Ongoing reporting obligations

Requirements for foreign private issuers

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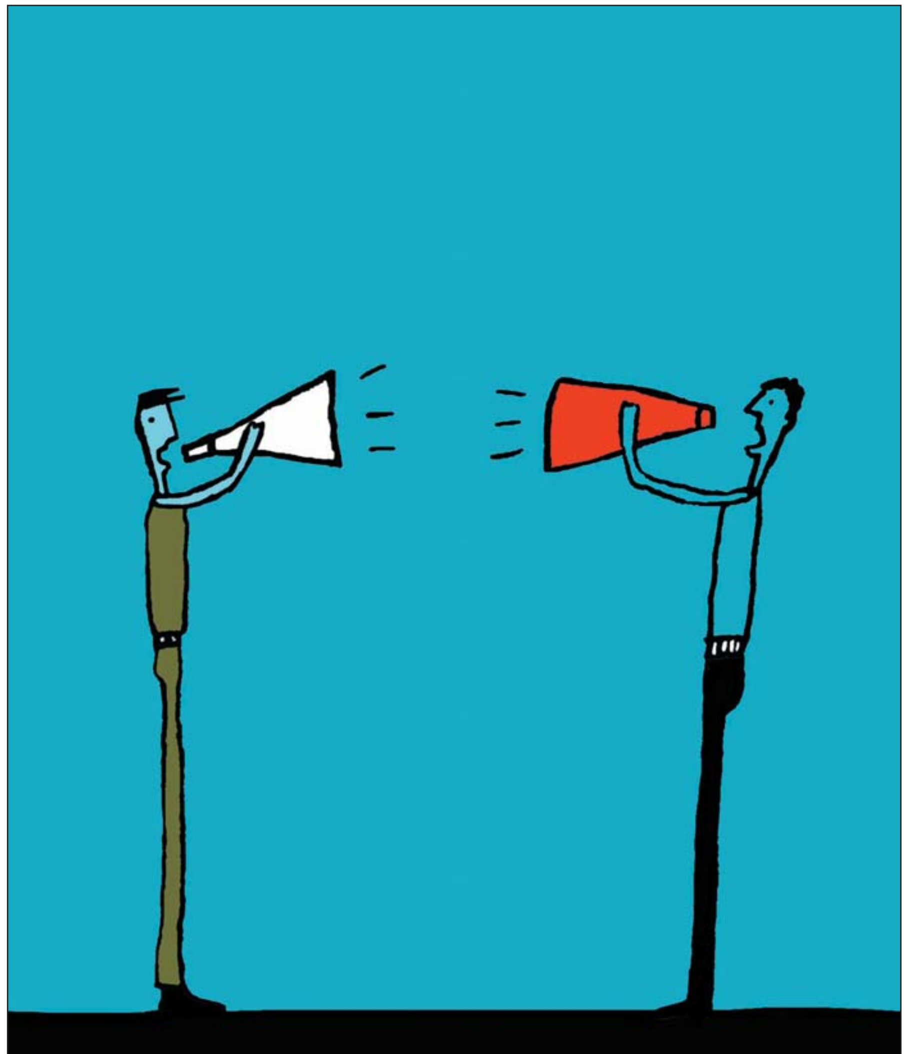

This article provides a general description of the ongoing reporting and other compliance obligations imposed by US securities laws and stock exchange listing rules on non-US companies that are both "foreign private issuers" and "reporting companies" under US securities laws.

The term "foreign private issuer" includes most companies organised outside the US. However, a non-US company is not a foreign private issuer if a majority of its shares are held by US residents and any of the following applies (*Rule 405, US Securities Act of 1933* (Securities Act)):

- A majority of its directors and executive officers are US citizens or residents.
- Its business is administered from inside the US.
- A majority of its assets are located in the US.

If the company is not a foreign private issuer, it is required to report and comply, on an ongoing basis, as if it were a US

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company. In all other cases, the company is a foreign private issuer, and enjoys the relatively more relaxed ongoing US reporting and securities compliance regime described in this article.

Currently, a foreign private issuer could lose that status if it ceases to meet the test described above. However, the Securities and Exchange Commission (SEC) has recently amended this rule, and from 6 December 2008, a non-US company need only assess whether or not it is a foreign private issuer once a year, at the end of its second fiscal quarter. If it fails the test, it must begin reporting as if it were a US company in its next fiscal year.

In most cases, a foreign private issuer must become a "reporting company" in the US if it does one or more of the following:

- Registers securities with the SEC.
- Lists on a US securities exchange.
- Has 300 or more US-resident beneficial owners of its shares and does not comply with Rule 12g3-2(b) under the Securities Exchange Act of 1934 (Exchange Act). Rule 12g3-2(b) provides an exemption from reporting company status in certain circumstances (*see box "Alternatives to reporting company status in the US"*).

A reporting company is required to:

- File periodic reports with the SEC under the Exchange Act.
- Abide by most of the corporate governance and other requirements of the US Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).
- Comply with other US laws (*see box "Other US laws and rules to bear in mind"*).

As a reporting company, the issuer is commonly said to be a "public" company in the US and to have "gone public".

Alternatives to reporting company status in the US

Not every foreign private issuer with securities circulating in the US needs to be a reporting company and therefore comply with the Securities Exchange Act of 1934 (Exchange Act) and the Sarbanes-Oxley Act of 2002. To tap the US capital markets while avoiding reporting company status, an issuer should:

- Offer and sell securities in the US on a private basis only. This can be accomplished if, for example, the securities are marketed and sold only to "qualified institutional buyers" (QIBs) as defined in the Securities Act of 1933 (Securities Act) Rule 144A (essentially, institutions that manage at least $100 million of investments in securities) or "accredited investors" as defined in Securities Act Regulation D (essentially, individuals with annual incomes over $200,000 and entities with assets over $5 million).
- Not list securities on a national securities exchange in the US or have them traded on the OTC Bulletin Board in the US. However, the issuer can have securities traded in the US over-the-counter market (including on the Pink Sheets electronic quotation service) if it meets the requirements described in the next bullet, below.
- Keep the number of US-resident beneficial owners below 300, or comply with Exchange Act Rule 12g3-2(b). All US-resident beneficial owners must be counted, whether they have acquired their securities from the issuer or in the aftermarket. If there is a risk that the number of US-resident beneficial owners may reach or exceed 300, the issuer should comply with Rule 12g3-2(b). Rule 12g3-2(b) automatically exempts a foreign private issuer from registering a class of securities under the Exchange Act so long as the issuer:

- maintains a listing of the securities on one or more foreign securities exchanges and, during the issuer's last fiscal year, at least 55% of the worldwide trading of those securities took place on one or two of those foreign exchanges and the US was not the largest trading market for those securities. An issuer will have to re-examine the trading volumes in each relevant jurisdiction after each fiscal year in order to determine whether it is still eligible for the exemption;
- has published, in English, on its website or through an electronic information delivery system generally available to the public in its primary trading market, from the first day of its last fiscal year, any material information that the issuer: makes public or is required to make public pursuant to the laws of the country of its organisation; includes in any filings made with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; or distributes or is required to distribute to its security holders; and
- has no existing reporting obligations under Exchange Act Sections 13(a) or 15(d).

The Exchange Act Rule 12g3-2(b) requirements described above are the result of SEC amendments that took effect in early October 2008. Issuers that previously held a Rule 12g3-2(b) exemption have three years to comply with the new Rule 12g3-2(b) requirements or lose their exemption.

See Article, "Avoiding US reporting obligations: exemptions for non-US issuers", page 39.

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ONGOING REPORTING OBLIGATIONS

Foreign private issuers that are reporting companies are required to file annual reports and also periodic reports on the happening of certain events.

Annual Report on Form 20-F

A foreign private issuer that is a reporting company must file an annual report for each fiscal year on Form 20-F with the SEC, within six months after the end of that fiscal year. (The deadline will be accelerated to four months after the end of the fiscal year for all fiscal years ending on or after 15 December 2011.) This report is typically referred to as the issuer's "20-F". In addition to filing the 20-F with the SEC, the issuer must file it with any US securities market on which its securities are listed.

Form 20-F specifies the subject matters that must be discussed and the particular, detailed financial and non-financial disclosures that must be made in the annual report. The Form 20-F requirements are similar to the requirements imposed when an issuer is preparing its first public offering prospectus in the US. Required items include an "Operating and Financial Review and Prospects" section that, among other things, explains financial statement changes over recent fiscal periods, a "Risk Factors" section and consolidated group financial statements that are (in most cases) prepared under, or reconciled to, US generally accepted accounting principles (US GAAP) and (in all cases) are audited under US generally accepted auditing standards by an auditor that meets US independence standards.

Additional required disclosures that may go beyond an issuer's previous prospectus disclosures include:

- Certifications by the issuer's chief executive officer (CEO) and chief financial officer (CFO) required under Sections 302 and 906 of Sarbanes-Oxley (*see "Ongoing Sarbanes-Oxley obligations" below*).

Other US laws and rules to bear in mind

Insider trading prohibitions. Issuers should adopt an anti-insider trading policy to reduce the possibility of being found liable in connection with any insider trading of the issuer's securities by employees or others. The Securities and Exchange Commission (SEC), or a private litigant, can bring a claim against a person for insider trading under Sections 10(b) of and Rule 10b-5 under the Securities and Exchange Act of 1934 (Exchange Act) (and against those that control such person under Section 20(a) of the Exchange Act), among other provisions. Under Section 21A of the Exchange Act the SEC can bring a civil action against any person that controls a person who trades while in possession of non-public information, if the control person is on notice that such trading may occur and does not take appropriate steps to prevent it. If the issuer is found liable, the court can impose a civil penalty of the greater of $1 million and up to three times the loss avoided or the profit realised.

Regulation FD. US companies that are reporting companies must comply with this specific set of rules in order to avoid selective disclosure of material non-public information, as might happen if, for example, a company gives advance notice of material developments to a research analyst. Although Regulation FD does not apply to foreign private issuers, such issuers should seek to avoid selective disclosure in the US in order to steer clear of potential claims under general US anti-fraud principles, and can use Regulation FD as a guide.

Foreign Corrupt Practices Act (FCPA). Reporting companies, whether US companies or non-US companies, may violate this statute if they or their employees or agents engage in bribery of government officials anywhere in the world. FCPA enforcement has been stepped up in recent years (*see Article, "The Foreign Corrupt Practices Act: US legislation with global implications", page 167*).

Office of Foreign Assets Control (OFAC). Companies that avail themselves of the US capital markets, and also do business with certain individuals or entities or the companies or governments of certain countries that have been designated by the US government as suspect or hostile, must structure or limit their activities appropriately or they may attract sanctions from OFAC, a part of the US Treasury Department. OFAC issues specific prohibitions on business activities that vary among the various designated individuals, entities and countries.

Reporting by shareholders. A person who accumulates beneficial ownership of 5% or more of a class of a reporting company's voting securities is required to report to the SEC on Schedule 13D within ten days of reaching that ownership threshold. Schedule 13D requires disclosure of, among other things, the percentage of securities owned and whether the beneficial owner plans to effect a change of control of the issuer. Amendments to the Schedule 13D must be filed every time there is a material change in the facts previously disclosed, typically including percentage changes in ownership of 1% or more (or possibly less, depending on the circumstances). Institutional investors that do not intend to influence control of the issuer may often instead file a short-form Schedule 13G. Issuers are not liable for failures by their shareholders to keep their Schedules 13D and 13G up to date, but out-of-date filings can cause complications in takeover situations.

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Rule 10A-3 audit committees

Securities Exchange Act of 1934 Rule	Requirement
10A-3(b)(1)	Each member of the audit committee must be a member of the issuer's board of directors and must otherwise be independent.
10A-3(b)(2)	The audit committee must be directly responsible for the appointment, compensation and oversight of the issuer's independent auditor (including the resolution of disagreements between management and the auditor regarding financial reporting). The independent auditor must report directly to the audit committee.
10A-3(b)(3)	The audit committee must establish procedures for: • The receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters. • The confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters.
10A-3(b)(4)	The audit committee must have the authority to engage independent counsel and other advisers as it determines necessary to carry out its duties.
10A-3(b)(5)	The issuer must provide for appropriate funding, as determined by the audit committee, for: • The payment of compensation to the independent auditor. • The payment of compensation to any outside advisers engaged by the audit committee under Rule 10A-3(b)(4). • Ordinary administrative expenses of the audit committee that are necessary or appropriate for the audit committee to incur in carrying out its duties.

- A report from the issuer's management concerning the issuer's internal financial controls, accompanied by an attestation from the issuer's independent auditor in respect of that report (*see "Ongoing Sarbanes-Oxley obligations" below*).

- Disclosure of the conclusions of the CEO and CFO regarding the effectiveness of the issuer's overall disclosure controls and procedures, based on their review as of the end of the fiscal year (*see "Ongoing Sarbanes-Oxley obligations" below*).

- Disclosure of the determination of the issuer's board of directors as to whether it has an "audit committee financial expert" serving on its audit committee, and if it does not, why not (*Item 16A, Form 20-F*).

- Disclosure as to whether the issuer has adopted a code of ethics that applies to its principal executive, financial and accounting officers, and if it has not, why not. The code must be filed as an exhibit to the 20-F or posted on the issuer's website, or the issuer must undertake to provide free copies on request. An issuer must also report any amendment to the code relating to covered persons, as well as the nature and date of any waivers of the code granted in respect of specific covered persons (*Item 16B, Form 20-F*).

- Disclosure of payments made to the issuer's independent auditor (*Item 16C, Form 20-F*).

- If the foreign private issuer is availing itself of an exemption from the listing standards for audit committees, disclosure required by Exchange Act Rule 10A-3(d) (*Item 16D, Form 20-F*). (*For information on the listing standards for audit committees see box "Rule 10A-3 audit committees".*)

- Disclosure concerning a change of and disagreements with the issuer's independent auditor (*Item 16F, Form 20-F,* effective for fiscal years ending on or after 15 December 2009).

- A concise summary of the significant ways in which the corporate governance practice of the foreign private issuer's home country differ from those followed by US companies under the

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relevant US stock exchange's listing rules (*Item 16G, Form 20-F, effective for fiscal years ending on or after 15 December 2008*).

- Disclosure of the fees and other charges paid by holders of American Depositary Receipts (ADRs) to depositaries, as well as any incentive and other payments made by depositaries to the foreign private issuer whose securities underlie the ADRs (*Item 12D3, Form 20-F, effective for fiscal years ending on or after 15 December 2009*).

The SEC has recently adopted rules that allow foreign private issuers to include financial statements that are prepared in accordance with International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB) in their SEC filings, without reconciling those financial statements to US GAAP. This change should permit many foreign private issuers to make significant savings of time and money. However, foreign private issuers using IFRS other than as issued by the IASB, or using another non-US GAAP standard, will continue to be subject to the US GAAP reconciliation requirement.

The new rules apply to financial statements for financial years ending after 15 November 2007 or for interim periods within those years. A limited accommodation has been made for EU foreign private issuers that have historically prepared their financial statements by applying the EU's carve-out from IFRS 39 with respect to hedge accounting for certain financial instruments. For those issuers' first two financial years that end after 15 November 2007, the SEC will accept financial statements that do not include a reconciliation to US GAAP if those financial statements otherwise comply with, and include a reconciliation to, IFRS as issued by the IASB.

Failure to file a 20-F by the date on which it is due will preclude a foreign private issuer, at least temporarily, from using "short form" Securities Act registration statements for the registration of new securities. The use of such short form registration statements can be valuable because they usually allow issuers to sell new securities more quickly and economically than in an initial public offering. The issuer must also publicly state the reasons for missing the Form 20-F due date and may attract other SEC and securities exchange sanctions, such as censures, fines and further disqualifications. As a result, a foreign private issuer should take care to file its 20-Fs on time.

Periodic reports on Form 6-K

A foreign private issuer subject to reporting company obligations is required to furnish reports on Form 6-K to the SEC "promptly" upon the occurrence of certain events, which are listed below. In addition, the reports must be filed with the issuer's US securities exchanges.

A 6-K report consists of a cover page, a signature page and a copy of reports or documents that:

- The issuer is required to make public in its home country, are filed with and made public by any foreign securities exchange, or are distributed to security holders.

- Contain information that is material to the issuer and its subsidiaries concerning one or more of the following:

  - changes in business, management or control;

  - acquisitions or dispositions of assets;

  - bankruptcy or receivership;

  - changes in certifying accountants;

  - the issuer's financial condition and results of its operations;

  - legal proceedings;

  - changes in securities or in the security for registered securities;

  - defaults upon senior securities;

  - increases or decreases in the amount of securities or indebtedness outstanding;

  - the results of the submission of matters to a vote of security holders;

  - transactions with directors, officers, or principal security holders;

  - the granting of options or payments of other compensation to directors or officers; and

  - any other information that the issuer deems to be important to security holders.

There is an interesting, and intentional, omission from the list of required 6-K disclosure items set out above. US reporting companies (and non-US reporting companies that fall outside the foreign private issuer definition) are required by the SEC to file quarterly reports that include quarterly financial statements.

There is no such requirement for foreign private issuers, in Form 6-K or elsewhere (unless the issuer is required to produce such reports in its home country or by a non-US securities exchange or distributes such reports to security holders, in which case, by the terms of Form 6-K it must also furnish such reports to the SEC). Nevertheless, in certain securities offerings (for example, in offerings of many debt products), underwriting banks may require a foreign private issuer to agree, on a contractual or similar basis, to issue quarterly reports and quarterly financial statements.

Under current SEC staff practice, whether a Form 6-K has been filed sufficiently "promptly" depends upon the type and significance of the disclosure being made and, if applicable, the amount of time required to prepare an English translation.

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In the SEC's view, whenever an issuer publishes a press release containing important information about its business or prospects, a copy of that press release should be furnished using Form 6-K on or around the same business day of its original publication. In practice, many issuers furnish most or all of their press releases using Form 6-K, and furnish their more important releases immediately after they are published.

The Form 6-K reporting system does not require the disclosure of all information material to the issuer on a continuous basis. Such "continuous" disclosure obligations are imposed in the UK, Australia and certain other jurisdictions, but not in the US. However, if a foreign private issuer has investors in more than one jurisdiction, it would be well advised to make the same disclosures at the same time in all its jurisdictions, regardless of the relative rigor or laxity of particular disclosure rules in particular jurisdictions. This will help it avoid the investor relations and other problems that could arise if the issuer were to make different disclosures to different jurisdictions at different times.

A Form 6-K does not need to be certified by an issuer's CEO or CFO.

Liability for false or misleading statements

Section 10(b) of and Rule 10b-5 under the Exchange Act provide for general fraud liability in connection with misconduct in the sale of securities. Forms 20-F and 6-K and all public statements by an issuer may be subject to liability under these provisions. Liability arises from knowledge of a misstatement in, or an omission from, the required disclosure, or recklessness with respect to the accuracy and completeness of such disclosure.

Generally, a director or officer will not be found liable based solely on their status; sufficient involvement in the conduct giving rise to the liability must be shown. Both the SEC and private litigants can bring actions under these provisions.

Any person who makes or causes to be made a false or misleading statement in a 20-F is liable to any person who traded in reliance on the statement (*Section 18, Exchange Act*). The issuer itself, its officers and directors and others can be liable. The defendant can establish a defence by proving that he or she acted in good faith and had no knowledge that the statement was false or misleading.

Every person who directly or indirectly controls a person liable under the Exchange Act (including the directors and officers of an issuer that is liable) is jointly and severally liable for that person's violation, unless the controlling person acted in good faith and did not directly or indirectly induce the acts constituting the violation (*Section 20(a), Exchange Act*).

The Private Securities Litigation Reform Act of 1995 is intended to provide a safe harbor from liability for false or misleading statements that are forward-looking and are made without knowledge of their false or misleading character. The issuer can avoid liability by accompanying the forward-looking statements with meaningful cautionary language identifying important risk factors that could cause actual results to differ materially from those suggested in the forward-looking statements. Such language should usually be included in 20-Fs, 6-Ks, annual reports to shareholders, press releases and any other public statements the issuer makes.

ONGOING SARBANES-OXLEY OBLIGATIONS

Sarbanes-Oxley was passed in 2002 in response to the failure of Enron and other corporate scandals. Since then, the Act has added, often on a delayed and phased-in basis, a variety of disclosure, corporate governance and other reforms to the securities compliance regime that applies to reporting companies.

Most Sarbanes-Oxley provisions apply to all reporting companies, although some provisions only apply to reporting companies that are listed in the US. These latter provisions have been imposed through rule changes at the securities exchanges.

Sarbanes-Oxley makes only a few concessions to foreign private issuers. In most cases, the same or similar rules apply regardless of whether the reporting company is a US company or a non-US company.

Sarbanes-Oxley provisions that amend disclosure rules have been incorporated into the disclosure requirements imposed under Form 20-F and the other forms an issuer may have to file, including in connection with the preparation of prospectuses for new securities.

Internal control over financial reporting

Pursuant to Sarbanes-Oxley, reporting issuers are required to maintain "internal control over financial reporting" (*Rules 13a-15(a) and 15d-15(a), Exchange Act*). Internal control over financial reporting is defined as a process designed by, or under the supervision of, the issuer's CEO and CFO, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles.

The compliance requirements for internal control over financial reporting are as follows.

Management's report. Management is required to evaluate and report on the effectiveness of the issuer's internal control over financial reporting on an annual basis (*Rules 13a-15(c) and 15d-1(c), Exchange Act*). The report must state whether the issuer's internal control over financial reporting is effective and disclose all material weaknesses and material changes in internal controls (*Item 308(a)(3), Regulation S-K*). In June 2007, the SEC approved the issuance of interpretive guidance regarding management's report (*Release No. 33-8810*) and adopted

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rule amendments intended to help issuers strengthen the effectiveness of their internal control evaluations while reducing unnecessary costs (*Release No. 33-8809*).

Auditor's attestation. Management's internal control report is required to be accompanied by an attestation from the issuer's independent auditor (*Item 308(b), Regulation S-K*). To give the attestation, the independent auditor must conduct an audit of the issuer's internal control over financial reporting under Auditing Standard No. 5 promulgated by the Public Company Accounting Oversight Board (PCAOB), a new regulator created by Sarbanes-Oxley and overseen by the SEC. Auditing Standard No. 5 specifies procedures for the audit and the format of the attestation.

Management's evaluation and disclosure. Management is required to evaluate material changes in financial internal controls on an annual basis (*Rules 13a-15(d) and 15d-15(d), Exchange Act*) and make appropriate disclosures in respect of them in the 20-F (*Item 308(c), Regulation S-K*).

All reporting companies that are "accelerated filers" are currently required to include management's report on internal controls, together with the independent auditor's attestation, in their 20-Fs. An accelerated filer is a company that has a public float of at least $75 million as of the last business day of the company's most recently completed second fiscal quarter, has been subject to the reporting requirements of the Exchange Act for at least 12 months, has filed at least one annual report on Form 20-F and is not eligible to use the SEC's special forms for small business issuers (*Rule 12b-2, Exchange Act*).

Non-accelerated filers must include management's report beginning with fiscal years ending on or after 15 December 2007 and the auditor's attestation beginning with fiscal years ending on or after 15 December 2009. Newly public companies are not required to include these items in their first 20-F.

Disclosure controls and procedures

Reporting companies must establish and maintain "disclosure controls and procedures" designed to ensure that information generally, including non-financial information, required to be disclosed by the issuer under the Exchange Act is recorded, processed, summarised and reported in a timely fashion, and accumulated and communicated to the issuer's management to allow for timely decisions about disclosure. The regime governing general disclosure controls and procedures is similar to the regime governing internal control over financial reporting, minus the independent auditor's attestation:

- An issuer must maintain disclosure controls and procedures (*Rules 13a-15(a) and 15d-15(a), Exchange Act*).

- An issuer's management must evaluate, with the participation of the CEO and CFO, the effectiveness of the issuer's disclosure controls and procedures as of the end of each fiscal year (*Rules 13a-15(b) and 15d-15(b), Exchange Act*).

- The issuer must disclose the conclusions of its CEO and CFO regarding the effectiveness of the issuer's disclosure controls and procedures, based on their review, in its 20-F for that year (*Item 307, Regulation S-K*).

Section 302 certifications

A reporting company is required to file, as an exhibit to its 20-F, a certificate signed by the company's CEO and CFO certifying as to each officer that, among other things:

- The officer has reviewed the 20-F.

- Based on the officer's knowledge, the 20-F does not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

- Based on the officer's knowledge, the financial statements and other financial information included in the 20-F fairly present in all material respects the financial condition, results of operations and cash flows of the issuer.

- The officers are responsible for establishing and maintaining disclosure controls and procedures and internal control over financial reporting.

The form of the certification is set out in Exhibit 12 to Form 20-F. The wording of the certification may not be changed in any respect (*Rules 13a-14(a) and 15d-14(a), Exchange Act*).

False Section 302 certifications are subject to civil liability under Section 18 of the Exchange Act and Section 10(b) of and Rule 10b-5 under the Exchange Act. A false certification may also have liability consequences under Sections 11 and 12(a)(2) of the Securities Act, if the accompanying 20-F is incorporated by reference in the registration statement and prospectus being used in connection with a sale of securities. Section 11 of the Securities Act makes the issuer and others liable for material misstatements and omissions in a registration statement for the sale of securities. Section 12(a)(2) of the Securities Act makes a seller of securities liable to the buyer for material misstatements or omissions in the prospectus used in the sale.

Section 906 certifications

Section 906 of Sarbanes-Oxley requires an issuer's CEO and CFO to certify that the issuer's 20-F fully complies with Exchange Act requirements and that the information contained in the 20-F fairly presents, in all material respects, the issuer's financial condition and results of operations.

Section 906 certifications are required to be furnished with the Form 20-F. Section 906 exists alongside Section 302 in order to add potential criminal liability for CEOs and CFOs who make false certifications. The CEO or CFO who certifies

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under Section 906, "knowing" that the 20-F does not comport with the certification, is liable for a fine of up to $1 million or imprisonment for up to ten years, or both.

The CEO or CFO who "willfully" certifies under Section 906, "knowing" that the 20-F does not comport with the certification, is liable for a fine of up to $5 million or imprisonment for up to 20 years, or both. A false Section 906 certificate also attracts liability under Section 10(b) of and Rule 10b-5 under the Exchange Act.

Forfeiture of bonuses

Section 304 of Sarbanes-Oxley requires CEOs and CFOs to disgorge bonuses and compensatory stock profits received by them during the 12-month period following the first public issuance or filing of a financial document with respect to which the issuer is later required to prepare an accounting restatement due to the issuer's material non-compliance as a result of misconduct with any financial reporting requirement. It is unclear whether the term "misconduct" applies to simple mistakes as well as willful, knowing or reckless conduct.

Prohibition on extending credit to directors and executive officers

Section 402 of Sarbanes-Oxley prohibits an issuer from extending or maintaining credit, or arranging for the extension of credit, or renewing an extension of credit, in the form of a personal loan to or for any director or executive officer of the issuer, subject to certain exceptions.

Blackout trading restrictions

Section 306 of Sarbanes-Oxley prohibits directors and executive officers from acquiring or transferring equity securities of the issuer during issuer pension fund "blackout periods." The SEC has adopted Regulation Blackout Trading Restrictions (Regulation BTR) to implement Section 306. Regulation BTR prohibits, subject to certain exceptions, any director or executive officer of an issuer from purchasing, selling or otherwise transferring equity securities of the issuer during any blackout period applicable to the securities, if the officer acquires or previously acquired the securities in connection with his or her service or employment as a director or officer. The issuer has certain obligations to notify its directors and officers of blackout periods.

For a foreign private issuer, a blackout period generally means any period of more than three consecutive business days during which the ability to purchase or sell an interest in the issuer's equity securities held in an individual's pension fund account is temporarily suspended with respect to 50% or more of participants or beneficiaries located in the US and either of the following applies:

- The number of participants and beneficiaries located in the US subject to the temporary suspension exceeds 15% of the total number of employees of the issuer and its consolidated subsidiaries.
- More than 50,000 participants or beneficiaries located in the US are subject to the temporary suspension.

Profits realised by an insider in violation of Section 306 are recoverable by the issuer. If the issuer fails to institute an action to recover such profits within 60 days after being asked to do so by a shareholder, the shareholder can initiate the action to recover the profits on behalf of the issuer (*see box "Alternatives to Sarbanes-Oxley compliance"*).

Alternatives to Sarbanes-Oxley compliance

Foreign private issuers that are reporting companies in the US must comply with the Sarbanes-Oxley Act of 2002. The only alternatives are:

- To avoid becoming a reporting company in the US in the first place (*see box "Alternatives to reporting company status in the US"*).
- If the issuer is already under US reporting company obligations, to de-list from the issuer's US exchanges and de-register the issuer's securities with the Securities and Exchange Commission (SEC).

De-listing is usually not difficult, but de-registering can be difficult and expensive. The SEC has recently liberalised the rules governing de-registration by foreign private issuers (see *Article, "Exiting the US markets: more workable rules", page 59*).

LISTING MAINTENANCE REQUIREMENTS

The two largest securities markets in the US are the New York Stock Exchange (NYSE) and the NASDAQ Stock Market (NASDAQ). To remain listed on the NYSE or NASDAQ, foreign private issuers must comply on an ongoing basis with certain minimum quantitative requirements, including share price and capitalisation requirements. These requirements differ depending on the exchange, but for each exchange they can be less rigorous than the requirements that had to be met in order to be granted the initial listing.

The NYSE's quantitative requirements are in Section 802.00 of the NYSE Listed Company Manual (*www.nyse.com/regulation/listed/1182508124422.html*). NASDAQ's quantitative requirements are at *www.nasdaq.com/about/nasdaq_listing_req_fees.pdf*.

In addition to quantitative requirements, the issuer must comply on an ongoing basis with certain qualitative rules imposed by the exchanges. These requirements principally apply to the issuer's corporate

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governance practices, and many have been imposed as a result of Sarbanes-Oxley. The requirements differ to a certain extent depending on the exchange.

NYSE qualitative rules

Consistent with Sarbanes-Oxley, the NYSE allows foreign private issuers in most instances to follow their home country corporate governance practices rather than the NYSE's standard corporate governance practices (*NYSE Listed Company Manual Section 303A.00*). The only exceptions to this policy are that foreign private issuers must comply with the following:

- The issuer must have an audit committee of independent board members that satisfies the requirements of Rule 10A-3 under the Exchange Act. The issuer should ensure that it fulfils the requirements of Rule 10A-3 in a manner consistent with the guidance provided by the SEC in SEC Release No. 34-47654 (1 April 2003) (*NYSE Listed Company Manual Section 303A.06*).

- The issuer must disclose how the home-country corporate governance practices it follows differ from those followed by US companies applying the NYSE's standard corporate governance practices. The NYSE requires a brief, general summary of the significant differences, not a long analysis. (*NYSE Listed Company Manual Section 303A.11*). This is the same disclosure required by Item 16G of Form 20-F and the issuer satisfies this requirement by including the disclosure in its Form 20-F.

- The issuer's CEO must promptly notify the NYSE in writing if the issuer has not complied with the requirements set out in the two bullet points above (*NYSE Listed Company Manual Section 303A.12(b)*).

- The issuer must submit an annual written affirmation to the NYSE and interim written affirmations regarding any changes to the issuer's board or audit committee (*NYSE Listed Company Manual Section 303A.12(c)*).

Securities registered by foreign private issuers under the Exchange Act are exempt from the proxy solicitation rules under Section 14 of the Exchange Act. These rules specify minimum procedures for the gathering of shareholder votes for shareholders' meetings. Despite the Exchange Act exemption, however, the NYSE requires foreign private issuers listed on its exchange to solicit proxies for all meetings of shareholders. The NYSE may grant an exemption from this rule when applicable foreign law precludes compliance or makes compliance virtually impossible.

NASDAQ qualitative rules

Consistent with Sarbanes-Oxley, NASDAQ also allows foreign private issuers in most instances to follow their home country corporate governance practices rather than NASDAQ's standard corporate governance practices. The only exceptions to this policy are that foreign private issuers must comply with the NASDAQ corporate governance requirements relating to:

- Audit committees. Specifically, the issuer must have an audit committee charged with the specific responsibilities and authority necessary to comply with Rules 10A-3(b)(2), (3), (4) and (5) under the Exchange Act (*Nasdaq Stock Market Rule 4350(d)(3)*) and must consist of members who each satisfy the independence requirements of Rule 10A-3(b)(1) under the Exchange Act (*Nasdaq Stock Market Rule 4350(d)(2)(A)(ii)*).

- Disclosure regarding how the home-country corporate governance practices followed by the issuer differ from those followed by US companies applying NASDAQ's standard corporate governance practices (*Nasdaq Stock Market Rule 4350(a)(1)*).

- Disclosure of an audit report that raises doubt about an issuer's ability to continue as a going concern for a reasonable amount of time (*Nasdaq Stock Market Rule 4350(b)(1)(B)*).

- Notification of material non-compliance with the qualitative listing requirements (*NASDAQ Stock Market Rule 4350(m)*).

NASDAQ allows foreign private issuers listed on its exchange to follow their home country proxy solicitation rules, rather than NASDAQ's Exchange Act-based proxy solicitation rules, so long as this is disclosed in the issuer's 20-F or on its website, and the home country practice is described. If a NASDAQ-listed foreign private issuer does not follow its home country proxy rules, NASDAQ requires that it solicit proxies for all meetings of shareholders.

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