

Exemption from Registration for Foreign Private Issuers: SEC Amends Rule 12g3-2(b)

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Client Advisory

September 16, 2008 by Andris J. Vizbaras, Guy P. Lander and G. Christina Gray-Trefry

On September 5, 2008, the U.S. Securities and Exchange Commission (the "SEC") published amendments to Rule 12g3-2(b) under the Securities Exchange Act of 1934 (the "Exchange Act"). Under the amendments, a foreign private issuer may claim the exemption without notifying the SEC as long as:

1. the issuer's securities are listed on an exchange outside the United States that constitutes the primary trading market for those securities,
2. the issuer is not required to report under the Exchange Act, and
3. the issuer published electronically in English specified non-U.S. disclosure documents on its internet website or through an electronic information delivery system generally available to the public in its primary jurisdiction.

The amendments are effective October 10, 2008.

Background

Under Section 12(g) of the Exchange Act and the SEC's related rules, a foreign private issuer generally must register a class of its equity securities with the SEC and file reports under the Exchange Act when they become "widely held," i.e., the issuer has \$10 million in assets and more than 500 record holders of the securities, of which at least 300 are U.S. residents.

Before the amendments, a foreign private issuer that was approaching 300 or more holders resident in the U.S. was able to avoid SEC registration and reporting by obtaining an exemption from the SEC under Rule 12g3-2(b). To obtain the exemption, the issuer was required to submit an application within 120 days of the issuer's financial year end, which was subject to review by the SEC staff.

Eligibility for the Exemption

The amendments automatically grant the Rule 12g3-2(b) exemption to a foreign private issuer that satisfies the following eligibility conditions:

1. Foreign Listing Condition

To claim the Rule 12g3-2(b) exemption, an issuer must maintain a listing of the subject class of securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in one other foreign jurisdiction, constitutes

the “primary trading market” for those securities. The foreign listing condition is intended to assure there is a non-U.S. jurisdiction that principally regulates and oversees the trading of the issuer’s securities and its disclosure obligations to investors.

The amendments define “primary trading market” to mean that at least 55% of the worldwide trading in the subject class of securities took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer’s most recently completed fiscal year. If a foreign private issuer aggregates the trading of its class of securities in markets in two foreign jurisdictions, the trading in the securities in the markets of at least one of the two foreign jurisdictions must be larger than the trading in the U.S. markets in those securities. An issuer that is establishing the exemption, but not deregistering, need not have maintained a foreign listing for a full fiscal year, or any other specified period of time. A newly listed issuer may be eligible to establish the exemption even though it has no history of trading on any securities market.

2. Non -Reporting Condition

To be eligible for the Rule 12g3-2(b) exemption, an issuer must not have any reporting obligations (whether for the subject class or any other securities) under the Exchange Act. A foreign private issuer that has suspended its Exchange Act reporting obligations by filing a Form 15 (under Rules 12g-4 or 12h-3) or a Form 15F (under Rule 12h-6) would meet the non-reporting condition upon its deregistration becoming effective. Also, a foreign private issuer that has suspended its reporting obligations under Section 15(d) would meet the non-reporting condition.

The amendments eliminate the requirement for an issuer to look back over the previous eighteen months to determine whether it had a reporting obligation during that period.

3. Electronic Publishing Condition

The amendments require foreign private issuers to supply certain information in order to claim the Rule 12g3-2(b) exemption. In particular, unless the issuer claims the Rule 12g3-2(b) exemption in connection with or following a recent Exchange Act deregistration, the issuer must publish in English, on its internet website or through an electronic information delivery system generally available to the public in its primary trading market, information that, from the first day of its mostly recently completed fiscal year, it:

- has made public or been required to make public under its home country laws;
- has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and
- has distributed or been required to distribute to security holders.

These are the same categories of information that the SEC has historically required a non-reporting company to submit in paper when applying for the Rule 12g3-2(b) exemption. As under the previous rule, the amendments require an issuer only to publish electronically information that is material to an investment decision regarding the subject securities, such as (i) results of operations or financial condition; (ii) changes in business; (iii) acquisitions or disposition of assets; (iv) the issuance, redemption or acquisition of securities; (v) changes in management or control; (vi) the granting of options or the payment of other remuneration to directors or officers; and (vii) transactions with directors, officers or principal security holders. Now, none of this information need be furnished or otherwise delivered directly to the SEC.

The amendments require an issuer to publish electronically, at a minimum, English translations of the following documents if in a foreign language:

- its annual report, including or accompanied by annual financial statements;
- interim reports that include financial statements;
- press releases; and
- all other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

The SEC provided guidance on when an issuer may provide an English summary instead of an English translation. Generally, if an issuer could submit an English summary of a non-U.S. disclosure document under cover of Form 6-K or under Rule 12b-12(d)(3), it can do so when claiming or maintaining the Rule 12g3-2(b) exemption.

Electronic Publishing Requirement to Maintain the Exemption

To maintain the Rule 12g3-2(b) exemption, the issuer must publish the same types of information that it used to claim the exemption, on an ongoing basis and for subsequent fiscal years, on its internet website or through an electronic information delivery system in its primary trading market. For example, SEDAR is an acceptable electronic delivery system.

Similar to the previous rule, the amendments require an issuer to publish its non-U.S. disclosure documents promptly after the information has been made public under its home country laws, non-U.S. stock exchange rules or shareholder meeting rules and practices.

Elimination of Application Requirement

The amendments eliminate the requirement that, to obtain a Rule 12g3-2(b) exemption, if not deregistering under Rule 12h-6, an issuer must submit an application to the SEC. Under the amendments, the Rule 12g3-2(b) exemption would be self executing, i.e., automatically applying upon the issuer's meeting all of its conditions. The issuer generally is not required to notify the SEC or otherwise make any public statement that it is relying on the exemption (unless it is filing a Form F-6 to register American Depositary Receipts ("ADRs"), as discussed below), although the issuer may elect to do so voluntarily, for example to enable broker quotations under Rule 15c2-11 (as discussed below).

Duration of the Rule 12g3-2(b) Exemption

The Rule 12g3-2(b) exemption remains in effect as long as the issuer continues to comply its eligibility conditions. The exemption terminates when an issuer:

- no longer maintains a listing of the subject class of securities on one or more exchanges in a primary trading market;
- registers a class of securities under Section 12 of the Exchange Act or incurs reporting obligations under Section 15(d) of the Exchange Act or
- no longer electronically publishes the specified non-U.S. disclosure documents required to maintain the exemption.

There is no cure period. A non-complying issuer must re-establish compliance with any of the Rule 12g3-2(b) conditions promptly or else register under the Exchange Act. Consequently, those claiming the exemption should evaluate their compliance with its conditions annually based on the last day of their fiscal year.

Elimination of the Successor Issuer Prohibition

Under the previous rule, an issuer generally was precluded from obtaining the Rule 12g3-2(b) exemption if the issuer succeeded to the Exchange Act reporting obligations of another issuer by a merger, consolidation, exchange of securities or acquisition of assets. The amendments eliminate the successor issuer prohibition, so that a successor issuer may claim the Rule 12g3-2(b) exemption upon effectiveness of its exit from Exchange Act reporting.

Elimination of the Rule 12g3-2(b) Exception for Multijurisdictional Disclosure System ("MJDS") Filers

The amendments eliminate the ability of Canadian issuers that have a reporting obligation solely due to filing a registration statement under certain MJDS forms to claim the Rule 12g3-2(b) exemption. The amendments also eliminate the ability of a Canadian issuer that already relies on the Rule 12g3-2(b) exemption for one class of securities, but that later acquires Exchange Act reporting obligations as a MJDS filer for another class of securities, to retain the Rule 12g3-2(b) exemption. Under the amendments, a MJDS registrant is treated the same as other foreign private issuers and eligible to claim the Rule 12g3-2(b) exemption on the same grounds as other foreign registrants.

Treatment of Compensatory Stock Options

As under the previous rule, the exemption afforded to a class of equity securities under Rule 12g3-2(b) may include compensatory stock options for that class of equity securities.

Elimination of the "Automated Inter-Dealer Quotation System" Prohibition

The amendments eliminate the provision that generally prohibited a foreign private issuer from claiming the Rule 12g3-2(b) exemption if it has securities or ADRs quoted in the U.S. on an automated inter-dealer quotation system, which until recently, referred to the inter-dealer quotation system administered by Nasdaq. The SEC has eliminated this prohibition because Nasdaq has become a national securities exchange.

Revisions to Form F-6

The SEC adopted conforming changes to Form F-6, the registration statement used to register ADRs under the Securities Act of 1933. The amendments require a Form F-6 registrant to state that, if the issuer of deposited securities against which ADRs are registered is not an Exchange Act reporting company, this issuer meets the electronic publishing condition of Rule 12g3-2(b). The registrant must also disclose the foreign issuer's internet website address or the electronic information delivery system in its primary trading market. For an unsponsored ADR facility, a Form F-6 filer may base its representation that the issuer publishes the information in English required to maintain the exemption from registration under Rule 12g3-2(b) upon the filer's reasonable, good faith belief after exercising reasonable diligence.

Amendment of Rule 15c2-11 under the Exchange Act

Rule 15c2-11 under the Exchange Act prohibits broker-dealers from initiating or resuming quotations for a covered over-the-counter security unless they have obtained and reviewed current information about the issuer. A broker-dealer must make this information reasonably available upon request to any person expressing an interest in a proposed transaction involving the security with the broker-dealer. Rule 12g3-2(b) information is one of the types of information that satisfy the Rule 15c2-11 obligation. The amendments permit a broker-dealer to fulfill its Rule 15c2-11 obligation by providing the requesting person with appropriate instructions regarding how to obtain the information electronically.

Transition Periods

The amendments are effective October 10, 2008. They also establish a three-year transition period to accommodate a foreign private issuer that currently relies upon the Rule 12g3-2(b) exemption but that is unable to satisfy the new conditions of the amended Rule 12g3-2(b). These foreign private issuers are not required to register their securities under the Exchange Act or make any related Exchange Act filings until

October 10, 2011 (three years from the effective date of the amendments). The period is intended to provide an adequate period to complete the registration process, including obtaining required audited financial statements.

The SEC also adopted a three-month transition period for the electronic publication condition. Until January 10, 2009 (three months from the effective date of the amendments), the SEC will continue to process paper Rule 12g3-2(b) submissions and make them publicly available in the Public Reference Room. After the three month transition period, the SEC will no longer process paper Rule 12g3-2(b) submissions, and an issuer that does not submit documents electronically will no longer be able to claim the Rule 12g3-2(b) exemption.

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