

New SEC Disclosure Requirements for Depositary Fees and Payments

The United States Securities and Exchange Commission (SEC) has adopted additional requirements that will mandate disclosure in a company's Form 20-F (Annual Report) of (x) the fees and charges that the holders of American Depositary Shares (ADSs) may have to pay, either directly or indirectly, to depositary banks (*Depositary Fees and Charges*), and (y) the direct and indirect payments the depositary bank made to the company that sponsors the American Depositary Receipts (ADR) program (*Depositary Payments*). The additional disclosure will apply to Annual Reports on Form 20-F filed with the SEC for fiscal years ending on or after December 15, 2009.

The adoption of these additional disclosure requirements did not come as a surprise to ADR practitioners since the staff of the SEC has for some time required additional disclosure about Depositary Fees and Charges in the public offering context (through the SEC comment process applicable to registered offerings). These additional disclosures have made their way into the F-1/2/3/4 registration statements filed by issuers with the SEC (most often in the description of American Depositary Shares section of the applicable prospectuses), and in comment response letters that issuers submitted to the SEC (which are also part of the public record). In many instances additional disclosure about Depositary Fees and Charges, and in some instances about Depositary Payments, was incorporated in the deposit agreements filed with the SEC under cover of F-6 registration statements for the ADR programs. In addition, the SEC has, in the context of SEC - registered offerings, made inquiries (principally through the comment process) about Depositary Payments. In most instances these inquiries were addressed formally or informally by issuers and their counsels. In many transactions legal practitioners concluded that the Depositary Payments were not, given the size of the issuers and the transactions, material to the investment decisions. Finally, in response to the SEC rule proposal, a number of comment letters were submitted to the SEC staff that addressed various aspects of the Depositary Fees and Charges and of the Depositary Payments.

With the new rules on the books and the effective date looming at the end of the 2009, some planning may be advisable to address these new disclosure requirements for the annual reports on form 20-F that issuers plan to file for the fiscal years ending on after December 15, 2009.

The disclosure of Depositary Fees and Charges that ADR holders may have to pay should be mostly formulaic and in many instances a restatement of the disclosure contained in the F-1/2/3/4 and F-6 registration statements. An example that may be of interest for this type of disclosure is attached as [Appendix I](#).

The more controversial part of the new disclosure requirements involves the Depositary Payments. The new requirements mandate disclosure in the form of a description of "all fees and other direct or indirect payments made by the depositary to the foreign issuer of the deposited securities." The SEC staff notes in its adopting release that the disclosure of the Depositary Payments made to the issuer must be made on a *per payment* basis. Disclosure of an aggregate amount is not according to the SEC staff sufficient to enable holders of ADRs to understand the nature of the Depositary Payments. In addition, in the view of the SEC staff, the value of the information about Depositary Payments would be "diminished" if provided only on an aggregated basis.

In our view, disclosure of each individual payment received by an issuer from a depository bank is not what the new rules call for, and is not particularly helpful to the understanding of their nature. In this context, we note that, the rule itself, as adopted by the SEC, does not require individual payment details. However, the SEC staff commentary does make reference to disclosure on a "per payment basis." This commentary must, in our view, be interpreted in light of the SEC's purported intention, namely, that the disclosure of Depository Payments must be "useful to investors" to facilitate an understanding of their purpose, and must not be provided in such fashion as to "diminish" its value.

If aggregation diminishes value, so does, in our view, a compilation or litany of individual payments. It would be absurd to argue that investors in multinational companies would find any usefulness in receiving information about individual postage payments (*i.e.*, \$175.00 for postage and printing of a Depository Notice), or the cost of electronic linkages to The Depository Trust Company clearing system for purposes of identifying the brokers that hold ADSs.

To address the new regulatory disclosure standard that applies to Depository Payments in light of the SEC's reported purpose, we propose that disclosure of payments aggregated in logical categories may be well warranted. Among those to consider, listing fees, legal expenses, proxy expenses, and investor relations expenses. A template form of disclosure that may be of interest is attached as Appendix II.

Should you have any additional questions or comments concerning the disclosure of Depository Fees and Charges and of Depository Payments, please contact Herman H. Raspé by phone at (212) 336 - 2301 or via email at hhraspe@pbwt.com.

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APPENDIX I

Depository Fees and Charges

Under the terms of the Deposit Agreement for the **[company's]** American Depositary Shares (ADSs), an ADS holder may have to pay the following service fees to the depository bank:

<u>Service</u>	<u>Fees</u>
• Issuance of ADSs	Up to U.S. 5¢ per ADS issued
• Cancellation of ADSs	Up to U.S. 5¢ per ADS canceled
• Distribution of cash dividends or other cash distributions	Up to U.S. 5¢ per ADS held
• Distribution of ADSs pursuant to stock dividends, free stock distributions or exercises of rights.	Up to U.S. 5¢ per ADS held
• Distribution of securities other than ADSs or rights to purchase additional ADSs	Up to U.S. 5¢ per ADS held
• Depository Services	Up to U.S. 5¢ per ADS held on the applicable record date(s) established by the Depository

An ADS holder will also be responsible to pay certain fees and expenses incurred by the depository bank and certain taxes and governmental charges such as:

- Fees for the transfer and registration of **[Shares]** charged by the registrar and transfer agent for the **[Shares]** in **[country]** (*i.e.*, upon deposit and withdrawal of **[Shares]**).
- Expenses incurred for converting foreign currency into U.S. dollars.
- Expenses for cable, telex and fax transmissions and for delivery of securities.
- Taxes and duties upon the transfer of securities (*i.e.*, when **[Shares]** are deposited or withdrawn from deposit).
- Fees and expenses incurred in connection with the delivery or servicing of **[Shares]** on deposit.

Depository fees payable upon the issuance and cancellation of ADSs are typically paid to the depository bank by the brokers (on behalf of their clients) receiving the newly - issued ADSs from the depository bank and by the brokers (on behalf of their clients) delivering the ADSs to the depository bank for cancellation. The brokers in turn charge these transaction fees to their clients.

Depository fees payable in connection with distributions of cash or securities to ADS holders and the depository services fee are charged by the depository bank to the holders of record of ADSs as of the applicable ADS record date. The Depository fees payable for cash distributions are generally deducted from the cash being distributed. In the case of distributions other than cash (*i.e.*, stock dividends, rights offerings), the depository bank charges the applicable fee to the ADS record date holders concurrent with the distribution. In the case of ADSs registered in the name of the investor (whether certificated or un-certificated in direct registration), the depository bank sends invoices to the applicable record date ADS holders. In the case of ADSs held in brokerage and custodian accounts via the central clearing and settlement system, The Depository Trust Company (DTC), the depository bank generally collects its fees through the systems provided by DTC (whose nominee is the registered holder of the ADSs held in DTC) from the brokers and custodians holding ADSs in their DTC accounts. The brokers and custodians who hold their clients' ADSs in DTC accounts in turn charge their clients' accounts the amount of the fees paid to the depository banks.

In the event of refusal to pay the depository fees, the depository bank may, under the terms of the deposit agreement, refuse the requested service until payment is received or may set- off the amount of the depository fees from any distribution to be made to the ADS holder.

Note that the fees and charges you may be required to pay may vary over time and may be changed by us and by the depository bank. You will receive prior notice of such changes.

APPENDIX II

Depository Payments [Fiscal Year 20--]

In 20[--], we received the following payments from **[Name of Depository]**, the Depository Bank for our ADR program:

Reimbursement of listing fees (NYSE/NASDAQ):	\$ _____
Reimbursement of SEC filing fees:	\$ _____
Reimbursement of settlement infrastructure fees (including DTC feeds):	\$ _____
Reimbursement of proxy process expenses (printing, postage and distribution):	\$ _____
Reimbursement of ADS holders identification expenses:	\$ _____
Reimbursement of legal fees:	\$ _____
Contributions towards our investor relations efforts (<i>i.e.</i> non-deal roadshows /investor conferences and IR agency fees):	\$ _____
[other]:	\$ _____