SEC PROPOSES AMENDMENTS TO RULE 12G3-2(B) EXEMPTION AND ENHANCEMENTS TO FOREIGN PRIVATE ISSUER REPORTING OBLIGATIONS

In February 2008, the United States Securities and Exchange Commission (the "SEC") proposed, in companion releases, amendments to certain of its rules applicable to foreign private issuers[1] which, if adopted as proposed, will provide greater flexibility to foreign private issuers by eliminating unnecessary barriers to the U.S. capital markets,[2] while at the same time enhancing certain disclosure requirements applicable to foreign private issuers.[3]

In the Rule 12g3-2(b) Release, the SEC has proposed to revise the requirements for qualification under Rule 12g3-2(b) of the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), which exempts certain foreign private issuers from the registration and reporting requirements under the Exchange Act, bringing these requirements in line with similar standards under recent amendments to foreign private issuer deregistration rules under the Exchange Act. If the proposed amendments to Rule 12g3-2(b) are adopted, they will replace existing Rule 12g3-2(b) eligibility requirements, which are discussed in greater detail below.

In the Foreign Private Issuer Release, the SEC has proposed to:

- permit foreign issuers to assess their qualification as such on an annual basis, rather than on a continuous basis, as currently required,
- reduce the timeframe in which a foreign private issuer is required to file its annual report on Form 20-F with the SEC from six months after its fiscal year end to between 90 and 120 days after its fiscal year end, depending on whether it is a non-accelerated filer, an accelerated filer or a large accelerated filer, and
- clarify that when a foreign private issuer becomes eligible to deregister under recently adopted amendments,[4] it may, in certain instances, be subject to the SEC's "going private" rules.

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1 A foreign private issuer is any foreign issuer other than a foreign government except an issuer that meets the following conditions: (1) more than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

2 SEC Release No. 34-57350 (February 19, 2008) (the "Rule 12g3-2(b) Release"). Comments on this release are due on April 25, 2008.

3 SEC Release No. 34-57409 (February 29, 2008) (the "Foreign Private Issuer Release"). Comments on this release are due on May 12, 2008.

4 SEC Release No. 34-55540 (March 27, 2007).

The SEC also indicated that it is "seriously considering" other amendments to expand the required disclosures in annual reports on Form 20-F to include:

- any changes in, and disagreements with, a foreign private issuer's certifying accountant,
- fees and other expenses paid by a foreign private issuer's ADR holders,
- in the case of a listed foreign private issuer, the significant differences in corporate governance standards of such issuer as compared to a domestic issuer listed on the same exchange, and
- certain financial information about highly significant, completed acquisitions.

I. The Rule 12g3-2(b) Release

An issuer can become subject to the periodic reporting and other obligations under the Exchange Act:

- *Section 12(g)*. By filing an Exchange Act registration statement either voluntarily or as required because such issuer had 500 or more record holders of its securities and such issuer's total assets exceeded $10 million on the last day of the issuer's most recently completed fiscal year,
- *Section 12(b)*. By listing a class of equity or debt securities on a U.S. national securities exchange and registering this class of securities under the Exchange Act, or
- *Section 15(d)*. By filing with the SEC a registration statement under the Securities Act of 1933, as amended (the "Securities Act"), which has gone effective, in connection with a public offering made in the U.S.

1. *Exchange Act Rule 12g3-2 Exemptions*

In 1967, the SEC adopted Exchange Act Rule 12g3-2, which established two exemptions from the registration requirements of Section 12(g) of the Exchange Act for non-reporting foreign private issuers (i.e., those foreign private issuers that do not otherwise have reporting obligations pursuant to Section 13(a) and Section 15(d) of the Exchange Act): Exchange Act Rule 12g3-2(a) and Exchange Act Rule 12g3-2(b). These rules generally exempt non-reporting foreign private issuers from registration under Section 12(g) of the Exchange Act (as described above) and the related SEC reporting obligations.

a. *Exchange Act Rule 12g3-2(a)*

A foreign private issuer that does not otherwise have a reporting obligation pursuant to Section 13(a) and Section 15(d) of the Exchange Act may rely on Exchange Act Rule 12g3-2(a), which exempts such foreign private issuer from registration under Section 12(g) of the Exchange Act and the related reporting obligations if such issuer's equity securities are held of record by less than 300 residents in the United States, despite the fact that it may have 500 or more record

holders on a worldwide basis as of the end of its most recently completed fiscal year. Currently, a foreign private issuer that relies on this exemption must assess the number of its U.S. record holders as of the end of each fiscal year to determine whether it is still eligible to rely on this exemption. Over the years, it has become increasingly difficult for foreign private issuers to meet this standard due to increased U.S. investor interest in securities of foreign issuers, as well as the difficulties associated with calculating the number of U.S. shareholders.

b. *Current Exchange Act Rule 12g3-2(b)*

Current Exchange Act Rule 12g3-2(b) exempts a foreign private issuer from registration under Section 12(g) of the Exchange Act and the related reporting obligations without regard to the number of its U.S. holders or the need to annually assess the number of its U.S. holders if such issuer satisfies certain conditions, including that the issuer:

- make an initial paper filing with the SEC that includes (i) a list of its non-U.S. disclosure documents,[5] (ii) copies of all *material* non-U.S. disclosure[6] documents published since the beginning of the issuer's most recently completed fiscal year, and (iii) a list disclosing the number of U.S. holders of its equity securities and the percentage held by them, as well as a brief description of how its U.S. holders acquired such securities;
- has not had, during the prior 18 months, a class of securities registered under Section 12 of the Exchange Act or a reporting obligation under Section 15(d) of the Exchange Act; and
- continues to furnish its non-U.S. disclosure documents in English to the SEC in paper format once the issuer has obtained the Rule 12g3-2(b) exemption.[7]

Once a foreign private issuer has obtained the Rule 12g3-2(b) exemption, its equity securities may be traded on a limited basis on the over-the-counter market in the United States through an unlisted American Depositary Receipt ("ADR") facility.[8]

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5 "Non-U.S. disclosure documents" refers to information the issuer has made public or is required to make public under the laws of its jurisdiction of organization, pursuant to its non-U.S. stock exchange filing requirements, or that it has distributed or is required to distribute to its security holders.

6 "Material non-U.S. disclosure documents" include those non-U.S. disclosure documents that are material to an investment decision, such as: financial condition or results of operations; changes in business; acquisitions or dispositions of assets; issuance, redemption or acquisitions of their 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.

7 In addition to the conditions discussed above, a foreign private issuer that has issued securities in a transaction to acquire, by merger, consolidation, exchange of securities or acquisition of assets, another issuer that has securities registered under Section 12 of the Exchange Act or a reporting obligation under Section 15(d) of the Exchange Act, known as a "successor registrant," generally may not avail itself of the Rule 12g3-2(b) exemption.

8 Foreign private issuers that maintain a listed ADR facility on a national securities exchange may not avail themselves of the Rule 12g3-2(b) exemption.

In March 2007, the SEC adopted amendments to Rule 12g3-2 that permit a foreign private issuer that deregisters and terminates its Exchange Act reporting obligations pursuant to the SEC's newly adopted Rule 12h-6[9] to rely on the Rule 12g3-2(b) exemption immediately upon the effectiveness of such issuer's deregistration, without regard to the 18-month waiting period discussed above. Pursuant to these amendments, a foreign private issuer that deregisters under Rule 12h-6 is required to publish in English its non-U.S. disclosure documents on an ongoing basis on its website or through an electronic information system generally available to the public in its primary trading market, rather than to submit such documents to the SEC in paper format, as required for other foreign private issuers relying on the Rule 12g3-2(b) exemption.

2. *Proposed Amendments to Rule 12g3-2(b) Exemption*

Under the SEC's proposed amendments to Rule 12g3-2(b), a non-reporting foreign private issuer would be eligible, subject to a short transition period during which paper applications would still be accepted, to claim the Rule 12g3-2(b) exemption without submitting an application to the SEC, subject to the following conditions:

- such issuer is not required to file or furnish periodic reports pursuant to Exchange Act Section 13(a) or Exchange Act Section 15(d);
- such issuer currently maintains 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 another jurisdiction, constitutes the primary trading market[10] for those securities;
- either:
    - the average daily trading volume[11] of the subject class of securities in the United States (the "U.S. ADTV") for the issuer's most recently completed fiscal year has been no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

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[9] A foreign private issuer may deregister and terminate its Exchange Act reporting obligations regarding a class of equity securities pursuant to Rule 12h-6 if, among other things, the U.S. ADTV (as defined below) for the subject class of securities is five percent or less than the average daily trading volume on a worldwide basis.

[10] The proposed amendments define "primary trading market" to mean that at least 55 percent of the trading in the subject class of equity securities must take place in, on or through the facilities of a securities market or markets in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. Under the proposed amendments, an issuer may aggregate the trading of the subject class of equity securities in foreign jurisdictions for purposes of determining the issuer's primary trading market, provided that at least one of the two foreign jurisdictions is larger than the U.S. trading market for those securities.

[11] When calculating U.S. ADTV, an issuer would have to take into account all U.S. trading of its subject securities as of the end of its most recently completed fiscal year, would have to include transactions that occur on an exchange, and may include transactions that occur off an exchange. An issuer would then divide its U.S. ADTV by the worldwide ADTV of that class of securities for the same period. Issuers may calculate the U.S. ADTV based on information from "publicly available sources, market data vendors or other commercial information service providers upon which an issuer has reasonably relied in good faith, as long as the information does not duplicate any other trading volume information obtained from exchanges or other sources."

  - the issuer has terminated its registration of a class of securities under Section 12(g) of the Exchange Act, or terminated its obligation to file or to furnish periodic reports under Section 15(d) of the Exchange Act, pursuant to Exchange Act Rule 12h-6; and

- unless such issuer is claiming the exemption in connection with or following its Exchange Act deregistration, the issuer has published in English certain specified non-U.S. disclosure documents required to be made public from the first day of its most recently completed fiscal year on its internet website or through an electronic information delivery system generally available to the public in is primary trading market.

If the amendments to Rule 12g3-2(b) are adopted as proposed, any foreign private issuer that meets the conditions set forth above would be immediately eligible for the exemption from Exchange Act registration and reporting without the need to apply to, or otherwise notify, the SEC. As a result, a foreign private issuer that has in excess of 300 U.S. holders would maintain the Rule 12g3-2(b) exemption unless any of the requirements of the exemption are no longer fulfilled.

The proposed amendments to Rule 12g3-2(b) also include a transition period that provides limited relief for a foreign private issuer that is currently exempt under Rule 12g3-2(b) but would otherwise lose the exemption if the amendments to Rule 12g3-2(b) are adopted as proposed, such as if its U.S. ADTV exceeds 20 percent of its worldwide trading volume on the last day of the most recently completed fiscal year under the new test. Under the proposed amendments, such issuer would have until three years after the effective date of the rules to prepare the necessary U.S. GAAP financial statements and to complete the Exchange Act registration process. During the transition period, such issuer may continue to rely on the Rule 12g3-2(b) exemption so long as it complies with Rule 12g3-2(b)'s other conditions, including that such issuer continues to electronically publish the required non-U.S. disclosure documents. Foreign private issuers that currently maintain the Rule 12g3-2(b) exemption should therefore assess whether they will be eligible to maintain such exemption if the amendments to Rule 12g3-2(b) are adopted as proposed.

Importantly, if the proposed amendments to Rule 12g3-2(b) are adopted as proposed, they will have the helpful effect of eliminating the significant differences in the eligibility and the ongoing disclosure requirements applicable to a foreign private issuer that maintains the Rule 12g3-2(b) exemption after it deregisters from the Exchange Act under Rule 12h-6 and a previously unregistered foreign private issuer that wishes to rely on the current Rule 12g3-2(b) exemption.[12]

[12] For example, a foreign private issuer that deregisters under the Exchange Act pursuant to Rule 12h-6 may automatically avail itself of the Rule 12g3-2(b) exemption, while a foreign private issuer that wishes to rely on the Rule 12g3-2(b) exemption must submit a paper application to the SEC. Likewise, a foreign private issuer that deregisters under the Exchange Act pursuant to Rule 12h-6 is not subject to the 18-month waiting period discussed above, while a foreign private issuer that wishes to rely on the Rule 12g3-2(b) exemption is still subject to the 18-month waiting period. Finally, a foreign private issuer that deregisters under the Exchange Act pursuant to Rule 12h-6 may publish its material non-U.S. disclosure documents electronically, while a foreign private issuer that wishes to rely on the Rule 12g3-2(b) exemption must continue to furnish its non-U.S. disclosure documents to the SEC in paper format.

II. The Foreign Private Issuer Release

Under the current SEC regulatory regime, foreign private issuers that are subject to the reporting requirements under the Exchange Act are not subject to, or granted accommodations with respect to, certain SEC rules, including:

- *Proxy Rules*. Foreign private issuers are generally exempt from the SEC's proxy rules.
- *Section 16 of the Exchange Act*. Foreign private issuers are not subject to Section 16 of the Exchange Act, which generally requires that an issuer's officers and directors and 10 percent beneficial owners (i) disgorge profits realized as a result of purchases and sales of equity securities of the issuer within any period of less than six months, and (ii) publicly disclose purchases and sales of such issuer's equity securities.
- *Annual Reports on Form 20-F*.
    - Foreign private issuers may include in their annual reports on Form 20-F financial statements that are prepared in accordance with either U.S. GAAP or their home-country GAAP, provided that, in the latter case, such financial statements must include a reconciliation to U.S. GAAP unless such financial statements are prepared in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board.
    - Foreign private issuers are currently required to file an annual report with the SEC on Form 20-F within six months after their fiscal year end, while U.S. issuers are required to file an annual report on Form 10-K with the SEC within 60 to 90 days after their fiscal year end (depending on whether such issuers are non-accelerated filers, accelerated filers or large accelerated filers).
    - Foreign private issuers may disclose in their annual reports on Form 20-F executive compensation on an aggregate basis, as opposed to an individual basis, as is currently required for U.S. issuers, if such information is reported on an aggregate basis in their home country.
- *Quarterly and Current Reports*. Foreign private issuers are not required to file quarterly reports with the SEC, as required for U.S. issuers, but instead must furnish home-country reports on Form 6-K on the basis of home-country regulatory and stock exchange requirements. Likewise, rather than filing current reports on Form 8-K (which requires that U.S. issuers publicly disclose the occurrence of certain material events), foreign private issuers are required to furnish to the SEC, under cover of Form 6-K, copies of material non-U.S. disclosure documents promptly after such documents are made public.

In order to maintain the benefit of these accommodations, foreign issuers are currently required to assess their status as foreign private issuers on a continuous basis under the requirements described in footnote 1 above. If a foreign issuer no longer qualifies as a foreign private issuer, it would immediately become subject to SEC reporting and other requirements applicable to U.S. issuers, including that its financial statements be prepared in accordance with U.S. GAAP.

1. *Foreign Private Issuer Status*

Under the SEC's proposed amendments, a foreign private issuer would be required to assess its continuing status as a foreign private issuer once a year, on the last business day of its second fiscal quarter, rather than on a continuous basis as currently required. Under the proposed amendments, if a foreign issuer determines that it no longer qualifies as a foreign private issuer, it would then be required to comply with the various SEC reporting obligations applicable to U.S. issuers on the first day of the fiscal year following the determination date, effectively providing a six-month period during which such former foreign private issuer would be able to transition to the requisite forms and disclosure and other requirements applicable to U.S. issuers.

If, for example, a foreign issuer with a calendar-year end determined that it did not qualify as a foreign private issuer on June 30, 2009, it would then be required to file an annual report on Form 10-K with U.S. GAAP financial statements in 2010 for the fiscal year ended December 31, 2009. Likewise, such foreign issuer would then be required to comply with the SEC's proxy rules and with Section 16 of the Exchange Act's prohibition against short-swing profits by officers and directors and 10 percent beneficial owners, and the related public reporting requirements, as well as with the requirement that such issuer file current reports on Form 8-K and quarterly reports on Form 10-Q, commencing on the first day of its fiscal year in 2010.

Conversely, the SEC's proposed amendments provide that a foreign issuer that determines that it qualifies as a foreign private issuer at any time may, commencing on the date of such determination, immediately avail itself of the accommodations available to foreign private issuers. In such case, the newly determined foreign private issuer would from such date no longer be required to file current reports on Form 8-K, quarterly reports on Form 10-Q or annual reports on Form 10-K, but instead would be required to file an annual report on Form 20-F and the less comprehensive current reports on Form 6-K.

2. Accelerated Filing Deadline for Annual Reports on Form 20-F

Under the SEC's proposed amendments, a foreign private issuer that is a large accelerated filer[13] or an accelerated filer[14] would be required to file its annual report on Form 20-F within 90 days after such issuer's fiscal year end, while a non-accelerated filer[15] would be required to file its

[13] The term "accelerated filer" means an issuer that meets the following conditions as of the end of its fiscal year: (i) the issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $75 million or more, but less than $700 million, as of the last business day of the issuer's most recently completed second fiscal quarter; (ii) the issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months; (iii) the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and (iv) the issuer is not eligible to use the requirements for smaller reporting companies for its annual and quarterly reports.

[14] The term "large accelerated filer" means an issuer that had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter, and meets the other requirements described in the definition of accelerated filer described in footnote 13 above.

[15] A "non-accelerated filer" is an issuer that is neither an accelerated filer nor a large accelerated filer.

annual report on Form 20-F within 120 days after such issuer's fiscal year end, rather than within six months as required under current SEC rules.

The proposed amendments include a two-year transition period that, for example, provides that if the amendments are adopted during 2008, the filing deadline would be changed for fiscal years ending on or after December 15, 2010. While foreign private issuers in certain jurisdictions such as the European Union are currently required to publish their annual reports within four months after their fiscal year end, all foreign private issuers, particularly those that are required to include a U.S. GAAP reconciliation in the financial statements included within their annual reports on Form 20-F, should begin to assess what action would have to be taken to comply with the accelerated filing obligations to the extent the amendments are adopted as proposed.

3. *Disclosures in Annual Reports on Form 20-F*

The SEC is also considering expanding the required disclosures in annual reports on Form 20-F, including the following:

- *Certifying Accountant*. Foreign private issuers listed on the New York Stock Exchange (the "NYSE") are currently required to notify the NYSE of changes in their auditors. The SEC is proposing a similar requirement that a foreign private issuer would disclose in its annual report on Form 20-F any disagreements or reportable events that occurred within such issuer's last two fiscal years and any interim period preceding the change of accountants. Such an issuer would also be required to disclose whether any material transactions were accounted for or disclosed in a manner different from that which such issuer's former accountants concluded was required. In addition, a foreign private issuer would be required to disclose whether its independent accountant has resigned, declined to stand for reelection, or was dismissed. By way of comparison, U.S. issuers are not required to make such disclosures in their annual reports on Form 10-K, but instead are required to report such information on a more current basis on Form 8-K.
- *ADR Fees and Payments*. The SEC is proposing to expand the disclosure in annual reports on Form 20-F to require that foreign private issuers disclose fees and other charges paid by holders of ADRs, as well as any payments by the depositary to the foreign issuer whose securities underlie the ADRs. Currently, foreign private issuers are required to make such disclosures in the Form F-6 Registration Statement that is filed with the SEC to establish an ADR program.
- *Corporate Governance Practices*. The SEC is proposing to add a new requirement to Form 20-F, under which listed foreign private issuers would be required to provide in their annual reports on Form 20-F a concise summary of the significant ways in which their corporate governance practices differ from the corporate governance practices of domestic issuers listed on the same exchange. Currently, issuers listed on the NYSE and the NASDAQ are required to make comparable disclosures on their websites or in their annual reports pursuant to NYSE and NASDAQ listing rules.

- *Significant Acquisitions*. The SEC is proposing to amend Item 17(a) of Form 20-F to require that foreign private issuers' annual reports on Form 20-F include financial statements for acquired companies that are deemed "significant," as well as pro forma financial statements giving effect to any such acquisitions, whereas currently such information must be disclosed by foreign private issuers only in a registration statement filed under the Securities Act or the Exchange Act. The SEC is proposing that such issuers include three years of audited financial statements with respect to "highly significant" acquisitions at the level of 50 percent or greater in their annual reports on Form 20-F.[16]
- *Financial Statements*. The SEC is proposing to amend Item 17 of Form 20-F to require that foreign private issuers, other than certain Canadian issuers, include the full information required by Item 18 of Form 20-F, including the information required by U.S. GAAP and Regulation S-X and the more limited reconciliation permitted under Item 17 of Form 20-F. Currently, Item 17 of Form 20-F allows foreign private issuers that are only listing a class of securities on a national securities exchange or registering a class of securities under Section 12(g) of the Exchange Act (i.e., issuers not engaging in a capital-raising transaction), or filing an annual report on Form 20-F, to omit certain information from their financial statements if such financial statements are prepared in accordance with U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board.

4. *Exchange Act Rule 13e-3*

The SEC is proposing to amend Exchange Act Rule 13e-3, which currently imposes certain disclosure obligations on an issuer when such issuer and/or any of its affiliates engage in "going-private" transactions[17] that have either a reasonable likelihood or purpose of causing any class of such issuer's equity securities to be (i) held of record by less than 300 persons, or (ii) delisted from a national securities exchange. In light of the recent amendments to the foreign private issuer deregistration rules, the SEC is proposing to amend Exchange Act Rule 13e-3 to clarify that such effect may also be deemed to occur when a foreign private issuer engages in a non-ordinary course transaction to become eligible to deregister under the Exchange Act pursuant to Rule 12h-6.

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[16] An entity would be deemed to be "significant" at the 50 percent level if (i) the issuer's investment in the entity exceeds 50 percent of the issuer's total assets, (ii) the entity's income exceeds 50 percent of the issuer's corresponding income, or (iii) in the case of a business combination, the entity's total assets exceed 50 percent of the issuer's total assets. Under current SEC rules, U.S. issuers are required to disclose, within four business days following the consummation of a "significant" acquisition, certain information with respect to the acquired company on a Form 8-K. If such entity is significant at the 20 percent or greater level, U.S. issuers must also disclose, within 71 calendar days after the Form 8-K was filed, certain financial statements with respect to the acquired company and certain pro forma financial information with respect to the acquisition.

[17] A "Rule 13e-3 transaction" is defined as (i) a purchase of any equity security by the issuer of such security or by an affiliate, (ii) a tender offer, (iii) a proxy solicitation or information statement distribution in connection with a merger or similar transaction, (iv) the sale of substantially all the assets of an issuer to its affiliate, or (v) a reverse stock split.

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