

Securities Update

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

On August 27, 2008, the US Securities and Exchange Commission (SEC) voted unanimously to adopt amendments to Exchange Act Rule 12g3-2(b). The rule currently exempts foreign private issuers from registering a class of equity securities pursuant to Section 12(g) of the Exchange Act if it makes initial and ongoing paper submissions to the SEC of information made public, filed or distributed to security holders pursuant to home country or securities exchange requirements (to the extent material to an investment decision in the subject securities). The rule also requires the initial submission to include an application that contains information regarding the non-US disclosure requirements to which a company is subject and information concerning its US security holders.

The amendments to Rule 12g3-2(b) make the following significant changes:

- **Electronic publication in lieu of paper submissions.** The initial and ongoing paper submissions to the SEC are replaced by a requirement to electronically publish, in English, information on a company's Internet website or through another electronic information delivery system generally available to the public in its "primary trading market." The required information is substantially identical to what is currently provided in initial and ongoing paper submissions. However, the amendments eliminate any requirement to submit an application to the SEC as part of the initial submission.
- **Primary trading market outside of the US.** A new condition requires the "primary trading market" for the subject class of securities to consist of securities exchanges located within one or two non-US jurisdictions. "Primary trading market" is defined to mean that at least 55 percent of the average daily trading volume in the subject class of securities occurred on securities exchanges within one or two non-US jurisdictions during the company's most recently completed fiscal year (and at least one non-US jurisdiction has a greater average daily trading volume than in the US).
- **Prior Exchange Act reporting obligations.** The amendments eliminate a rule that prohibited certain foreign private issuers from relying on Rule 12g3-2(b) if they had reporting obligations under Sections 13(a) or 15(d) of the Exchange Act anytime within the prior 18 months. As amended, the rule still requires companies to have no reporting obligations under Sections 13(a) or 15(d) of the Exchange Act during the period they are relying on the exemption.

The final amendments are substantially similar to the proposed amendments published in February 2008 as Release 34-57350, with the exception that a US trading volume test condition has been dropped, as advocated in a number of comment letters.¹ As originally proposed, the

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¹ See, e.g., the comment letter dated May 9, 2008, submitted by the Committee on Securities Regulation of the New York City Bar, chaired by N. Adele Hogan, Partner, White & Case LLP.

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US trading volume test had called for average daily trading volume in a foreign private issuer's subject class of securities in the United States to be no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period.

The amendments establish a transition period to accommodate a currently exempt foreign private issuer that is unable to satisfy the new requirements of amended Rule 12g3-2(b) and becomes subject to Exchange Act registration as a result. Such a foreign private issuer will not be required to register its securities under the Exchange Act or make any related Exchange Act filings until three years after the new amendments are effective. The amendments also establish a three-month transition period for purposes of the electronic publication requirement, during which the SEC will continue to process paper submissions.

Foreign private issuers typically must obtain Rule 12g3-2(b) exemptions in order to establish unlisted, sponsored or unsponsored depository facilities for American Depositary Receipts (ADRs). The elimination of paper submissions with the SEC simplifies the process of obtaining and maintaining the exemption and reduces the related costs. As a consequence, these amendments should make establishing ADRs in the United States more attractive to foreign private issuers.

The SEC will publish the final rule changes in the next several days and specify the effective date of the amendments.

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