

# HARMONY™

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9 May 2008

Ms Nancy M Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington DC 20549-1090  
United States of America

Re: File Number S7-05-08

Dear Miss Morris

COMMENTS ON PROPOSED RULE NO. 33-8900 ("FOREIGN ISSUER REPORTING  
ENHANCEMENTS")

I am writing in response to the Securities and Exchange Commission's proposed amendments to Foreign Issuer Reporting.

Foreign Private Issuers are a separate class of issuers governed under the Securities and Exchange Act and have, in the past given their unique

**Directors:** PT Motsepe\* (Chairman), GP Briggs (Chief Executive), F Abbott (Interim Financial Director),  
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**Secretary:** MP van der Walt

Registration Number: 1950/038232/06

circumstances, received various accommodations to rules applied under the Exchange Acts of the United States. These accommodations have principally been granted as a result of differing exchange requirements between home countries and the exchange on which the *Foreign Private Issuer* is registered in the United States.

We have only commented on those questions that are relevant and important to us and where we felt a meaningful contribution could be made.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Frank Abbott', written over a horizontal line.

Frank Abbott  
Interim Financial Director

## **II. Proposed Changes**

### **A. Annual Test for Foreign Private Issuer Status**

#### Question 1

*Is it appropriate for foreign issuers to have six months' notice that they no longer qualify as foreign private issuers, and therefore must use the domestic registration and reporting forms as of the beginning of the next fiscal year? Should issuers who have been foreign private issuers, but who fail to qualify as foreign private issuers, be required to use the domestic forms immediately, as is currently required?*

No comment.

#### Question 2

*Is it likely that foreign issuers will attempt to manipulate the amount of their voting securities that are held by U.S. residents at the end of the second fiscal quarter as a result of the proposed test? Are there other factors under the definition of foreign private issuer that may be susceptible to manipulation on the test date, such as the resignation and reappointment of officers and directors, or the transfer of non-physical assets such as cash, receivables or securities out of the United States?*

No Comment.

#### Question 3

*If a foreign issuer that has been filing on domestic issuer forms qualifies as a foreign private issuer on the last business day of its second fiscal quarter, should it be allowed to switch over immediately to the foreign private issuer forms, such as Forms 20-F and 6-K? In some cases, an event may trigger the*

*filling of a Form 8-K, but a Form 6-K might not be required because the foreign issuer's home jurisdiction or stock exchange does not require the publication of information about the event. If a foreign issuer would have been required to file a Form 8-K shortly after the end of its second fiscal quarter, but qualifies as a foreign private issuer on the last business day of the second fiscal quarter, should it be allowed to forgo the filing of the Form 8-K even if a Form 6-K would not be required? Should the foreign issuer be required to file the Form 8-K and make all the filings it would otherwise be required to make on the domestic forms until it files as Form 20-F or furnishes its first Form 6-K? Even if a foreign issuer is permitted to switch to the foreign private issuer forms immediately, should the foreign issuer be required to file a Form 8-K in the scenario described above because the event that triggered the filing occurred during its second fiscal quarter?*

No comment.

#### Question 4

*Because of the many accommodations provided to foreign private issuers, should foreign issuers be required to test their status twice a year, rather than just once a year? For example, should foreign issuers be required to test their status as of the last business day of their second fiscal quarter, as well as at the end of the fiscal year?*

No comment.

#### Question 5

*If we adopt the proposed amendment, to avoid confusion by investors, should a foreign issuer be required to notify the market when it has determined that it has switched its status from domestic issuer to foreign private issuer, or vice versa? If so, how should this notification be made, e.g. press release, notice on*

*its Website?*

No comment.

Question 6

*How should we address the potential flowback of securities into the United States if a reporting foreign issuer concludes that it does not qualify as a foreign private issuer in its third fiscal quarter and, under the proposed rule, is able to qualify as a Category 2 issuer under Regulation S and also avoid the restrictions of Category 3 and Rule 905 of Regulation S for unregistered offshore offerings of its equity securities for almost a year and a half after it has made this determination?*

No comment

Question 7

*Should MJDS filers be required to test their foreign private issuer status on the last business day of their most recent second fiscal quarter, as well as at the end of the fiscal year? Would it be reasonable to require MJDS filers to assess their status twice a year because they must test their qualification to use the Form 40-F at the end of the fiscal year in any case? Would such a testing requirement be reasonable in light of the accommodations made for MJDS filers, e.g. they comply with the disclosure requirements of their home jurisdiction?*

No comment

Question 8

*As proposed, a Canadian MJDS filer that did not qualify as a foreign private issuer on the last day of its second fiscal quarter would immediately not be able*

*to use the MJDS forms for Securities Act offerings, since the eligibility to use the MJDS Securities Act form is tested at the time that the registration statement is filed. In that case, the issuer would still be able to use the other foreign private issuer registration statement forms, such as Form F-3, until the end of its fiscal year. Should these issuers be permitted to file on the foreign private issuer registration statement forms in this circumstance? Alternatively, should these issuers be permitted to use the MJDS Securities Act registration statement forms until the end of their fiscal year?*

No comment

## **B Accelerating the Reporting Deadline for Form 20-F Annual Reports**

### Question 9

*Would accelerating the due date for Form 20-F annual reports be beneficial for investors? Given the differences in the reporting requirements that exist among the various foreign reporting regimes, would accelerating the due date for Form 20-F annual reports have different impacts on foreign private issuers or investors depending on the particular country or the nature of the issuer's business? Would any of these differences affect the usefulness of the information to investors? If you believe that the due date should be accelerated, are the proposed due dates appropriate? Should different due dates be applied to foreign private issuers depending on the worldwide market value of their common equity held by non-affiliates, similar to the different annual report filing deadlines that are applied to domestic issuers? Should foreign private issuers with a larger worldwide market value be required to provide reports on a faster basis than other foreign private issuers because they presumably have additional resources and a better developed infrastructure that would enable them to comply with an accelerated due date?*

We believe that as reporting becomes more complex it will, undoubtedly, require greater diligence and coordination efforts when the reporting required for SEC purposes does not accord with home country reporting requirements.

In many cases it is likely that the same people responsible for Home Country reporting are also involved in the preparation of the financial information required for the Form 20-F.

For several countries the regulatory requirements are substantially different, requiring differing processes that may not be capable of being harmonized by the reporting entity. For example, there are a number of procedures that are required to be completed prior to filing Form 20-F, including managements' annual report on Internal Control over Financial Reporting and the review of the Form 20-F by a Disclosure Committee. Unlike domestic issuers, their processes are incremental to the processes required for home country reporting.

In response to concerns that investors do not receive information timely from FPIs in comparison to domestic filers, we offer the following comments:

- FPIs furnish information to investors on Form 6-K as relevant events occur independent of the 20-F filing deadline. A Form 6-K would also be filed if a FPI publishes in its home country financial statements before filling its Form 20-F. Thus all investors of a FPI are treated equally.
- Press releases are made on a regular basis with sufficient advance notice.
- We understand technological advances have made it easier to process information, but domestic filers also have access to this information without additional home country reporting requirements.

Foreign investors receive their dividends based on the home country financial statements which are prepared according to the home country generally

accepted accounting practice. Accordingly, the due date for the filing of the annual Form 20-F should not be accelerated in circumstances where a foreign private issuer has home country requirements to file public documents for its home country investors.

#### Question 10

*Would accelerating the due date for filing annual reports on Form 20-F impose any unreasonable burdens on foreign private issuers, who may have to collect and provide more information in that Form than may be required in their home jurisdictions, and may also have to translate the information into English? Would the proposed accelerated due dates impose any burdens on foreign private issuers that may be required to file annual reports on Form 20-F with the Commission before they are required to provide annual reports in their home jurisdictions? Should the due date be accelerated to within 120 days of the foreign private issuer's fiscal year-end for all foreign private issuers, including large accelerated and accelerated filers?*

Accelerating the due date for filing annual reports on Form 20-F may impose unreasonable burdens on certain foreign private issuers.

These burdens may include translation, accelerated filing with respect to home country rules or even the alternative GAAP. Again it is likely that the same people responsible for home country reporting are also involved in the preparation of the financial information required for the Form 20-F.

A restructuring of the Form 20-F removing or abbreviating some of the information, for example – item 4 and Item 10 and allowing that information to be filed in a 6-K and incorporated by reference with an updating information requirement may assist greatly in achieving certain due dates.

#### Question 11



*Should different due dates be imposed on foreign private issuers depending on whether they file financial statements using U.S. GAAP, IFRS as issued by the IASB, or another GAAP with a reconciliation to U.S. GAAP? Should different due dates be imposed on foreign private issuers depending on whether their disclosure was originally prepared in a foreign language and needs to be translated into English?*

Different due dates should not be imposed for foreign private issuers depending on whether they file US GAAP or IFRS as issued by the IASB or another GAAP reconciliation. Foreign and private issuers that file full US GAAP, or include a reconciliation to US GAAP, should file on the same date which should require a 180 day deadline; also IFRS as issued by the IASB should file on the same date with a 180 day deadline.

#### Question 12

*Should the deadline for filing Form 20-F annual reports be linked to the issuer's home country requirements for filing annual reports? If so, should the deadline be the same as the one in the issuer's home country, or should it be on a delayed basis, such as one or two months later? If you believe that the deadline for filing Form 20-F should be linked to the issuer's home country requirements, should the foreign private issuer be responsible for submitting supporting materials that indicate when annual reports are due in its home jurisdiction, such as the applicable legislation or regulation, to the Commission at the time of its Form 20-F submission? Would varying deadlines according to home country requirements cause confusion for investors?*

We do not believe the deadline for filing Form 20-F annual reports should be linked to the home country reporting requirements, as the resulting number of different deadlines is likely to cause confusion for investors.

Question 13

*Would a different transition period be more appropriate for implementation of the accelerated deadline? For example, should foreign private issuers be subject to the accelerated deadline after a longer or shorter transition period instead?*

We do not support the implementation of an accelerated deadline and accordingly we do not believe that a transition period would be required.

Question 14

*Do foreign private issuers face unique challenges in preparing transition reports that would render a reduced filing period for those reports unduly burdensome?*

As stated earlier, foreign private issuers are governed by home country rules with regard to a number of different areas in addition to the SEC requirements, including director appointments and nominations, dividends and the ability of the company to declare dividends. Managing these regimes is a substantial ongoing project in coordination, and we believe that reducing the filing period for transition reporting would create another burdensome requirement providing little value to investors.

**C. Segment Data Disclosure**

Question 15

*In Part III.A. of this release, we propose an amendment to eliminate the option to prepare financial statements according to Item 17 of Form 20-F. Under that proposed amendment, foreign private issuers would be required to prepare their financial statements according to the requirements of Item 18 of Form 20-F, which requires all of the information required by U.S. GAAP and Regulation S-X. If that proposal is adopted, would it still be useful to eliminate the exemption from providing segment data?*

No comment

Question 16

*Should we provide an exemption for foreign private issuers that are currently preparing financial statements under U.S. GAAP that omit segment data pursuant to Instruction 3 of Item 17? If we adopt the proposed amendment, should we provide a "grandfather" provision or an exemptive order to permit the small number of foreign private issuers to continue to not report segment data?*

No comment.

**D. Exchange Act Rule 13e-3**

Question 17

*Is it appropriate to amend Rule 13e-3 by using the quantitative benchmark set forth in the new termination of reporting and deregistration provisions?*

No comment.

Question 18

*Instead of referencing the applicable termination of reporting and deregistration provisions, is there another threshold that should be applied to Rule 13e-3(a)(3)(ii)(A) to foreign private issuers?*

No comment.

Question 19

*If the proposed amendment is adopted, would more registrants be required to comply with Rule 13e-3 than intended because they may be engaged in one of the transactions described in Rule 13e-3(a)(3)(i) as a step towards terminating their registration or reporting obligations with respect to a class of securities, transactions that previously might not have resulted in the application of rule 13e-3?*

No comment.

Question 20

*To what extent may foreign private issuers engage in ordinary course securities transactions (such as buybacks or repurchases) that may trigger Rule 13e-3, and is it necessary to provide exceptions so that these transactions do not trigger Rule 13e-3?*

No comment.

**A. Requiring item 18 Reconciliation in Annual Report and  
Registration Statements Filed on Form 20-F**

Question 21

*Would the proposed amendment to eliminate the availability of Item 17 option benefit investors?*

No comment.

Question 22

*Is it appropriate to provide a transition period for foreign private issuers that are currently preparing financial statements in accordance with Item 17 of Form 20-F? Is a compliance date that provides a transition period in the best interests of investors? If so, is the suggested transition period appropriate in length, or should it be shorter or longer than proposed?*

No comment.

Question 23

*As proposed, Item 17 will now only be available for the presentation of financial information for non-issuer entities required to be included in a foreign or domestic issuer's registration statement or Exchange Act Report. Is there any reason for retaining the Item 17 financial information option for non-capital raising offerings made by foreign private issuers or annual reports?*

No comment.

Question 24

*Would the elimination of the Item 17 option increase costs for companies? If so, what types of compliance costs would be affected? Are there ways to mitigate the costs?*

No comment

#### Question 25

*To what extent are the benefits to investors from the additional Item 18 financial disclosure linked to more timely filing of Form 20-F? If we decide not to accelerate the deadline for filing Form 20-F as proposed, should we still require the additional Item 18 financial disclosure?*

No comment.

#### Question 26

*Should we provide an exemption for foreign private issuers that are currently preparing financial statements pursuant to Item 17? IF we adopt the proposed amendment, should we provide a "grandfather" provision or an exemptive order to permit these foreign private issuers to continue to provide financial information pursuant to Item 17?*

No comment.

### **B. Disclosure About Changes in a Registrant's Certifying Accountant**

#### Question 27

*Should foreign private issuers be required to provide information about changes in and disagreements with the certifying accountant? Would this disclosure be useful to investors? If so, should foreign private issuers be subject to the same*

*disclosure requirements that apply to domestic issuers, or would a different disclosure requirement be more appropriate?*

Foreign private issuers should be required to provide information about changes in, and disagreements with, the certifying accountant. This information should be required to be disclosed within ten days after shareholders, or the responsible authorized corporate body, have determined to replace a certifying accountant and should accompany a letter of confirmation signed by the chairman of the audit committee confirming the facts for the replacement of the certifying accountant.

Foreign private issuers should not be given any delayed basis. Foreign private issuers should be required to file the letter within the specified time frame of the certifying accountant being replaced. If the certifying accountant is replaced, immediately on issuing the financial report for the prior financial year the annual report should disclose such facts and circumstances.

#### Question 28

*Should foreign private issuers be permitted to provide the letter from the former accountant in their annual reports on a delayed basis for a change of accountants that occurs less than 30 days before the annual report is filed, as proposed? Is 30 days an appropriate parameter? Alternatively, should foreign private issuers be permitted to provide the letter from the former accountant on a delayed basis for a change in accountant that occurs up to 45 days or 60 days before the annual report is filed, or only if the change in accountant occurs less than 15 days before the annual report is filed? Because foreign private issuers provide this disclosure on a delayed basis compared to domestic issuers, is this accommodation necessary?*

Foreign private issuers should provide the letter from the former accountants simultaneously with filing the 6-K notifying of the change of accountants. Such

reporting should be no less than seven days after the shareholders have approved a change in the accountants, if required under the home country's jurisdiction.

Question 29

*Are there restrictions under a foreign issuer's home country law or regulations that would prohibit an auditor reporting to a foreign regulator about disagreements with the issuer? If so, how should we address such restrictions?*

No comment.

Question 30

*Should the proposed change of accountant disclosure requirements contained in Item 16F be extended to registration statements filed by all foreign private issuers under the Securities Act, not just first-time registrants? Would this impose an undue burden on foreign private issuers that may not be subject to such a disclosure requirement in their home jurisdiction?*

No comment.

**C. Annual Disclosure about ADR Fees and Payments**

Question 31

*Would it be useful to investors to receive information about ADR fees and payments made by depositaries on an annual basis? Is there other information relating to ADRs that would be useful to investors on an annual basis, such as the number of ADRs outstanding? Are there other methods by which investors can readily obtain this information? Should foreign private issuers be required*



*to disclose the information in their Form 20-F annual reports only if the information is not disclosed on their websites?*

Disclosure of any fees that an investor may incur as a result of investing via an ADR programme should be disclosed in the Registrant's reporting. There should also be a disclosure requirement for fees that may be required should the investor choose to make a direct investment into the Registrant via the home country practices.

Disclosure of the various fees would provide an investor with more information to judge their investment decisions and processes.

#### Question 32

*Should Item 12 be amended to also explicitly solicit a brief discussion of the reasons why the depositary is making payments to the foreign private issuer, or is disclosure of the amount paid to the issuer sufficient?*

No comment

#### Question 33

*Should depositaries be required to disclose payments that they make to third parties? Are these payments necessarily passed on to ADR holders?*

Depositaries should be required to disclose payments within the Registrant's Form 20-F and alternatively on direct 6-K filings into the foreign registrant's SEC reporting page to provide adequate transparency.

#### Question 34

*Should Regulation S-K and Form 10-K be amended to elicit similar disclosure from foreign issuers that are not foreign private issuers and that file annual reports on Form 10-K, but have securities traded in ADR form?*

Regulation S-K should be amended to provide the same information whether the securities are traded in ADR form or not.

#### **D. Disclosure about Difference in Corporate Governance Practices**

##### Question 35

*Would disclosure of significant differences in the corporate governance practices of foreign private issuers in their annual report enable investors to better monitor the corporate governance practices of the issuers in which they are investing?*

Foreign private issuers should be required to report significant differences between corporate governance practices required under US legislation and those adopted by the foreign private issuer to enable the investor a better understanding of the environment.

##### Question 36

*Instead of the narrative discussion that is proposed, is there an alternative format, such as a tabular presentation of the differences in corporate governance practices, that would make the information provided in the annual report easier to understand and thus more useful to investors?*

Issuers should be allowed a choice between different presentation formats.

##### Question 37

*Is it sufficiently clear what differences in corporate governance should be disclosed? Are there important elements of corporate governance that investors should be informed of and that should be specifically addressed in a company's disclosure under this proposed requirement?*

No comment.

## **E. Financial Information for Significant Completed Acquisitions**

### Question 38

*If the information about significant, completed acquisitions is disclosed on an annual, as opposed to current, basis, would the information still be useful to investors? Would investors find the information useful even though the disclosure would be provided at least several months after the acquisition was completed?*

Current basis information should be required for significant acquisitions that reach certain material thresholds for the Registrant. For example, acquisitions which are greater than 25% of a Registrant's measure, such as market capitalisation as of the last annual report or tangible assets, should be required currently. Other information which would not be deemed Registrant changing could be provided in the annual report.

### Question 39

*What types of burdens, if any, would be placed on foreign private issuers if they are required to provide financial information disclosure about highly significant, completed acquisitions annually on Form 20-F?*

Accounting disclosures under IFRS already require detailed financial information on highly significant completed acquisitions for the year of report and the comparative periods presented.

Preparing such information in the Form 20-F would not appear unduly burdensome.

#### Question 40

*As proposed, a foreign private issuer would be required to provide information about a highly significant, completed acquisition in its annual report on Form 20-F. In light of the proposal to accelerate the reporting deadline for annual reports filed on Form 20-F, should foreign private issuers be provided additional time to disclose information about a highly significant, completed acquisition on an amended annual report? If so, should the due date for the filing of this information be based upon the time the acquisition was consummated? For example, information about a significant acquisition that was consummated early in the calendar year would be due with the annual report filed on Form 20-F, whereas financial information for a highly significant acquisition that occurred late in the calendar year could be provided on a delayed basis beyond the reporting deadlines for the annual report filed on Form 20-F.*

As mentioned earlier, highly significant acquisition information which is registrant changing should be reported currently; all other information could be reported on a deferred basis. The accelerated deadline for annual reports is not supported.

#### Question 41

*Should foreign private issuers be required to provide financial information for business acquisitions that are significant at the 50% or greater level, or should the test of significance be at the 20% or greater level, as for domestic issuers?*

*Would another significance level between 20% and 50% be more appropriate? To ensure that only very large transactions are required to be presented, should the test of significance be limited to the comparison of the purchase price to their issuer's assets? Alternatively, should a new test be developed for this purpose in which the comparison for significance is based on the size of the issuer's public float?*

An examination of home country rules with regard to the ability of directors to undertake very large transactions without referring such transaction to shareholders for approval would need to be considered prior to determining any black-line test of significance.

Where home country rules require shareholder approval because of existing black-line tests, that home country rule should be applied in determining the test of significance.

#### Question 42

*Would it be useful to investors to require annual reports filed on Form 20-F to disclose the information required by Rule 3-05 and Article 11 of Regulation S-K even if the information has been provided previously in a registration statement? What kind of benefits would investors derive from disclosure in the annual reports?*

No comment.