

## News Bulletin

October 7, 2008



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

## Introduction

On September 5, 2008, the Securities and Exchange Commission (the “SEC”) issued its final rule amendments relating to the exemption from registration provided by Rule 12g3-2(b) under the Securities Exchange Act of 1934 (the “Exchange Act”) for foreign private issuers (“FPIs”).<sup>1</sup> These new rules are based on proposals that the SEC issued earlier this year.<sup>2</sup> The SEC stated that the new rules are intended to make it easier for U.S. investors to obtain timely financial information with respect to FPIs, and to encourage FPIs to provide this information.

The amendments to the rule are significant. The amendments, among other things:

- eliminate the requirement to submit an application and other materials to the SEC in order to comply with the rule;
- require FPIs to electronically publish the applicable disclosure documents in order to comply with the rule; and
- require FPIs to maintain a listing on one or more non-U.S. securities exchanges.

## Background

Rule 12g3-2(b) provides an exemption from registration and reporting under the Exchange Act for FPIs that do not have shares traded on a U.S. stock exchange, but could nonetheless otherwise be required to register because the number of their U.S. shareholders exceeds the applicable thresholds in Section 12(g) of the Exchange Act and the SEC related rules.<sup>3</sup> For these companies, compliance with Rule 12g3-2(b) allows them to avoid following the

<sup>1</sup> A “foreign private issuer” is a corporation or other entity organized outside of the U.S. that either has (a) 50% or less of its outstanding voting securities held of record by U.S. residents or (b) if more than 50% of its voting securities are held by U.S. residents, none of the following are true: (1) a majority of its executive officers or directors are U.S. citizens or residents; (2) more than 50% of its assets are located in the U.S.; and (3) the issuer’s business is administered principally in the U.S. The SEC’s final release may be found at: <http://www.sec.gov/rules/final/2008/34-58465.pdf>.

<sup>2</sup> Morrison & Foerster’s summary of the initial proposals may be found at: <http://www.mofo.com/news/updates/files/13546.html> and the summary of the SEC’s press release announcing the rule changes may be found at: [http://www.mofo.com/news/updates/files/Client\\_Alert\\_SEC\\_Amends\\_Reporting\\_Registration\\_and\\_Business.pdf](http://www.mofo.com/news/updates/files/Client_Alert_SEC_Amends_Reporting_Registration_and_Business.pdf).

<sup>3</sup> Exchange Act Section 12(g) and Rule 12g-1 provide that registration under Section 12(g) is required for an FPI if, within 120 days after the last day of the issuer’s last completed fiscal year, it has a class of equity securities held by 500 or more holders, 300 or more of which are in the U.S., and its total assets exceed \$10.0 million.

SEC's reporting requirements for publicly-traded companies, including many provisions of the Sarbanes-Oxley Act. Many of these companies have shares that trade over-the-counter in the U.S. (often in the form of Level I American Depositary Receipts ("ADRs")) or have engaged in private offerings to institutional investors in the U.S.; accordingly, their business and financial results are of interest to some U.S. investors.

### Elimination of Requirement to Submit a Written Application

Prior to these amendments, in order to obtain this exemption, an FPI was required initially to submit written materials to the SEC, including paper copies of its non-U.S. disclosure documents, and information as to the number of its shareholders in the U.S. The amended rule will eliminate this requirement, and compliance with Rule 12g3-2(b) will not depend on any application to, or approval from, the SEC.

### Electronic Publication of English Translations of Material Documents

To satisfy the amended rule, FPIs will be required to publish electronically (for example, through posting on the FPI's Internet home page), in English, certain non-U.S. disclosure documents on an ongoing basis, so that they may be easily accessed by U.S. investors. This provision is designed to enable U.S. investors to easily obtain material information about the issuer's equity securities when they trade them in the over-the-counter market.

The amended rules recognize that certain non-U.S. jurisdictions have an electronic information delivery system that would render an FPI's documents readily available to U.S. investors, and that would therefore satisfy the new publication requirement. For example, a Canadian issuer could publish its required documents on the Canadian "SEDAR" system, and simultaneously satisfy its obligations under Rule 12g3-2(b).

Unless the issuer is eligible for the exemption because of a recent Exchange Act deregistration,<sup>4</sup> then the issuer will need to publish English translation from the first day of its last fiscal year, information:<sup>5</sup>

- that the country of its incorporation, organization or domicile has required the issuer to make public;
- that the principal stock exchange in the issuer's primary trading market on which its securities are traded requires to be filed publicly; and
- that the issuer has distributed or has been required to distribute to its holders.

The issuer will only need to publish information that would be material to making an investment decision in connection with the relevant securities, such as:

- results of operations or financial information;
- changes in business;
- acquisitions or dispositions of assets;
- the issuance, redemption or acquisition of securities;
- changes in management or control;
- the granting of options or the payment of other compensation to directors or officers; and

<sup>4</sup> The non-U.S. publication requirements will not apply to a deregistered issuer because a deregistered issuer will have filed the Exchange Act reports for the prior fiscal year.

<sup>5</sup> These categories of information are the same as those that were required for paper submissions under Rule 12g3-2(b) prior to the amendments.

- transactions with directors, officers or principal securityholders.

The issuer should publish, at minimum, the following documents to obtain and maintain the exemption:<sup>6</sup>

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

In order to maintain the exemption, the issuer will need to publish electronically the documents “promptly.” Promptness will depend on the type of document and the time required to obtain an English translation, if needed. Generally, however, an issuer should post on or around the same business day of publication of the original document.

If the documents are not initially in the English language, English translations of these documents must be published.

Some commentators requested an option for issuers to use “English summaries,” “brief English descriptions” or “English versions” (as opposed to direct translations). However, the SEC declined to permit such usage. Instead, an issuer may only provide an English summary if a summary would be permitted for a document submitted under Form 6-K or Exchange Act Rule 12b-12(d)(3).<sup>7</sup>

### Foreign Listing Requirement

The amendments to Rule 12g3-2(b) will require an issuer to maintain a listing of the relevant securities on at least one non-U.S. exchange that constitutes its primary trading market. The amended rule defines “primary trading market” to mean that at least 55% percent of the trading in the issuer’s securities occurred in no more than two non-U.S. jurisdictions during the most recently completed fiscal year. If the issuer’s securities trade in two non-U.S. jurisdictions, then the trading in at least one of those jurisdictions must be greater than the trading in the U.S. of the same class of securities.

There is no requirement that the issuer has maintained a foreign listing for a certain period of time. As a result, even an issuer that only recently has obtained a foreign listing can qualify for the exemption.

The amendments do not include the originally-proposed provision that would have limited the U.S. average daily trading volume of the securities to 20% of the average daily trading volume on a worldwide basis. As proposed, this provision could have subjected a significant number of non-U.S. companies to Exchange Act registration and reporting if a substantial amount of their trading occurred in the U.S. In addition, such a provision could have discouraged foreign issuers from establishing sponsored ADR facilities in the U.S., or from conducting private placements to U.S. investors.

---

<sup>6</sup> Rule 12h-6 enables foreign private issuers to deregister under the Exchange Act if they do not exceed specified limits on the number of their U.S. shareholders or their U.S. trading volume. We describe the March 2007 liberalization of these deregistration provisions in: <http://www.mofo.com/news/updates/bulletins/11119.html>.

<sup>7</sup> For example, Form 6-K permits submission of an English summary for reports required to be made public under the laws of the issuer’s home country or home country stock exchange, provided that the report is not a press release and the laws do not require it to be distributed to the issuer’s securityholders.

## No Existing Exchange Act Reporting Obligations

In order to obtain the exemption, the issuer must not already be subject to reporting obligations under Exchange Act Section 13(a) or 15(d).<sup>8</sup> Therefore, if an issuer has Exchange Act reporting obligations for a class of its debt securities, it cannot seek to claim the exemption for a class of equity securities.

Prior to these amendments, an issuer could not obtain an exemption if during the preceding 18 months it had registered securities under Section 12 or had been subject to Section 15(d) reporting obligations. The new rule will not impose this 18 month look-back period. Once the issuer is able to comply with the requirements for the exemption, it can obtain it.

## Losing the Exemption

In order to maintain the exemption, the issuer must comply with its provisions on an ongoing basis. The issuer can lose the exemption if it:

- fails to publish electronically the required non-U.S. disclosure documents;
- no longer satisfies the foreign listing and primary trading market condition; or
- registers securities under Section 12 or otherwise incurs Exchange Act reporting obligations.

If the issuer is no longer in compliance with the exemption requirements, it must evaluate whether on the last day of the fiscal year, it will be subject to registration under Section 12 because it has exceeded the shareholder and asset thresholds.<sup>9</sup>

## Transition Periods

Some issuers may lose their Rule 12g3-2(b) exemption. For example, an issuer may not meet the foreign listing requirements. The SEC is providing a three-year transition period to these issuers to allow them sufficient time to prepare and complete the Section 12 registration process. The amended rules will be effective on October 10, 2008. Issuers who lose their current exemption as a result of the amended rules or who cannot obtain the exemption as a result of the amended rules and who would otherwise need to file for registration under Section 12 will need to finish registering their securities by October 10, 2011.

The SEC also is providing a three-month transition period to allow issuers time to switch from providing paper documents and to publish electronically. Therefore, issuers will need to post their required documents by January 10, 2009. Until that time, the SEC will continue to process paper submissions for those companies that are not yet in a position to publish their documents electronically, or that were not initially aware of the rule change.

## Other Related Amendments

**Elimination of 120 Day Application Requirement.** Prior to these amendments, if an issuer qualified for the Rule 12g3-2(b) exemption, it was required to apply for the exemption within 120 days after the end of the fiscal year in which it met the thresholds requiring registration under the Exchange Act.<sup>10</sup> The rule amendments eliminate the application requirement, as discussed above; in addition, the amendments do not replace this

<sup>8</sup> Section 13(a) requires reports to be filed when a company has registered under the Exchange Act. Section 15(d) requires reports to be filed when a company has effected a registered offering under the Securities Act during the same fiscal year.

<sup>9</sup> See note 3 above.

<sup>10</sup> Prior Rule 12g3-2(b)(2).

requirement with a provision requiring an issuer to comply with the publication requirements within 120 days after the end of the relevant year. The SEC does not believe that this requirement is necessary to protect investors. In addition, if a 120 day requirement was imposed, some issuers may not be able to comply with the publication requirements within the 120 day deadline, and in order to claim the exemption again, will have to wait until the end of their current fiscal year, when another 120 deadline would begin running.

**Compensatory Stock Options.** Some commentators were concerned that compensatory stock options would not be included in the classes of equity securities that are eligible for the exemption. The SEC has added a note to the amended rule to clarify that a class of equity securities that qualifies for an exemption will also include compensatory stock options for those underlying securities.

**Successor Issuers.** The amendments eliminate a prior provision of Rule 12g2-3(b) that precluded an FPI from obtaining the exemption if it succeeded to the Exchange Act reporting requirements of another issuer through the issuance of shares to acquire that issuer.<sup>11</sup>

**Revised Form F-6.** The SEC also is amending Form F-6, the registration statement used to register ADRs under the Securities Act of 1933 (the “Securities Act”). The revised Form F-6 will require a registrant to state that if the issuer of the deposited securities does not have Exchange Act reporting obligations, then the issuer has published English translations in compliance with the Rule 12g3-2(b) exemption.<sup>12</sup> Under this provision, a depositary may establish an ADR facility without the involvement of the issuer of the underlying security, provided that the depositary can state that the issuer of the underlying security has complied with Rule 12g3-2(b). The depositary may rely on its reasonable, good faith belief after exercising reasonable diligence in making the representation.

**Broker-Dealers and Rule 15c2-11.** The SEC also is amending Exchange Act Rule 15c2-11. The amended Rule requires that when a broker-dealer is initiating or resuming quotations for over-the-counter securities of an issuer that has an exemption under to Rule 12g3-2(b), the broker-dealer has obtained and reviewed the information since the start of the last fiscal year that the issuer electronically published in compliance with the Rule. The broker-dealer must have this information available to provide when requested by an investor. It will be sufficient if the broker-dealer instructs the person requesting the information how to obtain it electronically. Since it will be easier for broker-dealers to direct investors towards material information about FPIs, this may facilitate the Securities Act Rule 144A resales of FPI securities to QIBs.

**List of Rule 12g3-2(b) Exempt Issuers.** The SEC also will no longer publish an annual list of Rule 12g3-2(b) exempt issuers. Once the amended rule is effective, it will not receive the materials needed to determine which FPIs are attempting to comply with the rule. Investors and broker-dealers historically have utilized these lists to determine which issuers had a Rule 12g3-2(b) exemption. This will make it more difficult for a potential depositary of an unsponsored ADR facility or, for broker-dealers and for investors to determine whether or not an issuer of the applicable security has complied with the electronic publishing requirements of Rule 12g3-2(b). Since the SEC will cease publication of these lists, issuers that comply with the requirements for a Rule 12g3-2(b) exemption may want to consider explicitly stating so on their websites.

## Conclusion

The SEC designed these amendments to encourage greater dissemination of information in English that would be material to investors considering transactions involving the securities of FPIs. As investors are able to make more informed decisions, the revised rule should increase efficiency for U.S. investors in the trading of an FPI’s

<sup>11</sup> Prior Rule 12g3-2(d)(2).

<sup>12</sup> Under the prior Form F-6, the registration statement needed to indicate that the issuer *furnished to the SEC the documents* required by Rule 12g3-2(b).

securities. The SEC believes the rule revisions will encourage more FPIs to claim the Rule 12g3-2(b) exemption and will facilitate the establishment of unsponsored ADR facilities. The SEC also expects that the amendments will aid broker-dealers in their efforts to comply with Rule 15c2-11 and assist in the resale under Securities Act Rule 144A of an FPI's securities to U.S. qualified institutional buyers. The SEC anticipates that the modifications will encourage trading of an FPI's securities in the U.S. over-the-counter market.

---

## Contacts

Lloyd S. Harmetz  
(212) 468-8061  
[lharmetz@mofocom](mailto:lharmetz@mofocom)  
**New York office**

Paul W. Boltz, Jr.  
+85 2 2585 0856  
[pboltz@mofocom](mailto:pboltz@mofocom)  
**Hong Kong office**

Charles C. Comey  
+86 2163352290  
[ccomey@mofocom](mailto:ccomey@mofocom)  
**Shanghai office**

Bruce A. Mann  
(415) 268-7584  
[bmamm@mofocom](mailto:bmamm@mofocom)  
**San Francisco office**

Anna H. Lau  
(212) 336-4095  
[annalau@mofocom](mailto:annalau@mofocom)  
**New York office**

Steven L. Toronto  
+86 1065059090  
[storonto@mofocom](mailto:storonto@mofocom)  
**Beijing office**

Kristian E. Wiggert  
+44 20 7920 4009  
[kwiggert@mofocom](mailto:kwiggert@mofocom)  
**London office**

Andrew W. Winden  
+81 3 3214 6894  
[awinden@mofocom](mailto:awinden@mofocom)  
**Tokyo office**

---

## About Morrison & Foerster

With more than 1000 lawyers in 17 offices around the world, Morrison & Foerster offers clients comprehensive, global legal services in business and litigation. The firm is distinguished by its unsurpassed expertise in finance, life sciences, and technology, its legendary litigation skills, and an unrivaled reach across the Pacific Rim, particularly in Japan and China.

For more information, visit [www.mofocom](http://www.mofocom).  
© 2008 Morrison & Foerster LLP. All rights reserved.

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.*