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# Guide For Foreign Private Issuers: Preparing Your Upcoming Annual Report On Form 20-F

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Part I of this Guide summarizes rule changes affecting the Annual Report on Form 20-F (the "Annual Report") for fiscal year 2004 to be filed by foreign private issuers on or prior to June 30, 2005.[1] Part II of this Guide provides a brief overview of disclosure requirements applicable to Annual Reports for fiscal year 2005, and describes recently announced accommodations for foreign private issuers applying International Financial Reporting Standards for the first time. Part III of this Guide provides a summary of disclosure requirements applicable to Annual Reports for fiscal year 2006, including discussion of an item that could impact 2004 and 2005 Annual Reports.

This Guide is not intended to be a cumulative review of rules applicable to foreign private issuers mandated by the Sarbanes-Oxley Act or other requirements applicable to Annual Reports. We have prepared memoranda discussing the details of the provisions of the Sarbanes-Oxley Act and changes affecting the preparation of Annual Reports on Form 20-F covering years prior to the 2004 fiscal year, which are available on our website at *www.whitecase.com*.[2]

The information contained in this Guide is accurate as of April 21, 2005.

## Part I: New Disclosure Requirements Applicable To 2004 Annual Reports

Two new disclosure requirements apply to your Annual Report for fiscal year 2004 (the "2004 Annual Report") that did not apply to Annual Reports filed with respect to previous years. These relate to the following:

- Share Repurchases: In your 2004 Annual Report, you must disclose share repurchases by the company and any affiliated purchasers during the course of the year, as well as certain information relating to these transactions; and
- Loans to Insiders by Foreign Banks: Pursuant to rule changes in 2004, foreign banks are now permitted, without violating Section 402 of the Sarbanes-Oxley Act, to extend loans to their directors and senior management under specified circumstances, provided that certain required disclosure relating to such loans is included in the Annual Report.
- Use of Home Country Governance Practices: Nasdaq has amended rules to allow foreign private issuers traded on Nasdaq to follow certain home country corporate governance practices in lieu of Nasdaq requirements.

These requirements are discussed in more detail below.

### *Share Repurchases*

The U.S. Securities and Exchange Commission (the "SEC") has adopted changes to Form 20-F to enhance the transparency of a foreign private issuer's share repurchases by requiring disclosure of

all issuer repurchases of equity securities that are registered under Section 12 of the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), whether such purchases are made in the open market or in privately negotiated transactions. This disclosure must appear in Annual Reports filed for fiscal years ending on or after December 15, 2004.

Specifically, new "Item 16E - Purchases of Equity Securities by the Issuer and Affiliated Purchasers" of Form 20-F requires foreign private issuers to provide disclosure of all open market and private repurchases of any class of the issuer's equity securities (including depositary shares representing equity securities) that are registered under Section 12 of the Exchange Act, regardless of whether the repurchases are effected in the United States or offshore or in accordance with the Rule 10b-18 safe harbor.[3] Purchases of preferred stock, warrants, rights, convertible debt securities, options or futures products are not covered by this item.

New Item 16E requires issuers to disclose in the Annual Report the following items in tabular format:

- the total number of equity securities repurchased on a monthly basis;
- the average price paid per equity security;
- the total number of equity securities that were repurchased as part of a publicly announced repurchase plan or program; and
- the maximum number or approximate value of equity securities that may yet be purchased under such a plan or program.

In addition, the disclosure table must include footnotes that briefly describe the nature of each repurchase transaction. With respect to any publicly announced repurchase plans or programs, foreign private issuers also must include footnote disclosure of the principal terms of the plans or programs, including their respective announcement and expiration dates and the share or dollar amounts involved. In addition, disclosure must be made of each plan or program that has expired during the period covered by the table, has been terminated prior to expiration or under which the issuer does not intend to make further purchases.

## *Loans To Insiders By Foreign Bank Issuers*

Section 402 of the Sarbanes-Oxley Act (which is codified in Section 13(k) of the Exchange Act) prohibits issuers, directly or indirectly, from extending, arranging for or renewing any personal loan to or for any director or executive officer of the issuer, subject to certain limited exceptions. An exemption from this prohibition permits certain insider loans to be made by banks insured under the Federal Deposit Insurance Act, but this exemption is not available to foreign banks. Rule 13k-1 under the Exchange Act, which became effective as of April 30, 2004, seeks to provide foreign banks with the same type of exemption. Specifically, Rule 13k-1 provides that loans by a foreign bank (or the parent or other affiliate of a foreign bank) to any of its directors or executive officers are exempt from the prohibition contained in Section 13(k) if:

- (a) the laws or regulations of the foreign bank's home jurisdiction require the bank to insure its deposits or be subject to guarantees or protections; or (b) the Board of Governors of the U.S. Federal Reserve System has determined that the foreign bank is subject to comprehensive supervision or regulation by the bank's supervisor in its home jurisdiction; and
- the loan (a) is on substantially the same terms as other transactions by the foreign bank with non-insiders, (b) is made pursuant to a benefit or compensation program that is widely available to the employees or affiliates and does not give preference to the insider, or (c) has received the express approval of the bank's supervisor in its home jurisdiction.

Effective June 1, 2004, the SEC has amended Item 7.B of Form 20-F to require that if a foreign private issuer, its parent or any of its subsidiaries is a

foreign bank that has made a loan under Rule 13k-1, the identity of the director, senior management member or other related party who received the loan and the nature of the loan recipient's relationship to the foreign bank must be described in the Annual Report. However, Instruction 2 of Item 7.B permits abbreviated disclosure to be provided about certain loans that are not classified as non-accrual, past due, restructured or potential problem loans under the SEC's Industry Guide 3.

In addition, new Instruction 3 has been added to Item 7.B, which provides that if a reporting company has concluded that its home jurisdiction's privacy laws prevent it from identifying the insider who received a loan (and the loan is not covered by the abbreviated disclosure provision in Instruction 2 of Item 7.B), it must attach, as an exhibit to the Annual Report, a legal opinion attesting to that conclusion, as well as disclosing that an unnamed director, senior management member, or other related party has been the recipient of a loan, the home jurisdiction's privacy laws prevent the disclosure of the name of the loan recipient and the loan recipient is unable to waive or has otherwise not waived application of these privacy laws.

### *Nasdaq Rule Permitting Foreign Private Issuers To Follow Certain Home Country Corporate Governance Practices*

Under amended Nasdaq rules that went into effect on March 3, 2005, foreign private issuers whose securities are traded on Nasdaq are permitted to follow certain home country corporate governance practices in lieu of certain Nasdaq governance requirements, even if such home country practices are contrary to Nasdaq requirements. This rule change makes the Nasdaq requirements more consistent with those of the New York Stock Exchange. Prior to this amendment, foreign private issuers traded on Nasdaq were required to request exemption from the governance standards set forth in Rule 4350 of Nasdaq's Marketplace Rules ("Rule 4350") by establishing that such standards were contrary to accepted home country practices.

As a result of the amendment, foreign private issuers taking advantage of this accommodation will have to disclose in their Annual Report each requirement of Rule 4350 with which they are not complying and describe the home country practice followed instead. In addition, foreign private issuers that elect to rely on the proposed rule will have to submit a written statement to Nasdaq from independent counsel in their home country certifying that such corporate governance practices are not prohibited by the home country's laws. For Nasdaq-listed foreign private issuers, the certification is required at the time the company seeks to adopt its first non-compliant practice.

Notwithstanding the above, the amended rule does not excuse foreign private issuers from complying with certain sections of Rule 4350 pertaining to, among other things, public announcements of going concern qualifications contained in audit opinions; notification of Nasdaq of material non-compliance by an executive officer with the provisions of Rule 4350; and audit committee independence requirements, as mentioned in Part II of this Guide.

## Part II: Disclosure Requirements Applicable To 2005 Annual Reports

Below is a brief outline of disclosure requirements under the Sarbanes-Oxley Act and related SEC rules affecting your Annual Report for fiscal year 2005, which must be filed on or prior to June 30, 2006 (the "2005 Annual Report"). These may require that actions be taken during 2005 in order for foreign private issuers to be in a position to make the required disclosures in their 2005 Annual Reports. In the case of the accommodations for first-time application of International Financial Reporting Standards, the rule changes will be applicable to the 2005 Annual Report for a foreign private issuer that adopts IFRS for the first time with respect to its 2005 financial statements.

### *Disclosure As To Independence Of Directors Serving On Audit Committee And Any Exemptions*

Under the Sarbanes-Oxley-mandated audit committee listing standards, foreign private issuers

with securities listed on a U.S. exchange or on Nasdaq must indicate in their 2005 Annual Report that their audit committee is comprised entirely of "independent" directors (within the meaning of Rule 10A-3 under the Exchange Act), subject to certain exemptions. Certain exemptions from this requirement are available exclusively for foreign private issuers. If the company is relying on one of these exemptions, such reliance must be disclosed in the Annual Report.

### *Statement As To Independence Of Audit Committee Financial Expert*

Your 2005 Annual Report must disclose whether your named audit committee financial expert is "independent" of management, as defined by the applicable stock exchange or Nasdaq rules. If the company is not listed on a U.S. stock exchange or Nasdaq, it may choose to use the definition of "independent" as set forth in either the rules of a U.S. exchange or Nasdaq.

### *Accommodations For First-Time Application Of International Financial Reporting Standards*

In June 2002 the European Commission adopted a regulation requiring, with certain limited exceptions, companies incorporated under the laws of a European Union ("E.U.") member state and whose securities trade publicly in the E.U. to adopt International Financial Reporting Standards ("IFRS") with respect to their consolidated financial statements for each fiscal year starting on or after January 1, 2005. Other countries, including Australia, have adopted similar rules. Generally speaking, the SEC encourages the adoption of IFRS by foreign private issuers, including voluntary adoption by companies from jurisdictions where IFRS is not required. (The discussion of the accommodations for first-time IFRS adoption is included as part of the discussion of the 2005 Annual Report because 2005 is the first year for which foreign private issuers in the European Union are required to adopt IFRS, although issuers may have adopted IFRS for prior periods.)

On April 13, 2005, the SEC adopted amendments to Form 20-F intended to ease the financial requirements for foreign private issuers that have adopted IFRS as their basis of accounting as of January 1, 2005, or prior to or for the first financial year starting on or after January 1, 2007 *(see related report in this issue)*. These amendments will become effective on May 19, 2005. Set forth below is a brief summary of some of the more significant changes that have been implemented.

In order to be able to take advantage of the accommodations made by the Form 20-F amendments, a foreign private issuer, among other things, must be able to state unreservedly and explicitly that its financial statements comply with IFRS as published by the International Accounting Standards Board, and if its audited financial statements are not subject to any qualification, including qualification relating to the application of IFRS. In addition, the issuer's independent auditor must opine without qualification on compliance with IFRS.

The amendments, among other things, allow a foreign private issuer to include in its Annual Report for the first fiscal year for which it has adopted IFRS:

- audited financial statements under IFRS for its two most recently completed fiscal years, rather than for the three years that otherwise would have been required under Item 8.A of Form 20-F, if providing such third fiscal year under IFRS could not be done without unreasonable effort or expense (a U.S. GAAP reconciliation for the two fiscal years would still be required to be included); and
- two years of selected financial data under IFRS, versus the five years that otherwise would have been required under Item 3.A of Form 20-F, if such prior period data could not be provided without unreasonable effort or expense (but five years of selected data based on U.S. GAAP still must be provided).

The foreign private issuer may, but is not required to, include or incorporate by reference in its Annual Report financial information prepared under the accounting principles used in its primary financial statements prior to the adoption of IFRS ("Prior GAAP"), although Prior GAAP information should not be presented in a side-by-side columnar format with IFRS information. Issuers that do include the Prior GAAP information will be required to include or incorporate into the Annual Report management's discussion about the issuer's operating and financial review and prospects under Item 5 of Form 20-F for the reporting periods covered by the Prior GAAP financial statements.

In addition, Item 5 has been amended so as to limit management's discussion about the operating and financial review and prospects solely to the fiscal years for which IFRS financial statements are provided. Item 5 was also amended to require any issuer relying on any of the elective or mandatory exceptions under IFRS to include detailed disclosure regarding each exception used in the discussion of its operating and financial review and prospects based on its IFRS financial statements.

A more detailed memorandum regarding these amendments to Form 20-F and the related changes that have been implemented is in the process of being prepared and will be posted on our website shortly.

## Part III: Disclosure Requirements Applicable To 2006 Annual Reports

Below is a brief outline of requirements under the Sarbanes-Oxley Act and related SEC rules affecting your Annual Report for fiscal year 2006, which must be filed on or prior to June 30, 2007 (the "2006 Annual Report"). Please note that while these requirements apply only to your 2006 Annual Report, work that you perform in order to prepare to comply with these requirements may affect the disclosure that should be made in your 2004 Annual Report and 2005 Annual Report, as further discussed below.

### *Report On Management's Internal Control Over Financial Reporting And Auditor's Attestation*

On March 2, 2005, the SEC announced the extension for one additional year of the compliance deadline for foreign private issuers for including management's report on internal control over financial reporting in their Annual Reports *(see WSLR, March 2005)*. The SEC's purpose in allowing this extension is to provide additional time for foreign private issuers to take a serious look at their internal controls, as the Sarbanes-Oxley Act contemplates. It is not intended that companies use the extension to delay preparations for compliance, but instead to improve the quality of their efforts. Foreign private issuers must now include the internal control report in the first Annual Report filed for a fiscal year ending on or after July 15, 2006.

As a result, foreign private issuers with a calendar fiscal year now must include the internal control report with the 2006 Annual Report.

Pursuant to Section 404 of the Sarbanes-Oxley Act, your 2006 Annual Report should include a management report on internal control over financial reporting containing, among other things, a statement of management's responsibility and assessment over internal control. In addition, a related attestation from the company's independent auditors will be required to be included.

Although the Section 404 requirements will not apply to your 2004 and 2005 Annual Reports, both Annual Reports may be affected by the work that you have done or do prior to the filing of the relevant Annual Reports to be able to comply with these requirements in your 2006 Annual Report or in connection with your 2004 and 2005 audits. For example, if material weaknesses in your internal controls have been identified by you or by your auditors as part of the Section 404 work, your year-end audit or otherwise, these will likely need to be disclosed in your 2004 or 2005 Annual Reports,

as the case may be, under Item 15 (which deals with disclosure controls and procedures) and may make it difficult for your chief executive officer ("CEO") and chief financial officer ("CFO") to be able to certify that your disclosure controls and procedures are effective, which is part of the certification required under Section 302 of the Sarbanes-Oxley Act to be included in your 2004 and 2005 Annual Reports. Therefore, in preparing both Annual Reports, you do need to review where you are in your internal controls assessment process and what problems have been discovered to date and determine their impact on your 2004 and 2005 Annual Report disclosure.

We have prepared a memorandum discussing the requirements of Section 404 of the Sarbanes-Oxley Act, including with respect to its application to foreign private issuers, which is available on our website.[4]

### *Section 302 Certification Covering Internal Control Over Financial Reporting*

As part of the extension of the filing deadlines announced on March 2, 2005, the SEC also extended the deadline for filing the amended Section 302 certifications that contain additional certifications regarding internal controls. As a result of the extension, the amended Section 302 certifications must be provided in the first Annual Report required to contain the internal control report and in all Annual Reports filed thereafter. The extended compliance dates also apply to the amendments of Exchange Act Rules 13a-15(a) and 15d-15(a) relating to the maintenance of internal control over financial reporting.

Therefore, in addition to the currently applicable Section 302 certification requirements, your CEO and CFO will be required to certify in connection with your 2006 Annual Report that they are responsible for internal control over financial reporting and have designed a system of internal control over financial reporting to provide reasonable assurance that the financial statements are reliable and prepared in accordance with GAAP.

1 For purposes of this Guide, we have assumed a fiscal year ending December 31. If your company does not have a calendar fiscal year, the timing of the applicability of the new disclosure requirements discussed in this Guide may differ.

2 In particular, see the following memoranda: "Guide for Foreign Private Issuers: Preparing Your Upcoming Annual Report of Form 20-F" (dated March 2004); "Guide for Foreign Private Issuers: Preparing Your Upcoming Annual Report on Form 20-F Under the Sarbanes-Oxley Act and Recent SEC Rules" (dated March 13, 2003); "Summary of the Provisions of the Sarbanes-Oxley Act of 2002"; and "Sarbanes-Oxley Update: SEC Adopts Final Rules Regarding Certification and Disclosure Controls and Procedures."

3 Rule 10b-18 under the Exchange Act provides issuers with a non-exclusive safe harbor from liability for manipulation when they repurchase their equity securities in the market in accordance with the specified manner, timing, price and volume conditions of the rule. It is a day-by-day safe harbor, so that purchases on any given day must meet the conditions of the rule for that day's purchases to qualify for the safe harbor.

4 "Management's Internal Control Report: Compliance Tips for Working with External Auditors" (dated March 2005).