

## Client Alert

### NYSE Eliminates Annual Report Distribution Requirement

On August 21, 2006, the United States (US) Securities and Exchange Commission (SEC) approved rule changes proposed by The New York Stock Exchange (NYSE) which, among other things, eliminate the annual report distribution requirements applicable to NYSE-listed issuers.<sup>1</sup>

Under the new rules, NYSE-listed issuers<sup>2</sup> are no longer required to physically distribute their annual reports to shareholders. The new rules allow a NYSE-listed issuer to make its annual reports on Form 10-K, 20-F, 40-F or N-CSR available on its corporate website directly or by a link, in lieu of physical distribution of printed copies.

The new rules require that each NYSE-listed issuer:

- have and maintain a publicly accessible corporate website;<sup>3</sup>
- make available on its corporate website, directly or by a link, its annual report filed with the SEC;
- undertake in its corporate website that it will deliver a paper copy of its complete audited annual reports free of charge to any shareholder who requests it;<sup>4</sup> and
- must, simultaneously with the web posting of its annual report, issue a press release stating that the annual report has been filed with the SEC, specifying the issuer's corporate website address and that the shareholders have the ability to receive a paper copy of the issuer's complete audited annual report free of charge upon request.

The rule changes approved by the SEC also eliminated the NYSE requirements that a NYSE-listed issuer:

- inform the NYSE if it is unable to file its annual report with the SEC in a timely manner;
- provide the NYSE with copies of press releases and shareholder communications;
- notify the NYSE prior to the filing deadline if it will not file its annual report with the SEC on time; and
- include specific NYSE-dictated content in its annual report and annual financial statements.

The new rules have minimal effect on NYSE-listed US issuers or non-US issuers that do not qualify as "Foreign Private Issuers" insofar as they continue to be subject to the annual report delivery requirement set forth in the US proxy rules promulgated by the SEC. However, the new rules significantly benefit non-US issuers that are exempt from such US proxy rules. For non-US issuers whose equity securities are listed on the NYSE and who qualify as "Foreign Private Issuers" and as such are exempt from the US proxy rules,<sup>5</sup> the new rules will significantly reduce the costs related to proxy solicitations and annual report distributions. In addition, the new rule is intended to provide shareholders in the US the benefit of immediate access to the issuer's annual reports.

### Home Country Standards

In the past, certain non-US issuers were able to satisfy the annual report distribution requirements imposed by the NYSE by electing to distribute home-country annual reports in English with summary financial information reconciled to US generally accepted accounting principles (US GAAP) and agreeing to provide full annual reports (*i.e.*, Form 20-F) to shareholders upon request. Consistent with the elimination of the NYSE annual report distribution requirement, the SEC also approved the elimination of the NYSE requirement that non-US issuers, who

elect to follow home-country practice in lieu of annual report distribution, distribute to shareholders in the US at least a summary annual report that includes summary financial information reconciled to US GAAP and provide a full annual report to shareholders upon request.

## Depository Share Programs

Non-US issuers whose shares trade on the NYSE in the form of Depository Shares are urged to review the terms of the deposit agreements for their Depository Share programs to ensure that the terms of the deposit agreements do not impose a contractual obligation on the non-US issuer or the ADR depository to make physical distribution of annual reports to the ADR holders.

## New York Registry Programs

Non-US issuers whose shares trade on the NYSE directly (*i.e.*, in the form of shares of New York Registry) are urged to consider the effect their constitutive documents (*i.e.*, articles of incorporation and bylaws) and the applicable home country legislation may have on the new NYSE rules so as to ensure no conflict exists between the NYSE requirements described in this Client Alert and the requirements imposed by the laws of the issuer's home country.

## NYSE Listing Agreement

All non-US issuers whose securities are listed on the NYSE and who are able to benefit from the elimination of the annual report distribution requirement are urged to review their NYSE listing agreement and to amend or supplement the same to eliminate any reference to the annual report distribution requirement.

Should you have any questions on the subject of these new rules, please contact Herman H. Raspé at 212.336.2301 (hhraspe@pbwt.com) or Karen M. McCarthy at 212.336.2529 (kmmccarthy@pbwt.com).

## Endnotes

- <sup>1</sup> The proposed rule changes relating to NYSE's Listed Company Manual Sections 103.00, 202.05, 203.00, 203.01, 203.02, 203.03, 204.00 through .33, 303A.14, 313.00, 401.04 and 703.09 were approved by the SEC in SEC Release No. 34-54344 (August 21, 2006). Amendments to Section 203.01 specifically relate to the elimination of the annual report distribution requirement. Any references to annual report distribution in this client alert refers to the distribution of annual financial statements to shareholders.
- <sup>2</sup> For purposes of this client alert, the term "issuer" includes both US and non-US issuers unless specified otherwise.
- <sup>3</sup> Section 303A.14 of the NYSE's Listed Company Manual requires that, the relevant corporate website include a printable version of the applicable charters of its compensation, nominating and audit committees, as well as its corporate governance guidelines and code of business conduct and ethics. In addition, a listed company that is a non-US issuer is required to include the disclosure (in English and accessible from the US) of how its corporate governance practices differ from those followed by US companies under the NYSE listing standards.
- <sup>4</sup> The NYSE's Listed Company Manual Section 203.01 requires that such undertaking by the issuer be made in English.
- <sup>5</sup> Non-US issuers that are "Foreign Private Issuers" as defined in Rule 3b-4 of the US Securities Exchange Act of 1934, as amended (Exchange Act), are exempt from the US proxy rules pursuant to Rule 3a12-3 of the Exchange Act. Non-US issuers will qualify as "Foreign Private Issuers" unless (i) more than 50% of issuer's voting securities are held of record, directly or indirectly, by residents of the US, and (ii) any one or more of the following applies: (x) the majority of the executive officers or directors are US citizens or residents, (y) more than 50% of the issuer's assets are located in the US, or (z) the business of the issuer is administered principally in the US.

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