

Impact of Amended SEC Disclosure Requirements On Foreign Private Issuers

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The U.S. Securities and Exchange Commission (“SEC”) recently adopted amendments to existing disclosure rules to simplify or eliminate requirements that are deemed “duplicative, overlapping, outdated, or superseded” and also to make the disclosure rules more consistent between U.S. issuers and foreign private issuers. While the amendments are incremental and technical in nature and primarily affect U.S. issuers, foreign private issuers will also be affected by the changes to disclosures in their annual reports on Form 20-F and registration statements on Form F-1, Form F-3 and Form F-4. The amendments will become effective on November 5, 2018. A copy of the SEC’s adopting release (Release No. 33-10532) is available [here](#). Other recent amendments also affect the cover page of Form 20-F.

Changes Impacting Foreign Private Issuer Disclosures

In general, the amendments eliminate or integrate disclosure requirements that overlap or are reasonably similar to the requirements in U.S. Generally Accepted Accounting Principles (“U.S. GAAP”), International Financial Reporting Standards (“IFRS”) as issued by the International Accounting Standards Board (“IASB”), or other SEC disclosure rules. The amendments affecting foreign private issuers are mostly related to amendments to Form 20-F, which set forth the bulk of the SEC’s disclosure requirements for foreign private issuers. The amendments to Form 20-F also affect the registration statements for foreign private issuers under the Securities Act of 1933, as amended, such as Form F-1, Form F-3 and Form F-4, as many of the disclosure requirements for those registration statements refer to Form 20-F disclosure requirements.

The following summarizes the more noteworthy changes that affect foreign private issuers:

1. Exchange Rate Data. The requirement under Item 3.A.3 of Form 20-F to disclose exchange rate data when financial statements are prepared in a currency other than the U.S. dollar has been eliminated, as exchange rate data are now readily available for free on a number of websites. This change also affects registration statements on Form F-1 and Form F-4, which currently refer to the same disclosure requirement in Form 20-F.
2. Earnings Per Share Calculation. The requirement to file as an exhibit a statement explaining how any earnings per share information presented in a filing was calculated has been eliminated, given that such requirement is duplicative of International Accounting Standards 33. This change is implemented through the changes to

Instruction 6 of “Instructions as to Exhibits” to Form 20-F, as well as in registration statements on Form F-1, Form F-3 and Form F-4 through amendments to Item 601(b)(11) of Regulation S-K.

3. Ratio of Earnings to Fixed Charges. The amendments eliminate the requirements to (i) provide a ratio of earnings to fixed charges and (ii) file as an exhibit a statement explaining how any ratio of earnings to fixed charges presented in a filing was calculated. These requirements were eliminated because many of the components commonly used in the ratio are already reasonably available in an issuer’s financial statements under U.S. GAAP and IFRS. These amendments are implemented through the changes to Instruction 7 of “Instructions as to Exhibits” to Form 20-F, as well as in registration statements on Form F-1, Form F-3 and Form F-4 through amendments to Items 503(d) and 601(b)(12) of Regulation S-K.
4. Market Price Disclosure; Trading Symbol. The requirement in Form 20-F, Form F-1, Form F-3 and Form F-4, which refer to Item 9.A.4 of Form 20-F, to disclose the historical market price of the issuer’s common equity (g., high and low market prices for specified prior periods) has been eliminated. However, the amendments add a requirement to disclose the trading symbols for the issuer’s common equity traded in the U.S. market and principal market. These changes were made because investors can directly obtain more robust information on market price from various websites using the trading symbols.
5. Amounts Spent on R&D. The amendments eliminate the requirement to disclose any material amounts spent on company-sponsored research and development activities since foreign private issuers are already required to disclose such information in the notes to the financial statements. These amendments are implemented through changes to Item 5.C of Form 20-F, as well as in registration statements on Form F-1 and Form F-4, which refer to Item 5.C of Form 20-F.
6. Dividend Restrictions. Requirements under Items 10.F and 14.B of Form 20-F to disclose any dividend restrictions and any limitations on the payment of dividends have been eliminated. These amendments were made because (i) foreign private issuers are already required to disclose dividend restrictions in the notes to the financial statements and (ii) Item 5.B.1(b) of Form 20-F requires disclosure of restrictions on a subsidiary’s ability to transfer funds to its parent company, including in the form of dividends. The change to Item 10.F of Form 20-F also affects the registration statement on Form F-1, which refers to the same disclosure requirements in Form 20-F.
7. Age of Financial Statements. Instruction 2 to Item 8.A.4 of Form 20-F has been amended to eliminate the requirement to obtain a formal waiver from the SEC when a foreign private issuer conducting an initial public offering includes audited financial statements that are not older than 15 months, rather than 12 months as would otherwise be required by Item 8.A.4. Prior to the amendment, a foreign private issuer had to obtain a waiver from the SEC staff by representing to the SEC staff that it is not public in any jurisdiction prior to the initial public offering and is not required to comply with the requirement to provide audited financial statements that are not older than 12 months in any other jurisdiction outside the U.S. and that complying with the requirement is impracticable or involves undue hardship. The waiver requirement was deemed obsolete because the SEC staff has almost always granted the waiver requests. Foreign private issuers must still comply with the 15-month age of financial statements requirement and the SEC retained the requirement to make the necessary representations and to file them as an exhibit to the registration statement.
8. Invitation for Competitive Bids. Item 601(b)(26) of Regulation S-K, which is incorporated by reference into registration statements on Form F-1, Form F-3 and Form F-4, has been amended to eliminate the requirement to file as an exhibit any invitation for competitive bids. This amendment was made because it was deemed that such information would provide little additional value to investors, given that those participating in the competitive bid would directly receive the invitation and all other investors would have access to the registration statement covering the securities offered at competitive bidding, as well as the results of the competitive bidding and the terms of reoffering.

The amendments also update and/or eliminate outdated or superseded disclosure requirements, including the following:

1. References to Generally Accepted Auditing Standards (“GAAS”). References to GAAS in General Instruction G(f)(1) and Instruction 2 to Item 8.A.2 of Form 20-F have been replaced with “the standards of the Public Company Accounting Oversight Board (United States) (‘PCAOB’).” Similarly, the reference to U.S. standards for auditor

independence has been replaced with “qualified and independent in accordance with Article 2 of Regulation S-X.” These changes codify the 2004 SEC guidance that indicated that references to GAAS should be understood to mean the audit standards of the PCAOB and do not result in substantive changes to disclosure.

2. Selected Financial Data for Foreign Private Issuers Reporting for the First Time Under IFRS as Issued by IASB. General Instruction G(c) and Instruction 2 to Item 3.A of Form 20-F have been amended to (i) eliminate the requirement to present selected financial data in accordance with U.S. GAAP and (ii) explicitly state that for foreign private issuers relying on the accommodation for the first-time application of IFRS under General Instruction G of Form 20-F, selected financial data is required only for the same two-year period for which the issuer presents financial statements prepared in accordance with IFRS as issued by IASB. These changes are intended to simplify compliance efforts by eliminating the U.S. GAAP requirement and aligning the selected financial data requirement with the accommodation provided for first-time IFRS adopters without the need for a formal request for accommodation.
3. Statement of Comprehensive Income. The amendments replace references to “income statement” with “statement of comprehensive income” to be consistent with the terminology used by the Financial Accounting Standards Board and IFRS.
4. SEC Public Reference Room Reference and Internet Address. The requirement to identify the SEC Public Reference Room and disclose its physical address and phone number has been removed from registration statements on Form F-1, Form F-3 and Form F-4, as the SEC acknowledged that the SEC Public Reference Room is rarely used by the public given the availability of information on the SEC website. The amendments instead require Form 20-F and Form F-1 to disclose the SEC’s internet address and include a statement that electronic SEC filings are available to align the requirements for foreign private issuers with those of U.S. issuers.
5. Issuer Internet Address. All issuers must now disclose their internet addresses, if they have one, in SEC filings, including registration statements on Form F-1, Form F-3 and Form F-4 and annual reports on Form 20-F to ensure that investors are aware of an additional resource for information about issuers.

In addition to the changes described above, the amendments also include various clean-up changes, including correcting the references to the SEC’s telephone numbers and offices and deleting outdated transitory language that was included in the various disclosure forms.

Going Forward

These amendments are mostly incremental and technical in nature and generally do not result in any significant, substantive changes. In light of the elimination or reduction of certain disclosure requirements, foreign private issuers should be able to reduce time and cost when preparing filings with the SEC.

Other Recent Amendments

Effective September 17, 2018, the requirement to post Interactive Data Files with eXtensible Business Reporting Language (XBRL) information on an issuer’s website was eliminated and the corresponding references on the cover page of Form 20-F to this required posting were also eliminated.

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