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On September 23, 2008 the Securities and Exchange Commission ("SEC") announced the adoption of a number of amendments to Form 20-F, one of which simplifies compliance with U.S. laws for Canadian companies, and others that are intended to improve the information that is available to investors. This is part of a greater SEC trend to make entry and continued participation in the U.S. capital markets by non-U.S. companies easier and less expensive. In our opinion, this trend is continuing to gain increased momentum.

The recent amendments to Form 20-F are being phased in over a three year period and: (1) permit Canadian companies to test their eligibility to file on Form 20-F on an annual basis, rather than on the continuous basis that is currently required; (2) for fiscal years ending after December 15, 2009, eliminate an instruction to Item 17 of Form 20-F that permits certain foreign private issuers<sup>1</sup> to omit segment data from their U.S. GAAP financial statements; (3) for fiscal years ending after December 15, 2011, require foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F; (4) for fiscal years ending after December 15, 2011, shorten the filing deadline for the Annual Report on Form 20-F from six months to four months; and (5) for fiscal years ending after December 15, 2009 amends Form 20-F to require Canadian issuers to disclose (a) information about changes in their certifying accountant, similar to the disclosures already required in Canada, and (b) for companies listed on a U.S. stock exchange such as the New York Stock Exchange or American Stock Exchange, the differences between the Canadian company's corporate governance practices and those applicable to U.S. companies under the U.S. exchange's listing rules.

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<sup>1</sup> "Foreign private issuer" is defined in Exchange Act Rule 3b-4(c). A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States, (ii) more than 50 percent of its assets are located in the United States, or (iii) its business is principally administered in the United States.

## I. Background

When the SEC originally adopted Form 20-F in 1979, the form used by foreign private issuers to register a class of securities under the Exchange Act and to file annual reports,<sup>2</sup> its objective was to mandate disclosures made by foreign private issuers comparable to those provided by U.S. issuers. Because of differences in the national laws and accounting regulations applicable to foreign private issuers, over the years the SEC provided numerous disclosure accommodations for Canadian issuers in the Form 20-F.

The amendments to Form 20-F are part of a recent series of initiatives by the SEC that seek to make the U.S. capital markets more attractive and accessible to Canadian companies, by reducing the cost of entering the U.S. capital markets and complying with ongoing reporting requirements. In addition to the changes related to the Form 20-F discussed in this memo, the SEC has, among other initiatives (i) relaxed the rules for cross-border offerings, such as tender offers, right offerings, exchange offers, and other business combinations, to make it easier for U.S. shareholders to participate in such transactions, (ii) adopted rules permitting Canadian companies to use financial statements prepared in accordance with International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board, without a reconciliation to U.S. GAAP, and (iii) adopted rules making it much easier for Canadian companies to terminate their reporting obligations in the U.S. The SEC also incorporated into Form 20-F all of the International Organization of Securities Commission's ("IOSCO")<sup>3</sup> International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers, which pertain to prospectuses prepared by foreign issuers for public offerings and listing of equity securities. Those rules are part of the SEC's efforts to foster international adoption of a single set of globally accepted accounting standards. Additionally, when implementing certain provisions of the Sarbanes-Oxley Act of 2002 the SEC has provided several significant accommodations to foreign private issuers relating to the requirements on internal control over financial reporting<sup>4</sup> and audit

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<sup>2</sup> Form 20-F is the combined registration statement and annual report form for foreign private issuers under the Exchange Act. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act of 1933, as amended.

<sup>3</sup> IOSCO consists of securities regulators from 109 countries ("ordinary" members) who are committed to working together "to promote high standards of regulation to maintain just, efficient and sound markets."

<sup>4</sup> The SEC permitted foreign private issuers to comply with the requirement to include in their annual reports management's report on the company's internal control over financial reporting and the auditor's attestation on a delayed basis compared to some U.S. domestic issuers. See Release No. 33- 8392 (Feb. 24, 2004) (extending the original compliance dates for accelerated filers to fiscal years ending on or after November 15, 2004, and for companies that are not accelerated filers and for foreign private issuers, to fiscal years ending on or after July 15, 2005); Release No. 33-8545 (Mar. 2, 2005) (adopting an additional one-year extension of the compliance dates for

committee independence. These accommodations recognized and took into consideration non-U.S. practices and requirements.

## II. Summary of Adopted Amendments

Following is a summary of the recently enacted amendments to the Form 20-F that are most relevant to Canadian companies:

- *Effective immediately*, Companies will now be allowed to test their eligibility to use Form 20-F once a year on the last business day of their second fiscal quarter rather than continuously, which is currently required. By being eligible to file on Form 20-F companies continue to be exempt from the SEC's proxy solicitation rules and the insider reporting and short-swing profit rules under Section 16 of the Exchange Act;
- *For fiscal years ending after December 15, 2009*, Form 20-F has been amended to eliminate the instruction to Item 17 of that form that permits companies Pacific to omit segment data from their U.S. GAAP financial statements;
- *For fiscal years ending after December 15, 2011*, Form 20-F has been amended to eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17 of Form 20-F for foreign private issuers that are only listing a class of securities on a U.S. national securities exchange, or only registering a class of equity securities under Section 12(g) of the Exchange Act, and not conducting a public offering. The SEC also eliminated this limited reconciliation option for annual reports filed on Form 20-F, and for certain non-capital raising offerings, such as offerings pursuant to reinvestment plans, offerings upon the conversion of securities, or offerings of investment grade securities;
- *For fiscal years ending after December 15, 2011*, Form 20-F has been amended to require all foreign private issuers that are required to provide a U.S. GAAP reconciliation to do so pursuant to Item 18 of Form 20-F, although required third party financial statements could continue to be prepared pursuant to Item 17 of Form 20-F. Beginning in 2011 Canadian regulations will require companies to prepare their financial statements under IFRS. Because in December 2007 the SEC adopted regulations permitting Canadian issuers to prepare their financial statements under IFRS without a

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companies that are non-accelerated filers and for foreign private issuers filing annual reports on Forms 20-F or 40-F); Release No. 33-8730A (Aug. 9, 2006) (extending for one year the date by which a foreign private issuer that is an accelerated filer and that files annual reports on Forms 20-F or 40-F must begin to comply with the requirement to provide the auditor's attestation report on internal control over financial reporting). Foreign private issuers also are permitted to report changes in their internal controls over financial reporting on an annual basis, rather than on a quarterly basis as is required of U.S. domestic issuers. Release No. 33-8238 (June 5, 2003).

U.S. GAAP reconciliation, the new regulations requiring the financial statements to be prepared pursuant to Item 18 of Form 20-F should have no material impact on Canadian companies;

- *For fiscal years ending after December 15, 2009*, Form 20-F has been amended to require disclosure about any changes in the Company's certifying accountant, similar to the disclosures already required in Canada;

- *For fiscal years ending after December 15, 2008*, Form 20-F has been amended to require disclosure of the significant differences in the corporate governance practices of foreign private issuers listed on a U.S. stock exchange (New York Stock Exchange, American Stock Exchange, etc.) compared to the corporate governance practices applicable to U.S. companies under that stock exchange's listing standards; and

- *For fiscal years ending after December 15, 2011*, Form 20-F has been amended to accelerate the deadline for companies to file their annual report on Form 20-F from six months to four months after their year-end.

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The foregoing is only a brief summary of the changes to Form 20-F as they relate to the Canadian companies and is not intended to be a comprehensive discussion of all of the Form 20-F amendments. If you have any questions on these changes, or any of the SEC's other recent changes regarding Canadian issuers in the United States, please contact either James Berns or Michael Berns at (212) 332-3320.