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SEC Amends the Rule 12g3-2(b) Exemption for Foreign Private Issuers

October 10, 2008

On September 5, 2008, the SEC approved amendments making it easier for foreign private issuers to take advantage of Exchange Act Rule 12g3-2(b), the rule exempting eligible foreign private issuers from registering equity securities under Section 12(g) of the Exchange Act.[1] The amendments become effective on October 10, 2008.[2]

In order to qualify for the amended exemption, a foreign private issuer must:

- maintain a listing of its securities on one or more exchanges in its non-U.S. "primary trading market";[3]
- not have any other reporting requirements under Section 13 of 15(d) of the Exchange Act; and
- publish in English its non-U.S. disclosure documents from the first day of its most recently completed fiscal year on its website or through an electronic information delivery system generally available to the public in its primary trading market.[4]

Importantly, a foreign private issuer who meets these qualifications is exempt regardless of its asset value or the number of U.S. persons who are record holders of its securities.

Under amended Rule 12g3-2(b), a foreign private issuer that meets the Rule's requirements automatically qualifies for the exemption and does not have to submit the written application that was previously required by the SEC. The foreign private issuer does not have to notify the SEC or any other party that it is relying on the exemption.

Definition of "Primary Trading Market"

To qualify under amended Rule 12g3-2(b), a foreign private issuer must list its securities on one or more exchanges in a non-U.S. jurisdiction that is considered the “primary trading market” for the securities. To qualify as the “primary trading market” for an issuer’s securities, at least 55 percent of the worldwide trading in the issuer’s class of securities during the most recently completed fiscal year must occur on the exchanges located in one, or no more than two, non-U.S. jurisdiction(s). If the foreign private issuer uses the trading volume in two non-U.S. jurisdictions to reach the 55 percent threshold, the trading for the securities in at least one of those non-U.S. jurisdictions must be larger than the trading for the securities in the United States.

It is important to note, however, that a foreign private issuer is not required to demonstrate that it has maintained a non-U.S. listing for any specified period of time. Instead, a foreign private issuer may qualify for the Rule 12g3-2(b) exemption immediately upon obtaining a non-U.S. listing.

No Other Exchange Act Reporting Obligation

A foreign private issuer may not rely on amended Rule 12g3-2(b) if it is subject to the reporting obligations set forth in Exchange Act Section 13 or 15(d). Accordingly, a foreign private issuer may not rely on amended Rule 12g3-2(b) for a class of securities if it has any class of securities registered under Exchange Act Section 12 or has a reporting obligation under Section 15(d) as a result of a registered offering in the United States. However, in a change from the previous operation of Rule 12g3-2(b), foreign private issuers are no longer required to wait eighteen months following Exchange Act deregistration to qualify. Instead, foreign private issuers are eligible for the amended exemption immediately upon the effectiveness of deregistration after filing a Form 15 or Form 15F.

Electronic Publication of Non-U.S. Disclosure Documents

Under amended Rule 12g3-2(b), a foreign private issuer is required to electronically publish, in English, the same information required to be filed with the SEC in paper under previous Rule 12g3-2(b). This includes information that the foreign private issuer:

- is required to make public by its home country;
- is required to make public by the principal stock exchange in its primary

trading market; and
- has distributed or been required to distribute to its holders.

To maintain the Rule 12g3-2(b) exemption, a foreign private issuer must, promptly and on an on-going basis, publish these non-U.S. disclosure documents either on its website or on another electronic information delivery system available in its primary trading market.

A foreign private issuer is required to electronically publish English translations of its non-U.S. disclosure documents that are considered material to an investment decision, including "results of operations or financial condition, changes in business, acquisitions or dispositions of assets, issuance, redemption or acquisition of securities, changes in management or control, the granting of options or the payment of other remuneration to directors or officers, and transactions with directors, officers or principal security holders."[5] At a minimum, an issuer must publish English translations of its annual report complete with annual financial statements, interim reports including financial statements, press releases, and any other communications provided directly to shareholders. The SEC has advised that an English summary may be provided in lieu of a full English translation, but only where such a summary would be permitted when filing Form 6-K.

The SEC has provided a short period for foreign private issuers to transition to the electronic publication of the information required under the Rule 12g3-2(b) exemption. As a result of this transition period, foreign private issuers will be required to publish their information electronically no later than January 10, 2009.

Transitioning from the Old Exemption to the New Exemption

Foreign private issuers currently relying on the Rule 12g3-2(b) exemption must ensure that they meet all of the requirements of the amended exemption. An important first step is to immediately begin to electronically publish English translations of all required non-U.S. disclosure documents. Unfortunately, not all currently exempted issuers may be able to transition seamlessly. For example, a foreign private issuer who cannot meet the new requirement that 55 percent of its worldwide trading occur in one or two foreign jurisdictions would be required to file a Section 12 registration statement or look to another exemption. To address this issue, the SEC has provided a three-year

transition period for issuers. Because many foreign private issuers use the Rule 12g3-2(b) exemption to establish a sponsored ADR facility in the United States, it is important that any issuer currently relying on the exemption should promptly evaluate its compliance under the amended exemption so it may place itself in the best possible position to avoid becoming an Exchange Act reporting company.

Conclusion

Please contact any of the attorneys listed below if you have any questions regarding the Rule 12g3-2(b) exemption.

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1. Absent an exemption, a foreign private issuer is required to register under Exchange Act Section 12(g) if, within 120 days after the end of its most recently completed fiscal year, it has a class of equity securities held by 500 or more holders of record (300 or more of which are in the United States) and its total assets are more than $10 million.

2. SEC Release 34-58465 (Sept. 5, 2008).

3. Initially, the SEC proposed that to qualify under Rule 12g3-2(b), a foreign private issuer's U.S. average daily trading volume could be no greater than 20 percent of its worldwide average daily trading volume for the most recently completed fiscal year. Based on comments submitted explaining that foreign private issuers cannot easily control the level of U.S. trading, the SEC did not adopt this requirement.

4. Foreign private issuers who claim the Rule 12g3-2(b) exemption upon termination of Exchange Act registration will not be required to publish non-U.S. disclosure documents for their most recently completed fiscal year.

5. SEC Release No. 34-58465 (Sept. 5, 2008) at 29-30.

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