

February 14, 2008

SEC Update: SEC Proposes Amendments to Exchange Act Rule 12g3-2(b)

On February 13, 2008, the SEC proposed amendments to Rule 12g3-2(b) under the U.S. Securities Exchange Act of 1934 (the “Exchange Act”). The SEC has proposed the amendments to make it easier for foreign private issuers to obtain the 12g3-2(b) exemption so long as they meet certain requirements, while enhancing U.S. investors’ access to material non-U.S. disclosure documents. Specifically, the proposed amendments would eliminate the paper submission requirements by automatically granting the Rule 12g3-2(b) exemption to a foreign private issuer that meets specified conditions, which do not depend on a count of the issuer’s U.S. security holders, and which would require the issuer to publish electronically in English specified non-U.S. disclosure documents.

Background – Rule 12g3-2(b) Exemption

Rule 12g3-2(b) currently provides an exemption from registration under Section 12(g) of the Exchange Act with respect to equity securities of a foreign private issuer if the issuer submits to the SEC certain information that the issuer has published or is required to publish pursuant to the laws of its home jurisdiction or the rules of its non-U.S. securities exchange, or that it has distributed to its security holders. In order to obtain the exemption under Rule 12g3-2(b), a non-reporting foreign private issuer must submit written materials to the SEC in paper. The initial submission must set forth information about the issuer’s non-U.S. disclosure requirements and its U.S. security holders, and include paper copies of its non-U.S. disclosure documents for its last fiscal year. Under the current rule, a foreign private issuer may also submit to the SEC paper copies of its non-U.S. disclosure documents that are required on an ongoing basis in order to maintain the 12g3-2(b) exemption.

For additional information about the application of the current Rule 12g3-2(b), see our other memoranda entitled [“Rule 12g3-2\(b\) Exemption from SEC Reporting”](#) (April 6, 2004) and [“SEC Permits Electronic Publication by Foreign Private Issuers Maintaining Exemptions under Exchange Act Rule 12g3-2”](#) (October 11, 2007), which are available at www.paulweiss.com.

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Proposed Amendments

Under the SEC's proposed rules, a foreign private issuer would automatically be able to rely upon the Rule 12g3-2(b) exemption without any paper submission to the SEC as long as it meets the following conditions:

- the U.S. trading volume for the subject securities must be no greater than 20% of its worldwide trading volume for its most recently completed fiscal year, or the issuer must be claiming the Rule 12g3-2(b) exemption in connection with its deregistration under Exchange Act Rule 12h-6;
- the issuer must maintain a listing of the subject securities on one or more exchanges in one or two foreign jurisdictions comprising its primary trading market (which accounts for at least 55% of the trading in the issuer's securities during the issuer's most recently completed fiscal year);
- the issuer must publish specified non-U.S. disclosure documents (that were published since the beginning of its most recently completed fiscal year) in English on its Internet web site or through an electronic information delivery system that is generally available to the public in its primary trading market, unless claiming the exemption in connection with or recently following its deregistration; and
- an issuer must not have any Exchange Act reporting obligations under Section 13(a) or 15(d) of the Exchange Act.

The SEC has also proposed to eliminate the current requirement to look back 18 months to determine whether an issuer had any active or suspended reporting obligations under the Exchange Act during that period. The SEC believes eliminating the 18-month waiting period to be eligible for the 12g3-2(b) exemption will accelerate the electronic publishing of a foreign private issuer's non-U.S. disclosure documents to the benefit of investors.

Under the proposed rules, in order to maintain the Rule 12g3-2(b) exemption, the foreign private issuer must:

- continue to meet the trading volume threshold for its most recently completed year other than the year in which it first claims the exemption;
- continue to maintain its foreign listing;
- electronically publish the specified non-U.S. disclosure documents in English for subsequent fiscal years on an ongoing basis; and
- not otherwise incur any reporting obligations under the Exchange Act.

Proposed Initial Transition Period

The SEC has proposed an initial three-year transition period at the time the rule amendments become effective before requiring registration under Section 12 of the Exchange Act with respect to any foreign private issuer that loses the Rule 12g3-2(b) exemption because it did not satisfy the trading volume threshold.

The SEC has also proposed an initial three-month transition period for issuers to comply fully with the electronic publishing requirement. During the three-month transition period, the SEC will continue to process paper documents submitted under Rule 12g3-2(b) and make them available for public inspection. After the three-month transition period, however, the SEC will no longer process paper documents submitted under Rule 12g3-2(b).

Impact of the Proposed Amendments

The proposed amendments make it easier for a foreign private issuer to obtain the 12g3-2(b) exemption by having such exemption automatically granted so long as the issuer meets the above requirements. At the same time, U.S. investors will have easier access to the issuer's material non-U.S. disclosure documents as English versions will be published on the issuer's Internet web site or through an electronic information delivery system.

In addition, the shift from measuring the number of U.S. shareholders to focusing on the trading volume of the issuer's securities in the United States will allow foreign private issuers to more easily qualify for the 12g3-2(b) exemption. In general, trading volume information is more easily obtainable than information regarding a foreign private issuer's U.S. and worldwide shareholders.

On the other hand, the proposed requirement to measure trading volume on an annual basis means that certain foreign private issuer may lose their 12g3-2(b) exemption (and as a result, be required to register under the Exchange Act) even after initially obtaining such exemption if the U.S. market interest in the issuer's securities grows significantly.

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Please note that this memorandum outlines the rule changes that have been proposed by the SEC in summary form only. We will post a detailed analysis of the proposed rule changes once the SEC publishes the full text of the proposing release. The SEC is currently soliciting comments to the proposed rules. Comments on the proposed rule changes should be submitted to the SEC within 60 days of publication of the proposing release in the *Federal Register*. After comments are received, the SEC staff will prepare a final set of new rules (which may be modified from the proposed set of rules) for approval by the SEC Commissioners. Once approved, the effective date could be immediate or subject to a transition period.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions regarding the foregoing, please contact any of the following:

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