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Client Alert

SEC Amends Rule 12g3-2(b) Exemption

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On March 21, the U.S. Securities and Exchange Commission (“SEC”) voted to adopt a new rule enabling foreign private issuers (“FPIs”) to use a trading volume benchmark, instead of the traditional headcount of U.S. shareholders, to determine eligibility to deregister a class of equity securities and terminate their reporting obligations under the Securities Exchange Act of 1934 (“Exchange Act”).¹ Rule 12g3-2(b) (“Rule”) was also amended to make it possible for FPIs that terminate their reporting obligations under new Rule 12h-6 to be immediately eligible for exemption under the Rule.²

Background

The Rule provides an exemption from registration under Section 12(g) of the Exchange Act for FPIs that submit to the SEC on a current basis certain materials required by the Rule. The purpose of the Rule is to give investors access to certain information regarding the issuer to allow them to become knowledgeable about the issuer. If not for the exemption provided by Rule 12g3-2(b), FPIs with total assets in excess of \$10 million and a class of equity securities held of record by 500 or more persons (of which 300 or more live in the United States) would be subject to registration under the Exchange Act and accordingly be subject to the provisions of the Sarbanes-Oxley Act of 2002.

Rule 12g3-2(b) requires that the following three categories of information be furnished to the SEC “promptly” after such information is made public or is required to be made public:

- Information made public or required to be made public pursuant to the law of the country of the issuer’s domicile or in which it is incorporated or organized;
- Information the issuer files with a stock exchange on which its securities are traded and which was made public by such stock exchange; and

- Information the issuer distributes or is required to distribute to its security holders.

The Rule only requires that information be furnished to the SEC if it is “information material to an investment decision.” Examples cited by the SEC include:

- an issuer’s financial condition or results of operations;
- changes in business;
- acquisitions or dispositions of assets;
- issuance, redemption or acquisitions of an issuer’s securities;
- changes in management or control;
- the granting of options or the payment of other compensation to directors or officers; and
- transactions with directors, officers or principal security holders.

Amendment to Rule 12g3-2(b)

The amended Rule permits an FPI to claim the Rule 12g3-2(b) exemption:

- immediately upon its termination of Exchange Act reporting under Rule 12h-6³, instead of waiting 18 months as is currently required; and
- upon the condition that it publish in English its home country materials required by the Rule on its Internet website.⁴

The Rule also permits a non-reporting company that, upon application to the SEC, has received or will receive the Rule 12g3-2(b) exemption to publish in English its required home country documents on its Internet website, rather than the current requirement to submit such documents in paper to the SEC.⁵

Electronic Publishing of Material Home Country Documents

Currently, foreign companies that claim the Rule’s exemption must submit documents to the SEC on an ongoing basis and only in paper format.⁶ As part of the condition requiring an issuer to publish its home country documents on its Internet website, the Rule will require an issuer to publish English translations⁷ of the following documents:

- 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 states in the Release that such materials posted on an issuer's Internet website must remain for a "reasonable period of time," but what constitutes such a period of time depends on the nature and purpose of the home country document. The Release suggests, however, that issuers provide Internet website access to such documents for at least a 12-month period. The Release also suggests that non-English Internet websites provide a prominent link on their Internet website to the English language documents.

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- ¹ See Release No. 34-55540 (April 5, 2007) ("the Release").
- ² Up until now, FPIs that registered a class of securities under section 12 of the Exchange Act had to wait at least 18 months following their termination of reporting before they would be eligible to apply for the Rule 12g3-2(b) exemption.
- ³ Amended Rule 12h-6 permits an FPI, regardless of size, to terminate its Exchange Act registration and reporting obligations if the FPI's U.S. average daily trading volume ("ADTV") has been no greater than 5% of its worldwide ADTV for a recent 12-month period.
- ⁴ The Rule also allows publication through an electronic information delivery system generally available to the public in its primary trading market, although most issuers that take advantage of the amended Rule are likely to put such English language materials on their Internet websites.
- ⁵ This provision, which is in new Rule 12g3-2(f), would apply, for example, to companies with unsponsored ADR programs that are currently furnishing information to the SEC under Rule 12g3-2(b) in paper format.
- ⁶ The SEC believes that electronic posting of an issuer's home country documents will increase investors' ability to access those documents.
- ⁷ Note that if an issuer chooses to avail itself of the option to post electronic documents to its Internet website, it must provide English "translations" if such documents are already not in English, which is more stringent than the "versions, summaries or descriptions" standard for an issuer that chooses to continue to submit paper copies of material documents to the SEC.

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