuer's U.S. trading volume exceeds the trading volume limitation under Rule 12g3-2(b) as proposed to be amended, it would no longer be eligible for the 12g3-2(b) exemption.

In addition, the automatic nature of the exemption under the proposed amendments to Rule 12g3-2(b) could result in an increase in unsponsored American Depository Receipt (ADR) facilities unless the SEC determines to implement some form of an issuer-approval mechanism in relation to new ADR facilities.

PROPOSED AMENDMENTS TO FOREIGN ISSUER REPORTING REQUIREMENTS

Overview

The principal amendments proposed by the SEC are as follows:

- accelerating the filing deadline for annual reports on Form 20-F from six months to 90 days after the issuer's fiscal year-end (in the case of large accelerated filers and accelerated filers) and from six months to 120 days after the issuer's fiscal year-end (for all other issuers);

- permitting reporting foreign issuers to assess their eligibility to use 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 as is currently required;

- revising Form 20-F to eliminate an accommodation that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; and

- amending Exchange Act Rule 13e-3 to extend the scope of covered going private transactions to include transactions that might result in deregistration and termination of reporting under recently adopted rules applicable to foreign private issuers.

In addition, the SEC is considering, and has asked for public comment on, the following other possible amendments that would affect foreign private issuers:

- eliminating the availability of the limited U.S. GAAP reconciliation option 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, for annual reports filed on Form 20-F, and for certain non-capital raising offerings;

- requiring disclosure in annual reports filed on Form 20-F about:

  - changes in the foreign private issuer's certifying accountant;

  - fees and other charges paid by holders of ADRs to depositaries, as well as payments made by depositaries to the foreign private issuers whose securities underlie the ADRs; and

  - significant differences in the corporate governance practices of listed foreign private issuers compared to the corporate governance practices applicable to U.S. issuers under the relevant exchange's listing standards; and

- amending Form 20-F to require foreign private issuers to present financial information about a completed acquisition that is "significant" at the 50% or greater level.

Accelerating the Filing Deadline for Form 20-F Annual Reports

Currently, a foreign private issuer must file its annual report on Form 20-F within six months after its fiscal year-end (*i.e.*, by June 30 in the case of an issuer with a fiscal year ended on the preceding December 31). In what may be the most significant change affecting all foreign private issuers registered with the SEC, the proposed amendments would accelerate the due date for annual reports filed on Form 20-F to within 90 days after the foreign private issuer's fiscal year-end (in the case of large accelerated filers and accelerated filers[5]) and to within 120 days after the issuer's fiscal year-end (for all other issuers). The acceleration of the Form 20-F annual report filing deadline would

[5] Exchange Act Rule 12b-2 defines an "accelerated filer" as an issuer that: (i) has common equity (held by non-affiliates), the aggregate worldwide value of which is between US$75 million and US$700 million as of the last business day of its second fiscal quarter; (ii) has been subject to the reporting requirements of Section 13(a) or Section 15(d) of the Exchange Act for at least 12 calendar months; (iii) has filed at least one annual report pursuant to Section 13(a) or Section 15(d) of the Exchange Act; and (iv) does not satisfy the eligibility requirements to use Forms 10-KSB and 10-QSB, the annual and quarterly reports applicable to smaller reporting companies. That same Rule defines a "large accelerated filer" to be an issuer with the same characteristics as an accelerated filer, except that the aggregate worldwide market value of its common equity held by non-affiliates is US$700 million or more.

become effective after a two-year transition period.[6] The SEC has also proposed a conforming deadline for transition reports filed on Form 20-F, so that the deadline is the same as the deadline for annual reports filed on Form 20-F.

This change could require some foreign private issuers to file their annual reports on Form 20-F with the SEC *prior* to the time they are required to publish the same or similar information in their home jurisdictions. Even where the accelerated deadlines are after the publication deadlines in their home jurisdictions, foreign private issuers that do not prepare financial statements under U.S. GAAP or International Financial Reporting Standards (IFRS) may find it difficult to meet the new deadlines for financial statements where the financial statements must be translated into English and/or reconciled to U.S. GAAP. It is expected that the accelerated deadlines, if adopted as proposed, would require many foreign private issuers to accelerate their internal processes for preparing financial and other disclosures required to be included in annual reports on Form 20-F. These concerns may make foreign private issuers reluctant to engage in transactions that would require them to become subject to SEC reporting requirements and may cause some foreign private issuers to terminate their SEC reporting obligations by deregistering their securities.[7]

Annual Test for Foreign Private Issuer Status

Historically, the SEC has taken the position that a foreign issuer must assess whether it meets the SEC definition of foreign private issuer at different times during its fiscal year.[8] The proposed

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[6] The new Form 20-F filing deadlines are expected to apply for fiscal years ending on or after December 15, 2010.

[7] The SEC recently published amendments facilitating the deregistration process for foreign private issuers. See "Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty To File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934," Release No. 34–55540 (March 27, 2007) [17 CFR 200, 232, 240 and 249].

[8] For example, the SEC staff has taken the position that, for the purpose of the Exchange Act Rule 3a12-3(b) exemptions from the Section 14 proxy rules and the Section 16 short-swing profit recovery rules, foreign private issuers must 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).

amendments would permit reporting companies[9] to assess their status only once a year – on the last business day of their second fiscal quarter.[10] If a reporting company determines that it no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter, it would be required 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. However, a reporting company that determines that it qualifies as a foreign private issuer would be permitted 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. Thus, a newly qualified foreign private issuer would not need to continue to provide reports on Forms 8-K and 10-Q for the remainder of that fiscal year.

Segment Data Disclosure Requirement

Under Instruction 3 to Item 17 of Form 20-F, a foreign private issuer that presents financial statements otherwise fully in compliance with U.S. GAAP may omit segment data from its financial statements and also is permitted to have a qualified U.S. GAAP audit report as a result of this omission. The proposed amendments would eliminate this accommodation.

Amendment to Exchange Act Rule 13e-3

Exchange Act Rule 13e-3 currently requires any issuer or affiliate that engages in a Rule 13e-3 transaction to file a Schedule 13E-3 disclosing its plan to take the company private, and to make prompt amendments to reflect certain information about the proposed transaction. 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[11] that have either a reasonable likelihood or a purpose of causing (i) any class

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9 New registrants are required to assess whether they meet the definition of foreign private issuer within 30 days prior to the filing of an initial registration statement.

10 The proposed test date is the same as that used to determine accelerated filer status under Exchange Act Rule 12b-2. It should be noted that, under the proposed amendments, a Canadian issuer using the multijurisdictional disclosure system (MJDS) would also be required to test its status as a foreign private issuer only as of the last business day of its second fiscal quarter. However, as is currently the case, a Canadian issuer would have to continue 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 its fiscal year and to test its ability to use the MJDS Securities Act registration statement forms at the time of filing.

11 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.

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. The proposed amendments would revise Rule 13e-3 to reflect the recently adopted rules pertaining to the ability of foreign private issuers to terminate their Exchange Act registration and reporting obligations. As amended, Rule 13e-3(a)(3)(ii)(A) would specify that the cited effect is deemed to have occurred when a domestic or foreign issuer becomes eligible to deregister under Exchange Act Rules 12g-4 and 12h-6, respectively.

Additional Matters Under Consideration

Requiring Item 18 Reconciliation in Annual Reports and Registration Statements Filed on Form 20-F

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. Foreign private issuers may also provide financial statements according to Item 17 for their annual reports on Form 20-F. Under Item 17, a foreign private issuer must either prepare its financial statements and schedules in accordance with U.S. GAAP, or IFRS as issued by the International Accounting Standards Board (IASB), or include a reconciliation of its financial statements prepared in accordance with another basis of accounting 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. 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.

The proposed amendments would 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, that file annual reports on Form 20-F or that register certain non-capital raising offerings, such as offerings pursuant to reinvestment plans, upon the conversion of securities or of investment grade securities.[12]

Disclosure about Changes in a Foreign Private Issuer's Certifying Accountant

U.S. reporting companies are required to 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 under the Exchange Act, as well as in their registration statements filed on Forms S-1 and S-4 under

[12] The SEC is not proposing to eliminate the availability of Item 17 disclosure for Canadian MJDS filers.

the Securities Act. Historically, foreign private issuers have not been required by the SEC to provide this disclosure. However, foreign private issuers that are listed on the New York Stock Exchange or The Nasdaq Stock Market are required to notify the relevant exchange of a change in their auditors. 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.

The proposed amendments would require substantially the same disclosures currently provided by U.S. reporting companies about changes in and disagreements with their certifying accountant under Form 20-F and Forms F-1 and F-4. A new Item 16F of Form 20-F would elicit similar disclosures to those required by Item 4.01 (Changes in Registrant's Certifying Accountant) of Form 8-K, including the disclosure requirements of Item 304(a) of Regulation S-K[13], 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, which refers to the disclosure requirements of Item 304(b) of Regulation S-K.[14] However, new Item 16F would eliminate or modify some of the due dates contained in Item 304(a)(3) of Regulation S-K because the disclosure would be made on an annual, rather than current, basis.

Annual Disclosure About ADR Fees and Payments

Disclosures about fees and other payments made by ADR holders to a depositary are currently provided in the registration statement that is filed to register the deposited securities under the Securities Act or the Exchange Act, but are not required to be disclosed in annual reports filed on Form 20-F. The proposed amendments would revise Item 12.D.3. and the Instructions to Item 12 of Form 20-F to require disclosure of ADR fees on an annual basis, including the annual fee for general depositary services and payments made to foreign issuers whose securities underlie ADRs. The revised Form 20-F would require disclosure of these payments in any registration statement on Form

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[13] Among other things, Item 304(a) of Regulation S-K 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 304(a) of Regulation S-K 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.

[14] Item 304(b) of Regulation S-K 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 304(b) requires the issuer to disclose the existence and nature of the disagreement or reportable event, and also disclose the effect on the financial statements if the method that would have been required by the former accountants had been followed.

20-F that is filed for deposited securities, as well as in any annual report, for sponsored ADR facilities.

Disclosure About Differences in Corporate Governance Practices

The New York Stock Exchange and The Nasdaq Stock Market exempt foreign issuers with listed securities from certain corporate governance requirements applicable to U.S. companies, but require those foreign issuers to disclose the significant differences between their corporate governance practices and those followed by U.S. companies under the relevant exchange's listing standards. The proposed amendments would require disclosure of this information in the Form 20-F annual reports filed by all foreign issuers whose securities are listed on a U.S. exchange.[15] New Item 16G to Form 20-F would require foreign private issuers to provide a concise summary in their annual reports of the significant ways in which their corporate governance practices differ from the corporate governance practices of U.S. companies listed on the same exchange.

Financial Information for Significant Completed Acquisitions

Historically, foreign private issuers have not been required to present financial information about significant, completed acquisitions in their annual reports filed on Form 20-F. The proposed amendments would require foreign private issuers to provide the financial information solicited by Rule 3-05 and Article 11 of Regulation S-X in their Exchange Act annual reports for any single completed business acquisition significant at the 50% or greater level.[16] These requirements would include the provision of financial statements for three fiscal years as prescribed by Rule 3-05(b)(2)(iv) of Regulation S-X for any such transaction if such financial statements have not been provided previously in a registration statement.

This memorandum is for general information purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as memoranda regarding recent corporate reporting and governance developments, can be obtained from our website, www.simpsonthacher.com.

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[15] Currently, foreign private issuers are required to provide in their annual reports the disclosure required by Exchange Act Rule 10A-3(d) regarding an exemption from the listing standards for audit committees.

[16] Rule 3-05 and Article 11 of Regulation S-X identify the financial statements that must be provided for significant, completed acquisitions and the preparation of pro forma financial statements, respectively.