

# Securities Update

## Guide for Foreign Private Issuers: Preparing Your Upcoming Annual Report on Form 20-F

During 2008, the US Securities Exchange Commission (the "SEC") implemented several rule changes that will affect both the timing and the content of the Annual Reports filed by foreign private issuers on Form 20-F ("Annual Report"). Among these changes is the set of rules known as the Foreign Issuer Reporting Enhancements ("FIRE") which became effective on December 6, 2008.<sup>1</sup>

Some of the new rules summarized in this Guide extend accommodations to foreign private issuers while others provide for more stringent requirements. Also, some of the FIRE rules apply to upcoming Annual Reports to be filed, in respect of the 2008 fiscal year, on or prior to June 30, 2009<sup>2</sup> (the "2008 Annual Reports"). Other FIRE rules will apply only to subsequent Annual Reports. We have prepared this Guide in order to assist SEC reporting foreign private issuers to keep track of these important changes and the timing for their implementation.

Part I of this Guide summarizes certain rule changes affecting 2008 Annual Reports. Part II of this Guide provides a brief overview of certain disclosure requirements applicable to Annual Reports for subsequent fiscal years.

### Part I: New Disclosure Requirements Applicable to 2008 Annual Reports

The following is a brief summary of new disclosure requirements and other regulatory developments affecting 2008 Annual Reports:

- **Annual Determination of Foreign Private Issuer Status.** The FIRE rules provide that companies must make a determination of their foreign private issuer status only on an annual, instead of a continuous, basis. Prior to this change, companies were required to monitor their foreign private issuer status on a continuous basis. If they lost that status, the company immediately became subject to the same reporting and disclosure obligations applicable to US reporting companies.<sup>3</sup> Pursuant to FIRE,

The White & Case LLP Securities Update provides a brief overview of some of the latest legislative, regulatory and judicial actions, policy statements and decisions that affect public and private companies.

Please contact the lawyer at White & Case who regularly advises you or any of the lawyers listed on the last page of this Guide with any questions in connection with this Securities Update.

<sup>1</sup> SEC Rel. 33-8959; 34-58620 (September 23, 2008).

<sup>2</sup> 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. Please do not hesitate to contact us with any questions you may have about when the new disclosure requirements come into effect for your company's Annual Report.

<sup>3</sup> For example, foreign private issuers are exempt from the SEC's proxy rules and from insider reporting and short-swing profit recovery provisions of the US Securities Exchange Act of 1934 (the "Exchange Act"). Foreign private issuers also disclose any interim and current reports on the basis of home country regulatory and stock exchange practices (rather than quarterly and current reports on Forms 10-Q and 8-K, as required by US reporting companies). In addition, foreign private issuers are permitted to provide executive compensation disclosure on an aggregate basis if the information is reported on such a basis in their home jurisdiction.

White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036  
+ 1 212 819 8200

[www.whitecase.com](http://www.whitecase.com)

companies are only required to assess their foreign private issuer status annually (on the last business day of their second fiscal quarter).

In addition, if the company loses its foreign private issuer status, it is not required to immediately begin complying with US reporting company obligations. Rather, these requirements apply only as of the first day of the company's next fiscal year (when the company is required to file an Annual Report on Form 10-K for the fiscal year in which the determination was made). This rule change effectively gives companies who lose their foreign private issuer status a period of six months to prepare to meet the obligations of US reporting companies. By contrast, a company determining that it qualifies as a foreign private issuer will be able to avail itself of the related accommodations immediately upon the determination date.<sup>4</sup>

- **Disclosure of Differences in Corporate Governance Practices.** US securities exchanges, including the New York Stock Exchange and the Nasdaq Stock Market, typically exempt foreign private issuers from many of the exchanges' corporate governance requirements. These exchanges generally require foreign private issuers to disclose the significant ways in which their corporate governance practices differ from the practices followed by US reporting companies listed on the same exchange, and allow this disclosure to appear in either a foreign private issuer's Annual Report or on its website. New Item 16G of Form 20-F<sup>5</sup> requires foreign private issuers with securities listed on a US securities exchange to provide in their Annual Reports

a summary of the significant ways in which such issuer's corporate governance practices differ from the corporate governance practices followed by US companies listed on the same exchange.<sup>6</sup> Accordingly, issuers that previously provided this information solely through their websites must now begin to include this summary in their Annual Reports.

**Extension of the Two-Year Accommodation for First-Time Adopters of IFRS.** Form 20-F currently provides an accommodation to foreign private issuers that are first-time adopters of International Financial Reporting Standards as issued by the International Accounting Standards Board ("IFRS") that allows such first-time adopters to present IFRS financial statements (i.e., balance sheet, income statement and statements of changes in shareholders' equity and cash flow, and notes thereto) for the two, rather than the three, most recent fiscal years. To provide an additional incentive for the adoption of IFRS in filings with the SEC, this accommodation has been extended indefinitely.<sup>7</sup> This is consistent with the SEC's stated policy of encouraging the adoption of a single set of globally accepted accounting standards<sup>8</sup> that the SEC believes will benefit US investors, as they may better understand and compare investment opportunities outside the United States, as well as US issuers, as they may access worldwide capital markets at a lower cost. Accordingly, if a foreign private issuer elects to adopt IFRS for the first time for purposes of its 2008 Annual Report (or any subsequent Annual Report), it can avail itself of the accommodation of having to provide only the two most recent years' financial statements in IFRS in such Annual Report.

---

4 Canadian issuers that participate in the multijurisdictional disclosure system ("MJDS") are also required to test their foreign private issuer status once a year as of the last business day of their second fiscal quarter, although such issuers will continue to test their eligibility to use MJDS registration statement forms at the time of filing and to test their eligibility to use Form 40-F for Annual Reports at the end of their fiscal years (other than the foreign private issuer requirement). Hence, FIRE provides an accommodation to MJDS filers, who are no longer required to use the domestic forms as soon as they lose their foreign private issuer status.

5 SEC Rel. 33-8959; 34-58620 (September 23, 2008).

6 In light of recent declines in stock prices, among other things, companies should consider whether to disclose whether they are taking an exemption from Nasdaq and NYSE shareholder approval requirements for certain issuances of securities and adoption of, or amendments to, equity compensation plans. Taking such an exemption, for example, could facilitate the raising of additional capital or the repricing of underwater options without the need for shareholder approval.

7 SEC Rel. 33-8879; 34-57026 (December 21, 2007).

8 See, for example, the SEC's roadmap for the potential use of financial statements prepared in accordance with IFRS by US issuers in SEC Rel. 33-8982; 34-58960 (November 14, 2008).

---

## Part II: Disclosure Requirements Applicable to Subsequent Annual Reports

This section briefly outlines FIRE rules and other regulatory developments affecting 2009 and subsequent Annual Reports. Although the provisions discussed in this section do not apply to the 2008 Annual Reports, foreign private issuers may need to take actions during 2008 to be in a position to make the required disclosures when these new rules become effective:

- **Auditor's Attestation of Internal Controls.** Section 404 of the Sarbanes-Oxley Act of 2002 requires each registrant's Annual Report to include an internal control report stating the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting, and an assessment of the effectiveness of the registrant's internal control structure and procedures for financial reporting. In addition, Section 404(b) requires the inclusion of a related attestation from the registrant's independent auditors. In June 2008, the SEC further extended the date by which nonaccelerated filers<sup>9</sup> must comply with the requirements of Section 404(b) until filing of their Annual Reports for fiscal years ending on or after December 15, 2009.<sup>10</sup> Therefore, foreign private issuers that qualify as nonaccelerated filers must provide the auditor's attestation for the first time in their 2009 Annual Reports. Management's report regarding its assessment of the effectiveness of internal control over financial reporting must still be provided by nonaccelerated filers in their 2008 Annual Reports.
- **Segment Data in Financial Statements.** Currently, foreign private issuers who present financial statements in Annual Reports otherwise fully in accordance with US GAAP may omit segment data required by US GAAP.<sup>11</sup> Such foreign private issuers may also provide a qualified audit opinion as a result of this omission of segment data. However, FIRE eliminates these accommodations and requires segment data disclosure in foreign private issuers' Annual Reports beginning with fiscal years ending on or after December 15, 2009. Accordingly, foreign private issuers who will be affected by this rule change should discuss this change with their independent auditors in 2008 so that they will be well-positioned to provide the appropriate disclosure in their 2009 Annual Reports.
- **Changes in and Disagreements with Certifying Accountants.** Unlike US reporting companies, foreign private issuers are not currently required under SEC rules to disclose information concerning changes in and disagreements with their certifying accountants in Annual Reports. Consequently, foreign private issuers are not currently required to publicly disclose whether a previously engaged certifying accountant resigned, declined to stand for re-election or was dismissed, or to publicly disclose certain disagreements or reportable events preceding a change in a certifying accountant. Foreign private issuers are not currently required to disclose if any types of transactions that caused prior disagreements were subsequently accounted for or disclosed in a manner different from that which the previously engaged certifying accountant would have concluded or required. New Item 16F of Form 20-F<sup>12</sup> will require disclosure in foreign private issuers' Annual Reports regarding changes in and disagreements with certifying accounts that is substantially identical to the public disclosure required of US reporting companies,<sup>13</sup> beginning with fiscal years ending on or after December 15, 2009.
- **ADR Fees and Payments.** Currently, foreign private issuers with sponsored American Depositary Receipt ("ADR") programs are only required to disclose fees and charges payable by ADR holders in registration statements initially filed in connection with the establishment of the ADR

---

<sup>9</sup> Rule 12b-2 of the Exchange Act defines "non-accelerated filers" as having a public float of less than US\$75 million.

<sup>10</sup> SEC Rel. 33-8934; 34-58028 (June 26, 2008).

<sup>11</sup> Currently, Item 17 of Form 20-F permits the omission of segment data presented in accordance with SFAS 131, so long as a breakdown of total revenues by category of activity and geographical market is provided.

<sup>12</sup> SEC Rel. 33-8959; 34-58620 (September 23, 2008).

<sup>13</sup> The substantive disclosure requirements for US reporting companies are found in Item 304 of Regulation S-K.

program. New Item 12D of Form 20-F<sup>14</sup> will require foreign private issuers to also disclose such information on an ongoing basis in their Annual Reports, beginning with fiscal years ending on or after December 15, 2009. In addition, new Item 12D will require foreign private issuers to disclose any payments they have received from depositaries in connection with their sponsored ADR programs.

We would be pleased to discuss any questions or concerns you may have regarding these new rule changes and to assist you in the preparation of your Annual Report in light of these changes.

■ **Accelerated Filing Deadline for Annual Reports.**

Currently, foreign private issuers are required to file their Annual Reports within six months of their fiscal year-end. FIRE will accelerate the Annual Report filing deadline to four months after a foreign private issuer's fiscal year-end, beginning with fiscal years ending on or after December 15, 2011.

■ **Reconciliation of Financial Statements to US GAAP.**

Foreign private issuers who do not present financial statements in accordance with US GAAP or IFRS are required to provide reconciliations to US GAAP in their Annual Reports. Currently, foreign private issuers are permitted to provide a limited reconciliation in accordance with Item 17 of Form 20-F in their Annual Reports. FIRE will eliminate this accommodation and require foreign private issuers to provide complete US GAAP reconciliations in accordance with Item 18 of Form 20-F,<sup>15</sup> beginning with fiscal years ending on or after December 15, 2011. However, FIRE will not eliminate the ability to provide limited US GAAP reconciliations for any third party financial statements that are required in foreign private issuers' Annual Reports (e.g., financial statements of an equity method investee or a significant acquired business).<sup>16</sup>

---

<sup>14</sup> SEC Rel. 33-8959; 34-58620 (September 23, 2008).

<sup>15</sup> Currently, Item 17 of Form 20-F permits the omission of footnote disclosures related to pension assets, obligations and assumptions, lease commitments, tax attributes, stock compensation awards, financial instruments and derivatives, among many others, unless they are otherwise required by the foreign private issuer's home country GAAP. Item 18 of Form 20-F requires such footnote disclosure.

<sup>16</sup> The amendments will also not eliminate the ability of Canadian issuers who participate in MJDS to provide limited US GAAP reconciliations in accordance with Item 17 of Form 20-F.

White & Case offers US securities law capabilities in the offices listed below. Please contact any of the lawyers listed below for additional information.

**Beijing** + 86 10 5912 9600

Stephen R. Payne – [payne@whitecase.com](mailto:payne@whitecase.com)

**Budapest** + 36 1 488 5200

Robert B. Irving – [rirving@whitecase.com](mailto:rirving@whitecase.com)

**Frankfurt** + 49 69 29994 0

James Black – [black@whitecase.com](mailto:black@whitecase.com)

**Helsinki** + 358 9 228 641

Petri Haussila – [phaussila@whitecase.com](mailto:phaussila@whitecase.com)

**Hong Kong** + 852 2822 8700

Jeremy C. Leifer – [jleifer@whitecase.com](mailto:jleifer@whitecase.com)

**Istanbul** + 90 212 275 7533

Laura Sizemore – [lsizemore@whitecase.com](mailto:lsizemore@whitecase.com)

**Johannesburg** + 27 11 341 4000

Gabor Molnar – [gmolnar@whitecase.com](mailto:gmolnar@whitecase.com)

**London** + 44 20 7532 1000

Francis Fitzherbert-Brockholes –  
[ffitzherbert-brockholes@whitecase.com](mailto:ffitzherbert-brockholes@whitecase.com)

Joshua G. Kiernan – [jkiernan@whitecase.com](mailto:jkiernan@whitecase.com)

David Becker – [dbecker@whitecase.com](mailto:dbecker@whitecase.com)

Robert S. Matthews – [rmatthews2@whitecase.com](mailto:rmatthews2@whitecase.com)

Sven E. Krogius – [skrogius@whitecase.com](mailto:skrogius@whitecase.com)

**Los Angeles** + 1 213 620 7700

Daniel H. Peters – [dpeters@whitecase.com](mailto:dpeters@whitecase.com)

Neil W. Rust – [nrust@whitecase.com](mailto:nrust@whitecase.com)

**Miami** + 1 305 371 2700

Mark O. Bagnall – [mbagnall@whitecase.com](mailto:mbagnall@whitecase.com)

Kenneth C. Ellis – [kellis@whitecase.com](mailto:kellis@whitecase.com)

Jorge L. Freeland – [jfreeland@whitecase.com](mailto:jfreeland@whitecase.com)

**Mexico City** + 5255 5540 9600

Alberto Sepúlveda Cosío –

[asepulveda-cosio@whitecase.com](mailto:asepulveda-cosio@whitecase.com)

**New York** + 1 212 819 8200

Ronald Brody – [rbrody@whitecase.com](mailto:rbrody@whitecase.com)

Colin J. Diamond – [cdiamond@whitecase.com](mailto:cdiamond@whitecase.com)

David Johansen – [djohansen@whitecase.com](mailto:djohansen@whitecase.com)

N. Adele Hogan – [ahogan@whitecase.com](mailto:ahogan@whitecase.com)

Gary Kashar – [gkashar@whitecase.com](mailto:gkashar@whitecase.com)

Kevin Keogh – [kkeogh@whitecase.com](mailto:kkeogh@whitecase.com)

Jin Kim – [jkim@whitecase.com](mailto:jkim@whitecase.com)

Howard Kleinman – [hkleinman@whitecase.com](mailto:hkleinman@whitecase.com)

Mark L. Mandel – [mmandel@whitecase.com](mailto:mmandel@whitecase.com)

Daniel Nam – [dnam@whitecase.com](mailto:dnam@whitecase.com)

Tomer Pinkusiewicz – [tpinkusiewicz@whitecase.com](mailto:tpinkusiewicz@whitecase.com)

Laura Sizemore – [lsizemore@whitecase.com](mailto:lsizemore@whitecase.com)

Kenneth Suh – [ksuh@whitecase.com](mailto:ksuh@whitecase.com)

John Vetterli – [jvetterli@whitecase.com](mailto:jvetterli@whitecase.com)

Nazim Zilkha – [nzilkha@whitecase.com](mailto:nzilkha@whitecase.com)

**Palo Alto** + 1 650 213 0300

Jeffrey Washenko – [jwashenko@whitecase.com](mailto:jwashenko@whitecase.com)

**Prague** + 420 255 771 111

Michal Dlouhý – [mdlouhy@whitecase.com](mailto:mdlouhy@whitecase.com)

**São Paulo** + 55 11 3147 5600

Donald E. Baker – [dbaker@whitecase.com](mailto:dbaker@whitecase.com)

**Shanghai** + 86 21 6132 5900

John C. Leary – [jleary@whitecase.com](mailto:jleary@whitecase.com)

**Singapore** + 65 6225 6000

Yin Mei Lock – [ylock@whitecase.com](mailto:ylock@whitecase.com)

Kaya H. Proudian – [kproudian@whitecase.com](mailto:kproudian@whitecase.com)

**Washington, DC** + 1 202 626 3600

Edward R. Neaheer (Ned), Jr. –

[eneaheer@whitecase.com](mailto:eneaheer@whitecase.com)

This Securities Update is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Update should not be acted upon in any specific situation without appropriate legal advice, and it may include links to websites other than the White & Case website.

White & Case has no responsibility for any websites other than its own, and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Securities Update is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.

White & Case LLP is a limited liability partnership registered as such in the State of New York.

© 2009 White & Case LLP