

Commission to apply equally to Form 20-F or 40-F annual reports filed by foreign private issuers and to Form 10-K or 10-KSB annual reports filed by domestic issuers. In response to the Proposing Release, three commenters believed that the rules should apply to foreign private issuers,<sup>132</sup> five commenters believed that the rules should not apply to MJDS filers,<sup>133</sup> and four commenters believed that the Sarbanes-Oxley Act does not, and should not, require the proposals to be applied to foreign private issuers and MJDS filers.<sup>134</sup> We do not believe that it is appropriate to exempt foreign private issuers or MJDS filers because, as discussed below, the disclosure requirements do not represent a fundamental change in our approach with respect to the financial disclosure provided by foreign private issuers and MJDS filers.

There are two additional reasons for applying the amendments to foreign private issuers' annual reports filed with the Commission. First, investors and others would enjoy the same benefits from expanded off-balance sheet disclosure in foreign private issuers' annual reports as they would from this disclosure in domestic issuers' annual reports. Second, for Form 20-F annual reports, the existing MD&A-equivalent requirements for foreign private issuers currently mirror the substantive MD&A requirements for U.S. companies. We believe this desirable policy should continue.<sup>135</sup>

The disclosure provided by Canadian issuers that file Form 40-F is generally that required under Canadian law. We have, however, supplemented these disclosure requirements with specific required items of information.<sup>136</sup> We have adopted additional disclosure

requirements under Form 40-F as a result of the Sarbanes-Oxley Act.<sup>137</sup>

Although an issuer prepares its MD&A discussion contained in a Form 40-F registration statement or annual report in accordance with Canadian disclosure standards, we believe that requiring disclosure of off-balance sheet arrangements and a table of contractual obligations in accordance with SEC rules is not inconsistent with the principles of the MJDS, is consistent with the Sarbanes-Oxley Act and, most importantly, will provide investors with useful information that is comparable to that provided by U.S. and other foreign companies that file reports under the Exchange Act.

Section 401(a) of the Sarbanes-Oxley Act also requires the Commission to adopt off-balance sheet disclosure rules that apply to "each quarterly financial report required to be filed with the Commission."<sup>138</sup> Foreign private issuers are not required to file "quarterly" reports with the Commission, and therefore the amendments do not apply to Form 6-K reports submitted by foreign private issuers to provide copies of materials required to be made public in their home jurisdictions.<sup>139</sup> Thus, unless a foreign private issuer files a Securities Act registration statement that must include interim period financial statements and related MD&A disclosure, it will not be required to update its MD&A disclosure more frequently than annually.<sup>140</sup>

<sup>137</sup> We have recently adopted amendments in Form 40-F to require disclosure concerning whether the issuer has adopted a code of ethics applicable to certain officers and whether it has a financial expert on its audit committee. See Release No. 33-8177 (January 23, 2003) [Not yet published in *Federal Register*].

<sup>138</sup> Exchange Act section 13(j) [15 U.S.C. 78m(j)].

<sup>139</sup> A foreign private issuer must furnish under cover of Form 6-K material information that it makes public or is required to make public under its home country laws or the rules of its home country stock exchange or that it distributes to security holders. While foreign private issuers may submit interim financial information under cover of Form 6-K, they do so pursuant to their home country requirements and not because of a Commission requirement to submit updated financial information for specified periods and according to specified standards. Therefore, we do not believe that a Form 6-K constitutes a "periodic" or "quarterly" report analogous to a Form 10-Q or 10-QSB for which expanded disclosure is required. We similarly clarified that Form 6-K reports are not subject to the recently adopted section 302 certification requirements. See Release No. 33-8124 at n. 50.

<sup>140</sup> Similar to our treatment of Securities Act registration statements filed by domestic issuers, we are including within the scope of the amendments Securities Act registration statements filed by foreign private issuers on Forms F-1, F-2, F-3 and F-4 [17 CFR 239.31-239.34]. Each of these registration statements references Form 20-F's disclosure requirements. The amendments would

The MD&A disclosure that foreign private issuers currently provide in documents filed with the Commission must focus on the primary financial statements, whether those are prepared in accordance with U.S. GAAP or a non-U.S. GAAP.<sup>141</sup> Foreign private issuers whose primary financial statements are prepared in accordance with a non-U.S. GAAP should include in their MD&A a discussion of the reconciliation to U.S. GAAP, and any differences between foreign and U.S. GAAP, if it would be necessary for an understanding of the financial statements as a whole.<sup>142</sup> Consistent with that existing MD&A requirement for foreign private issuers, the disclosure about off-balance sheet arrangements and the table of contractual obligations must focus on the primary financial statements presented in the document, while taking the reconciliation into account.

The definition of "off-balance sheet arrangements" covers the same types of arrangements regardless of whether a registrant is a foreign private issuer or a domestic issuer. We believe that the references to U.S. GAAP in the definition best achieve the appropriate scope of arrangements that require more transparent disclosure, regardless of any particular accounting treatment. To identify the types of arrangements that are subject to disclosure under the amendments, a foreign private issuer must assess its guarantee contracts and variable interests pursuant to U.S. GAAP. Foreign private issuers must already make this assessment when they reconcile or prepare their financial statements in accordance with U.S. GAAP. A foreign private issuer's MD&A disclosure should continue to focus on its primary financial statements despite the fact that its various "off-balance sheet arrangements" have been defined by reference to U.S. GAAP.

#### *H. Safe Harbor for Forward-Looking Information*

Some of the disclosure required by the amendments would require disclosure of forward-looking information.<sup>143</sup> To encourage the type of

not, however, apply to Securities Act registration statements filed by Canadian issuers under the MJDS because we believe them to be outside the scope of the directive in section 401(a) of the Sarbanes-Oxley Act. These MJDS registration statements are based on Canadian disclosure requirements.

<sup>141</sup> See Instruction 2 to Item 5 of Form 20-F [17 CFR 249.220f].

<sup>142</sup> *Id.*

<sup>143</sup> We are therefore eliminating a portion of the instructions in the MD&A rules that state that registrants are not required to provide forward-looking information. See, e.g., Instruction 7 to Item 303(a) and 6 to Item 303(b) of Regulation S-K [17

<sup>132</sup> See, e.g., the letters of AICPA, D&T and Pfizer.

<sup>133</sup> See, e.g., the letters of AICPA, D&T, Fried Frank, Pfizer and PwC.

<sup>134</sup> See, e.g., the letters of ABA, OFIL, NY City Bar and S&C.

<sup>135</sup> Although we revised the wording of the MD&A Item in Form 20-F in 1999, the adopting release noted that we interpret that Item as requiring the same disclosure as Item 303 of Regulation S-K. See Release No. 33-7745 (September 28, 1999) [64 FR 53900 at 59304]. In addition, Instruction 1 to Item 5 in Form 20-F provides that issuers should refer to the Commission's 1989 interpretive release on MD&A disclosure under Item 303 of Regulation S-K for guidance in preparing the discussion and analysis by management of the company's financial condition and results of operations required in Form 20-F. See Release No. 33-6835 (May 18, 1989) [54 FR 22427].

<sup>136</sup> For example, under General Instruction C.2 of Form 40-F, the issuer must usually include financial information that is reconciled to U.S. generally accepted accounting principles.