

SEC Proposes Rule Changes Affecting Foreign Private Issuers

February 22, 2008

At its open meeting on February 13, 2008, the US Securities and Exchange Commission (“SEC”) voted unanimously to propose (i) changes to Rule 12g3-2(b) under the US Securities Exchange Act of 1934, as amended (the “Exchange Act”), an exemption from Exchange Act registration for equity securities of foreign private issuers¹ that meet certain requirements, and (ii) changes affecting foreign private issuers’ Exchange Act reporting obligations.

The SEC release containing the proposed amendments to Rule 12g3-2(b) was published on February 19, 2008² and comments on this release will be due April 25, 2008. The SEC release containing the proposed amendments affecting foreign private issuers’ Exchange Act reporting obligations has not yet been published. Comments on this release will be due within 60 days after publication of the release in the Federal Register. This client alert is based on the Rule 12g3-2(b) Proposing Release and statements made by the SEC and its staff during the open meeting as well as the related SEC press release.³

Rule 12g3-2(b) Proposal

The first proposal would amend Exchange Act Rule 12g3-2(b), an exemption from registration under Exchange Act Section 12(g) for equity securities of a foreign private issuer that submits to the SEC initially and from time to time thereafter certain information, including information it (i) makes public pursuant to the law of its home country, (ii) files with a stock exchange on which its securities are traded and which is made public by that exchange or (iii) distributes or is required to distribute to its securityholders. Currently, these materials must be submitted to the SEC as paper copies.

Under the proposed amendments, the requirement to submit paper copies of the materials required under Rule 12g3-2(b) would be replaced with the requirement to make these materials available electronically. In addition, an issuer would no longer be required to apply to the SEC for an exemption under Rule 12g3-2(b). Instead, the exemption would be available automatically to any foreign private issuer that meets certain requirements.

¹ The term “foreign private issuer” is defined in Exchange Act Rule 3b-4(c).

² SEC Release No. 34-57350 (Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 For Foreign Private Issuer) (February 19, 2008) (the “Rule 12g3-2(b) Proposing Release”), available at <http://www.sec.gov/rules/proposed/2008/34-57350.pdf>.

³ SEC Press Release, “SEC Votes to Propose All-Electronic Disclosure for Foreign Issuers,” dated February 13, 2008 (available at <http://www.sec.gov/news/press/2008/2008-20.htm>).

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Requirements for Availability of Rule 12g3-2(b) Exemption

Under the proposed amendments, the Rule 12g3-2(b) exemption would be automatically available to a foreign private issuer that meets the following requirements:

Average Daily Trading Volume

The average daily trading volume (“ADTV”) of the subject class of securities in the United States must not have been greater than 20% of the worldwide ADTV of that class for the issuer’s most recently completed fiscal year, or the issuer must be claiming the Rule 12g3-2(b) exemption in connection with a deregistration of the subject class under Exchange Act Rule 12h-6.

Listing on Primary Trading Market

The issuer must maintain a listing of the subject class of securities on one or more foreign exchanges in one or more jurisdictions comprising its primary trading market. “Primary trading market” would be the securities market or markets (in no more than two foreign jurisdictions) in or through the facilities of which at least 55% of the trading in the subject class of securities took place during the issuer’s most recently completed fiscal year.

Electronic Publication of Disclosure Documents in English

The issuer must publish specified non-US disclosure documents⁴ 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,⁵ unless the issuer claims the Rule 12g3-2(b) exemption in connection with or recently following a deregistration of the subject class. Publication of these disclosure documents must occur promptly after the information has been made public pursuant to the law and practices in the issuer’s home country.

No Reporting Obligation under Exchange Act Section 13(a) or 15(d)

The issuer must not have any reporting obligations under Exchange Act Section 13(a) or 15(d). Under the current rule, an issuer must look back 18 months and determine whether it had any active or suspended reporting obligations during that period, in which

⁴ As under current Rule 12g3-2(b), this would encompass any information that the issuer: (i) has made public or been required to make public pursuant to the laws of its home country, (ii) 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 (iii) has distributed or been required to distribute to its security holders.

⁵ These would include systems similar to the SEC’s Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. An example would be the System for Electronic Document Analysis and Retrieval (SEDAR) used in Canada for filings with the Canadian securities regulatory authorities.

case the exemption is not available. The proposed rules would eliminate the 18-month look-back requirement.

Potential Consequences on ADR Facilities

Equity securities of a foreign private issuer that meets the proposed requirements of amended Rule 12g3-2(b) would automatically (i.e., without any affirmative steps taken by the issuer and possibly even without the issuer's knowledge) become subject to the Rule 12g3-2(b) exemption. For example, a foreign private issuer that routinely publishes non-US disclosure documents in English on its website or through an electronic information delivery system in its home country and meets the other requirements of Rule 12g3-2(b) could unintentionally cause its equity securities to become subject to the exemption. This represents a significant change from the current operation of Rule 12g3-2(b), which requires a foreign private issuer to make application to the SEC for the exemption to be granted.

The automatic availability of the Rule 12g3-2(b) exemption under the proposed new rules could have consequences for American Depositary Receipt ("ADR") facilities for securities of foreign private issuers in the United States. Currently, if a class of securities of a foreign private issuer is subject to the Rule 12g3-2(b) exemption, depositary banks in the United States, absent an issuer-sponsored ADR facility, can establish an unsponsored ADR facility for the issuer's securities without the issuer's consent. The existence of an unsponsored ADR facility creates problems for an issuer if it wishes to set up a sponsored ADR facility later on. Due to the automatic availability of the Rule 12g3-2(b) exemption under the proposed new rules, securities of foreign private issuers that never applied for the Rule 12g3-2(b) exemption but happen to meet its requirements would now suddenly become subject to the Rule 12g3-2(b) exemption without the issuers' involvement (and possibly knowledge) and be eligible for unsponsored ADR facilities in the United States. Currently, a foreign private issuer is able to restrict the ability of depositary banks to establish an unsponsored ADR facility in the United States simply by not applying to the SEC for the Rule 12g3-2(b) exemption.

The SEC recognized this potential issue in the Rule 12g3-2(b) Proposing Release and is asking for comment as to whether, as a condition to the registration on Form F-6 of ADRs of a foreign private issuer, it should require (i) that the issuer give its consent to the depositary bank or (ii) that the depositary notify the issuer of its intention to register ADRs and either (a) receive an affirmative statement of no objection from the issuer or (b) not receive an affirmative statement of objection from the issuer.

Transition Periods

Exchange Act Registration

Under the proposed amendments, a foreign private issuer whose securities are currently subject to the Rule 12g3-2(b) exemption but would not meet the proposed new requirements for the Rule 12g3-2(b) exemption, would have to file an Exchange Act registration statement and register the securities under Section 12(g) of the Exchange Act no later than three years from the effective date of the proposed amendments.

If a foreign private issuer that is currently exempt under Rule 12g3-2(b) is unable to satisfy the trading volume threshold under the proposed amendments, but complies with the other requirements of the amended rule, it could continue to rely on the Rule 12g3-2(b) exemption during the three-year transition period.

Paper Submissions

For a period of three months following the effectiveness of the proposed amendments, the SEC would continue to process paper submissions of disclosure documents required under Rule 12g3-2(b) and make the documents available in its Public Reference Room. Following the three-month period, a foreign private issuer that does not publish the submitted documents electronically as required under the proposed amendments, would not be able to claim the Rule 12g3-2(b) exemption.

Foreign Private Issuer Reporting Proposal

Proposed Amendments

The second proposal would amend Exchange Act filing and disclosure requirements for foreign private issuers in the following areas:

Acceleration of Form 20-F Reporting Deadline

The reporting deadline for annual reports filed by foreign private issuers on Form 20-F would be accelerated from currently six months to 90 days after the issuer's fiscal year-end for large accelerated filers and accelerated filers,⁶ and to 120 days after the issuer's fiscal year-end for all other issuers, following a two-year transition period.

⁶ These are companies (i) that have been subject to Exchange Act reporting under Exchange Act Section 13(a) or 15(d) for at least twelve months and have filed at least one annual report and (ii) whose voting and non-voting common equity held by non-affiliates has an aggregate worldwide market value of \$75 million (in the case of "accelerated filers") or \$700 million (in the case of "large accelerated filers"), respectively.

Annual Assessment of Foreign Private Issuer Eligibility

SEC-registered issuers would be permitted to assess their eligibility to use the special forms and rules available to foreign private issuers once a year on the last business day of their second fiscal quarter, rather than, as currently required, on a continuous basis. If an issuer no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter, it would be required to comply with the reporting requirements and use the forms prescribed for domestic issuers beginning on the first day of the fiscal year following the determination date.⁷ An issuer that determines on the last business day of its second fiscal quarter that it qualifies as a foreign private issuer would be permitted to use the forms and rules available to foreign private issuers immediately beginning on the determination date.

Elimination of Instruction to Item 17 of Form 20-F Permitting Omission of Segment Data From US GAAP Financial Statements

The instruction to Item 17 of Form 20-F that currently permits certain foreign private issuers to omit segment data from their financial statements prepared in accordance with US generally accepted accounting principles (“US GAAP”) would be eliminated. The SEC staff believes that this accommodation is no longer necessary or appropriate and pointed out that it is currently used by very few foreign private issuers.

Amendment to Going Private Rules

Exchange Act Rule 13e-3 pertaining to going-private transactions by SEC-registered issuers or their affiliates would be amended to reference the recently adopted deregistration and termination of reporting rules applicable to foreign private issuers.

⁷ For example, if a foreign private issuer determines that it no longer qualifies as a foreign private issuer as of the last day of its second fiscal quarter in 2009, the issuer would be required to comply with the filing requirements for domestic companies on the first day of its 2010 fiscal year. Among other things, the issuer would need to (i) file an annual report on Form 10-K in 2010 for its 2009 fiscal year, (ii) file quarterly reports on Form 10-Q, (iii) file current reports on Form 8-K, as necessary to comply with the requirements of that form, and (iv) comply with the proxy rules and Exchange Act Section 16.

Solicitation of Comment on Other Possible Amendments

In addition, the second proposal solicits comment on other possible amendments that would affect foreign private issuers, including the following:

Possible Additional Form 20-F Disclosure Items

The proposal solicits comment on possible amendments to Form 20-F to require, among other things, disclosure in annual reports about:

- Any changes in and disagreements with the foreign private issuer's certifying accountants;
- Fees, payments and other charges relating to ADRs;
- Significant differences between the foreign private issuer's corporate governance practices and the practices required for domestic issuers by US securities exchanges on which the foreign private issuer's securities are listed;⁸ and
- Financial information for completed highly significant acquisitions.⁹

Possible Elimination of Limited US GAAP Reconciliation Option in Item 17 of Form 20-F

The proposal also solicits comment on the possible elimination of the limited US GAAP reconciliation option contained in Item 17 of Form 20-F.

Depending on the context, the presentation of a US GAAP reconciliation must meet either the requirements of Item 17 or Item 18 of Form 20-F. Item 17 applies to Exchange Act registration statements, annual reports on Form 20-F and registration statements under the US Securities Act of 1933, as amended (the "Securities Act"), for investment grade non-convertible securities and certain rights offerings. It requires a narrative description of differences and a quantitative reconciliation of specific financial statement line items from non-US GAAP to US GAAP, but does not require all US GAAP and Regulation S-X disclosures, particularly with regard to industry segment reporting. Item 18 applies in the context of financial statements in a Securities Act registration statement for offerings of equity, convertible and other securities and requires the Item 17 information as well as generally all other information required by US GAAP and Regulation S-X, including segment information.

⁸ Under the rules of a number of US exchanges, listed foreign private issuers are exempt from many of the corporate governance requirements that otherwise apply to listed companies. One of the conditions for relying on the exemption is disclosure by the foreign private issuer of significant differences between its governance practices and the practices followed by domestic companies under the relevant exchange's listing standards. See, for example, Section 303A.11 of the New York Stock Exchange Listed Company Manual.

⁹ This would encompass acquisitions that are significant at the 50% or greater level, as determined based on Rule 1-02(w) of Regulation S-X.

If the SEC decided to propose this amendment and the proposed amendment were adopted, all foreign private issuers that are required to provide a US GAAP reconciliation would need to prepare their US GAAP reconciliation pursuant to Item 18 and include segment information. However, the SEC staff noted at the open meeting that required third-party financial statements could continue to be prepared pursuant to Item 17. The staff also noted that, if the SEC decided to propose eliminating Item 17, it would recommend establishing a compliance date that would give foreign private issuers sufficient time to transition to the Item 18 US GAAP reconciliation requirement.

In November 2007, the SEC adopted rules that permit foreign private issuers to include in their filings with the SEC financial statements prepared in accordance with International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB) without reconciliation to US GAAP.¹⁰ This change should lead to fewer non-US issuers having to reconcile their financial statements to US GAAP.

¹⁰ See Dewey & LeBoeuf client alert, "SEC Accepts IASB IFRS Financial Statements From Foreign Private Issuers Without U.S. GAAP Reconciliation," February 7, 2008 (available at <http://www.deweyleboeuf.com/files/News/12aeedc8-9e65-444e-a3e7-e6db908cc3f1/Presentation/NewsAttachment/667bdd34-0c1b-4450-9a5b-e92e3cb40ddd/6285.pdf>).

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