

Several commenters remarked on the proposal to require a company to disclose ethics waivers. A number of these suggested that we provide guidance as to the meaning of the terms "waiver" and "implicit waiver." In response, the final rules define the term "waiver" as the approval by the company of a material departure from a provision of the code of ethics.⁵⁷ They define the term "implicit waiver" as the registrant's failure to take action within a reasonable period of time regarding a material departure from a provision of the code of ethics that has been made known to an executive officer, as defined in Rule 3b-7,⁵⁸ of the registrant.⁵⁹

C. Foreign Private Issuers and Request for Comments

We included foreign private issuers within the scope of the proposed rules implementing both Sections 406 and 407 of the Sarbanes-Oxley Act. Some commenters requested that we exempt foreign private issuers from the application of these rules on the ground that the rules would overlap or conflict with the audit committee requirements and corporate governance code of ethics provisions in the issuers' home jurisdictions. Other commenters stated that, for the sake of simplicity, any rule requiring a company, whether foreign or domestic, to disclose whether its audit committee financial expert is independent should reflect the standard of independence set forth in the rules that we will adopt to implement Section 301 of the Sarbanes-Oxley Act.

We have determined to include foreign private issuers within the scope of the final rules implementing Sections 406 and 407. Their inclusion comports both with the plain language of the above statutory sections, which applies broadly to issuers, as well as with the overarching purpose of the Sarbanes-Oxley Act, which is to restore investor confidence in U.S. financial markets, regardless of the origin of the market participants.

Accordingly, like a domestic issuer, a foreign private issuer will have to disclose whether it has an audit committee financial expert in its Exchange Act annual report. Because foreign private issuers are not subject to Regulation S-K, however, we have amended Forms 20-F and 40-F to

require the audit committee financial expert disclosure.⁶⁰

We agree with the commenters that urged us to adopt an independence standard for the required audit committee financial expert disclosure that will be the same as that embodied in the rules to be adopted under Section 301 of the Sarbanes-Oxley Act. Accordingly, we intend to revise the Section 407 rules to reflect the independence standard eventually adopted and set forth in the rules implementing Section 301.⁶¹

In the interim, we believe that it is not appropriate or necessary at this time to require foreign private issuers to disclose whether their audit committee financial experts are independent.⁶² Unlike domestic issuers, foreign private issuers currently are not required to disclose whether their audit committee members are independent.⁶³ Imposing the independence disclosure requirement immediately may compel a foreign private issuer to disclose that its expert is not independent under our definition even though there has been no prior context in which that issuer has been required to consider our definition of the term. In addition, immediate imposition of our current definition of "independent" would require foreign private issuers to familiarize themselves with rules which we expect to revise within one annual reporting period. Such imposition may be unfair to foreign private issuers. Therefore, the final rules do not require a foreign private issuer to disclose whether its audit committee financial expert is independent. However, we reiterate that in conjunction with the adoption of our rules under Section 301, which will apply to foreign private issuers, we intend to amend Forms 20-F and 40-F to require such disclosure.

In the release implementing Section 301, we propose a special accommodation for certain audit committee requirements for foreign private issuers with a board of auditors or statutory auditors under home

country legal or listing provisions, subject to certain conditions.

Specifically, foreign private issuers with boards of auditors or similar bodies or statutory auditors meeting the requirements of our proposals would be exempt from the requirements regarding the independence of audit committee members. We request comment on whether the disclosure requirements related to audit committee financial experts should apply to such issuers. To the extent they should apply to such issuers, should the requirements apply to the board of auditors or similar body? Should we apply different standards or disclosure requirements for such issuers? For example, should audit committee financial experts of such issuers be subject to the same disclosure requirement regarding independence as other foreign private issuers? One of the proposed requirements for the listing exemption would be that home country legal or listing provisions set forth standards for the independence of such board or body. Should we permit these issuers to use those independence standards for their independence disclosure?

Like a domestic issuer, under the adopted Section 406 rules, a foreign private issuer will have to provide the new code of ethics disclosure in its Exchange Act annual report. However, in contrast to a domestic issuer, a foreign private issuer will not have to provide in a current report "immediate disclosure" of any change to, or waiver from, the company's code of ethics for its senior financial officers and principal executive officer. Instead, we are adopting as proposed the requirement that a foreign private issuer disclose any such change or waiver that has occurred during the past fiscal year in its Exchange Act annual report.⁶⁴ This differing treatment reflects the fact that, unlike domestic Exchange Act reporting companies, reporting foreign private issuers do not have any specific interim or current disclosure requirements mandated by the Commission.⁶⁵

The adopted revisions to Forms 20-F and 40-F do state, however, that a foreign private issuer may disclose any change to or waiver from the code of ethics obligations of its senior officers

⁶⁰ See new Item 16A of Form 20-F and new paragraph (8) to General Instruction B of Form 40-F.

⁶¹ See proposed Exchange Act Rule 10A-3 set forth in Release No. 33-8173 (Jan. 8, 2003).

⁶² A domestic company must disclose whether its audit committee financial expert is independent under the existing definition of independence in Item 7 of Schedule 14A. Upon the expected revision of that item, a domestic company must disclose whether its audit committee financial expert is independent under the new definition of independence.

⁶³ Foreign private issuers generally are exempt from the requirements of Regulation 14A, including Item 7(d) of Schedule 14A which requires disclosure of whether audit committee members are independent. See 17 CFR 240.3a12-3(b).

⁶⁴ See Release No. 33-8138, the text before and after n. 84.

⁶⁵ Instead, a foreign private issuer must file under cover of Form 6-K copies of all information that it: Makes or is required to make public under the laws of its jurisdiction of incorporation, domicile or organization; files or is required to file under the rules of any stock exchange; or distributes or is required to distribute to its security holders. See General Instruction B to Form 6-K.

⁵⁷ See Instruction 3.a. to new Item 10 of Form 8-K.

⁵⁸ 17 CFR 240.3b-7.

⁵⁹ See Instruction 3.b. to new Item 10 of Form 8-K.