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

The SEC has published for public comment proposed amendments to Rule 12g3-2(b) under the U.S. Securities Exchange Act of 1934 (the “Exchange Act”). The proposed amendments would make it easier for a foreign private issuer to obtain the Rule 12g3-2(b) exemption by automatically granting the exemption to a foreign private issuer so long as it meets specified conditions that depend in part on the trading volume of the subject class of securities, rather than the number of the issuer’s U.S. security holders as required under the current rules. The proposed amendments also allow issuers to publish electronically in English specified non-U.S. disclosure documents, rather than submitting the documents to the SEC in paper as required under the current rules.

While obtaining and maintaining the Rule 12g3-2(b) exemption would become significantly easier from a logistical standpoint, the proposed amendments could create uncertainty for some foreign private issuers as to whether they may continue to rely on the Rule 12g3-2(b) exemption. In contrast to the current rule, which provides that an exempt status, once granted, cannot be lost unless the issuer undertakes a public offering or listing in the United States, under the proposed amendments, foreign private issuers must test and meet the trading volume requirement on an annual basis in order to maintain its exempted status under Rule 12g3-2(b). Accordingly, if U.S. market interest in an issuer’s securities grows significantly, that issuer may become subject to Exchange Act registration.

Background – Rule 12g3-2(b) Exemption

Section 12(g) of the Exchange Act and the SEC rules promulgated thereunder require an issuer to file an Exchange Act registration statement regarding a class of equity securities within 120 days of fiscal year-end if, as of the last day of the fiscal year, the number of record holders is 500 or greater, of which 300 or more are U.S. residents, and the issuer’s total assets exceed \$10 million.

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.

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Under the current rule, in order to obtain the exemption under Rule 12g3-2(b), a non-reporting foreign private issuer must at the time the exemption is initially obtained, have less than 300 record holders resident in the United States. The initial submission, which is submitted to the SEC in paper, 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. The SEC has been publishing from time to time a list showing those foreign issuers that have claimed the 12g3-2(b) exemption.

Under the current rule, once a foreign private issuer obtains the 12g3-2(b) exemption, the exemption continues to apply even if record holders in the United States subsequently increase so long as the issuer complies with the obligation to submit non-U.S. disclosure documents.

Proposed Amendments

Requirements for Claiming Exemption

Under the SEC's proposed rule amendments, a foreign private issuer would automatically be able to claim the Rule 12g3-2(b) exemption without any paper submission to the SEC as long as it meets all four of the conditions discussed below.

Average daily trading volume must be 20% or less or the exemption can be claimed in connection with deregistration under Exchange Act Rule 12h-6. The average daily trading volume of the subject class of securities in the United States for the issuer's most recently completed fiscal year must be no greater than 20% of the average daily trading volume of that class of securities on a worldwide basis for the same period. This trading volume threshold would effectively replace the U.S. holder count thresholds used under the current rules to initially determine whether the issuer can claim the Rule 12g3-2(b) exemption. The SEC explains that the trading volume requirement is preferable because it would "be a more direct and less costly measure of the relative U.S. market interest in a foreign private issuer's securities than one based on a count of the issuer's shareholders."

When determining its U.S. average daily trading volume, the issuer must include all transactions, including both on-exchange and off-exchange transactions. In contrast, when determining its worldwide average daily volume, the issuer must include on-exchange transactions, and may include off-exchange transactions. An issuer would be permitted to obtain trading volume information from certain sources, including publicly available sources, market data vendors and other commercial information service providers, upon which the issuer has reasonably relied in good faith.

Alternatively, an otherwise eligible issuer would also be able to claim the Rule 12g3-2(b) exemption if its registration or reporting regarding the subject securities has been terminated because (1) the average daily trading volume of the subject securities in the United States, as measured over a recent 12-month period, has been no greater than 5% of the average daily trading volume of the subject securities on a worldwide basis for the same period, or (2) the number of

worldwide or U.S. holders of the subject securities is less than 300 on a date within 120 days before the issuer filing a certification of termination of its registration or reporting on Form 15F.

The primary trading market must be outside the United States. The issuer must currently maintain a listing of the subject class of securities on one or more exchanges in one or two non-U.S. jurisdictions comprising its primary trading market (accounting for at least 55% of the trading in the issuer's securities during the issuer's most recently completed fiscal year). Under the proposed rules, if an issuer aggregates the trading of its subject securities in two non-U.S. jurisdictions, the trading for those securities in at least one of the two jurisdictions must be larger than the trading for the subject securities in the United States. The foreign listing requirement is intended to help ensure that there is a non-U.S. jurisdiction that principally regulates and oversees the issuance and trading of the issuer's subject securities and the issuer's disclosure obligations to investors.

Disclosure documents must be published in English. The issuer must publish in English, on its Internet website or through an electronic information delivery system that is generally available to the public in its primary trading market, the same non-U.S. disclosure documents (that were published since the beginning of the issuer's most recently completed fiscal year) as are currently required to be submitted to the SEC in paper to claim the Rule 12g3-2(b) exemption. If the issuer is claiming the Rule 12g3-2(b) exemption in connection with or following its deregistration, however, the issuer would not be required to meet the electronic publication requirement for its last fiscal year since a recently deregistered issuer would already have filed its required reports under the Exchange Act on EDGAR for its most recently completed fiscal year. The issuer must also publish electronically English translations of its annual report, interim reports that include financial statements, press releases, and all other communications and documents distributed directly to security holders of the subject securities. The electronic publication requirement would replace the current requirement that an issuer submit to the SEC hard copies of non-U.S. disclosure documents, including a list of the issuer's non-U.S. disclosure requirements, the number of U.S. holders of its subject securities and the percentage of outstanding shares held by such holders.

There must be no current Exchange Act reporting obligations. The issuer must not currently have any Exchange Act reporting obligations under Section 13(a) or 15(d) of the Exchange Act. Under the proposed rules, an issuer would no longer be required to look back 18 months to determine whether it had any active or suspended reporting obligations under the Exchange Act during that period. Moreover, an issuer would no longer be required to seek the Rule 12g3-2(b) exemption within the 120-day period during which a registration statement must otherwise be filed under Section 12(g) of the Exchange Act. An otherwise eligible issuer would also be able to claim the Rule 12g3-2(b) exemption immediately upon the termination of its Section 12(g) registration or the suspension of its Section 15(d) reporting obligations.

Requirements for Maintaining 12g3-2(b) Exemption

Under the proposed rules, in order to maintain the Rule 12g3-2(b) exemption, a foreign private issuer must meet the four conditions discussed below.

First, the issuer must continue to meet the trading volume requirement for its most recently completed year except the year in which it first claims the exemption. Under the proposed rules, the issuer would have to determine at the end of each fiscal year, other than the year in which it first claims the exemption, whether it still meets the trading volume requirement, even if the issuer was in compliance with the non-U.S. disclosure publication requirements. This 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. In contrast, under the existing rules, a Rule 12g3-2(b)-exempt company that is current in its non-U.S. disclosure obligations does not have to assess at the end of each fiscal year whether it has exceeded the record holder thresholds for registration under Section 12(g) of the Exchange Act. An issuer would not be required to make the trading volume determination for the fiscal year in which the issuer first claims the exemption in order to provide a reasonably long enough period to assess relative U.S. market interest for the issuer's subject securities.

Second, the issuer must continue to meet the non-U.S. listing requirement. Under the proposed rules, any issuer that ceases to comply with this requirement would immediately lose the Rule 12g3-2(b) exemption.

Third, the issuer must electronically publish in English, on an ongoing basis and for each subsequent fiscal year, the same non-U.S. disclosure documents as are required to claim the Rule 12g3-2(b) exemption. The non-U.S. disclosure documents must be published promptly after the information has been made public pursuant to the issuer's home jurisdiction laws, non-U.S. stock exchange rules, or shareholder rules and practices. The SEC suggests that the concept of "prompt" disclosure would remain the same as under current SEC staff practice. In addition, as under the current rules, if an issuer has not complied with the non-U.S. publication requirements and thus can no longer claim the Rule 12g3-2(b) exemption, the issuer must determine on the last day of the fiscal year whether it must register the subject securities under the U.S. holder count requirement of Section 12(g) of the Exchange Act.

Fourth, the issuer must not otherwise incur any reporting obligations under the Exchange Act.

Other Proposed Amendments

The SEC has proposed other rule amendments, including those which would:

- eliminate the successor issuer provision under Rule 12g3-2(d)(2) and permit an issuer succeeding to the Exchange Act reporting obligations of another issuer through a merger, acquisition of assets or other similar transaction, to claim the Rule 12g3-2(b) exemption upon the effectiveness of the issuer's termination of Exchange Act registration and reporting;
- eliminate the prohibition against claiming the Rule 12g3-2(b) exemption applicable to issuers that have securities or ADRs quoted on Nasdaq (because Nasdaq has become a national securities exchange, and such issuers must register their securities under Section 12(b) of the Exchange Act by August 1, 2009); and

- revise Form F-6 (which is used to register ADRs under the U.S. Securities Act of 1933) to require a registrant to state that, if the issuer of deposited securities is not an Exchange Act reporting company, the issuer electronically publishes information in English as required to maintain the Rule 12g3-2(b) exemption, and to disclose the Internet website address at which the required information can be accessed.

Initial Transition Period

The SEC has proposed an initial three-year transition period at the time the proposed 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. If a currently exempt issuer is unable to claim the Rule 12g3-2(b) exemption upon the effectiveness of the proposed rules because it cannot meet the trading volume requirement, the issuer may continue to rely on the exemption during this transition period so long as it complies with the remaining conditions for maintaining the exemption under the proposed rules.

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 would 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 would no longer process paper documents submitted under Rule 12g3-2(b).

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The SEC is currently soliciting comments to the proposed rules. Comments on the proposed rule changes should be submitted to the SEC by April 25, 2008. 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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