

SEC Proposes Amendments to Rules Affecting Non-U.S. Issuers

Alert

On February 13, 2008, the U.S. Securities and Exchange Commission (SEC) held an open meeting to discuss certain proposals to amend current SEC Rules that relate to the exemption from registration under Rule 12g3-2(b) under the U.S. Securities Exchange Act of 1934, as amended (Exchange Act), and certain other SEC Rules related to disclosure requirements for Non-U.S. issuers.¹ The Commissioners unanimously approved the proposals which will be published in the near future and subject to a comment period.

Below is a brief summary of the relevant proposed amendments based on the discussions at the meeting.²

Proposed Rule 12g3-2(b) Amendments

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

- Average Daily Trading Volume (ADTV) test to replace 300 U.S. resident record holders test for qualification for 12g3-2(b) exemption
- No more than 20% of the ADTV of an equity security on a world-wide basis could take place in the U.S.

Electronic Publication

- Qualifying issuer would be required to publish electronically (*i.e.*, by placing on its website) English translations of: (i) information an issuer has made or is required to make public pursuant to the law of the country of its domicile or in which it is incorporated; (ii) information an issuer has filed or is required to file with a stock exchange on which its securities are traded and which was made public by such exchange; and (iii) all other information an issuer distributed or is required to distribute to its shareholders
- Paper-based submissions to SEC would be eliminated

Automatic Exemption Grant

- 12g3-2(b) exemption would be automatically granted once documents are so posted
- SEC staff review of 12g3-2(b) exemption application would be eliminated

Local Listing Requirement

- Equity securities of the issuer would be required to be listed on an exchange outside the U.S. to qualify for the exemption

Annual ADTV Testing

- Issuer would be required to meet the ADTV test on an annual basis (at end of issuer's fiscal year)
- Within 3 years of the date the issuer no longer meets the ADTV test, issuer would be required to register its securities with the SEC

Other Proposed Amendments for Non-U.S. Issuers

Annual determination of Non-U.S. Issuer status

- Issuer would no longer be required to determine its eligibility for Non-U.S. Issuer status on a continuous basis but on the last business day of the second quarter of the issuer's fiscal year

Accelerated filing of Annual Report on Form 20-F

- Large accelerated filers and accelerated filers would be required to file an Annual Report on Form 20-F with the SEC within 90 days after their fiscal year end
- All other filers would be required to file an Annual Report on Form 20-F within 120 days after their fiscal year end
- Two year transition period

The SEC noted that it will also be seeking input on the following issues:

Elimination of Item 17 limited U.S. GAAP reconciliation that is available for non capital raising transactions

New disclosure in Form 20-F

- Description of changes of or disagreements with auditors
- Description of ADR fee arrangements
- Description of corporate governance practices
- Description of recent acquisitions

Integration of certain de-listing and de-registration transactions in the definition of "going private" transactions under the Exchange Act

We will update the information provided in this Alert as necessary when additional information becomes available.

Should you have questions or comments regarding the proposed amendments, you may contact Herman H. Raspé at 212.336.2301 (hhraspe@pbwt.com) or Karen M. McCarthy at 212.336.2529 (kmmccarthy@pbwt.com).

Endnotes

¹ The term "Non-U.S. Issuer" is used in this Alert to mean a Foreign Private Issuer as defined in Rule 3b-4(c) promulgated under the U.S. Securities Act of 1933, as amended. It is defined in Rule 3b-4(c) to mean any foreign issuer other than a foreign government except an issuer meeting 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 Note that the proposing releases have not yet been issued so this summary is subject to further changes and clarifications that may be in such releases.

This alert is provided for general informational purposes only and should not be construed as specific legal advice. Please contact any of the attorneys listed above if we can provide assistance regarding the matters discussed herein.

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