SEWARD & KISSEL LLP

CAPITAL MARKETS BULLETIN

March 2008

SEC PROPOSES RULE CHANGES AFFECTING FOREIGN ISSUERS

On February 29, 2008 and February 19, 2008, the Securities and Exchange Commission (the "SEC") proposed amendments to its rules relating to public reporting and disclosure by foreign private issuers under the U.S. Securities Exchange Act of 1934 (the "Exchange Act").[1] These proposed rule changes represent the SEC's efforts to bring disclosure requirements for foreign private issuers closer to the reporting requirements for domestic companies while improving the accessibility of the U.S. public capital markets to foreign private issuers. Prior to making these proposals, the SEC in 2007 took a first step by liberalizing its rules governing a foreign private issuer's de-registration from SEC reporting requirements if certain conditions are met.[2] The SEC refers to these proposals as (i) the Foreign Issuer Reporting Enhancements proposal and (ii) the Rule 12g3-2(b) proposal.

I. Foreign Issuer Reporting Enhancements

The Foreign Issuer Reporting Enhancements proposal would update the Exchange Act filing requirements and enhance the disclosure required by foreign private issuers by:

- Permitting reporting foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers once a year on the last business day of their second fiscal quarter, rather than on a continuous basis, as currently required.[3]

- Accelerating the deadline for filing Annual Reports on Form 20-F to 90 days after the issuer's fiscal year-end in the case of large accelerated filers and accelerated filers, and to 120 days after the issuer's fiscal year-end for all other issuers. These new deadlines would become effective after a two-year transition period.

- No longer allowing certain foreign private issuers to omit segment data from their U.S. GAAP financial statements required by Item 17 of the Form 20-F.[4]

- Amending Exchange Act Rule 13e-3, which pertains to going private transactions by

[1] Release No. 34-57409 (February 29, 2008); Release No. 34-57350 (February 19, 2008).

[2] Release No. 34-55540 (March 27, 2007).

[3] We note that this proposed new annual test date is the same date that is used to determine accelerated filer status under Exchange Act Rule 12b-2, but differs from the determination date for well-known seasoned issuer ("WKSI") status. Under Rule 405 under the Securities Act, the determination date as to whether an issuer is a WKSI is the latest of: (i) the time of filing its most recent shelf registration statement, (ii) the time of filing its most recent amendment to a shelf registration statement for purposes of complying with Section 10(a)(3) of the Securities Act (*i.e.,* to update the financial and other information contained in the prospectus so that it is less than 16 months old), or (iii) in the event that the issuer has not filed a shelf registration statement or amended a shelf registration statement for purposes or complying with 10(a)(3) of that Act for 16 months, the time of filing of the issuer's most recent annual report on Form 10-K or Form 20-F.

[4] The SEC reports that currently fewer than 10 foreign private issuers use this accommodation.

reporting issuers or their affiliates, to reference the recently adopted de-registration and termination of reporting rules applicable to foreign private issuers.

In tandem with the Foreign Issuer Reporting Enhancements proposal, the SEC is soliciting comments on the following additional proposals:

- Eliminate the availability of the limited U.S. GAAP reconciliation option that is contained in Item 17 of Form 20-F for foreign private issuers that are not only listing a class of securities on a U.S. national securities exchange, or only registering a class of equity securities under Section 12(g) of the Exchange Act, and not conducting a public offering. The SEC is also proposing to eliminate this limited reconciliation option for Annual Reports on Form 20-F, and for certain non-capital raising offerings, such as offerings pursuant to reinvestment plans, offerings upon the conversion of securities, or offerings of investment grade securities. Thus, all foreign private issuers that are required to provide a U.S. GAAP reconciliation would have to do so pursuant to Item 18 of Form 20-F, although required third party financial statements could continue to be prepared pursuant to Item 17 or Form 20-F.[5]

- Amend Form 20-F to require disclosure in annual reports filed on that Form about any changes in the registrant's certifying accountant,[6] as currently required of domestic issuers[7] This information would also be required in Registration Statements on Form F-1 and F-4.

- Amend Form 20-F to require annual disclosure of the fees and other charges paid by holders of American Depositary Receipts (ADRs) to depositaries, as well as any payments made by depositaries to the foreign private issuers whose securities underlie the ADRs.

- Amend Form 20-F to require annual disclosure of the significant differences in the corporate governance practices of listed foreign private issuers whose securities underlie the ADRs.

- Amend Form 20-F to require annual disclosure of the significant differences in the corporate governance practices of listed foreign private issuers compared to the corporate governance practices applicable to domestic companies under the relevant exchange's listing standards.[8]

- Amend Form 20-F to require foreign private issuers to present information about highly significant, completed acquisitions that are significant at the 50% or greater level.[9]

II. Rule 12g3-2(b)

A foreign issuer with 300 or more shareholders residing in the United States as of the end of any fiscal year has the choice of either registering under the Exchange Act, and becoming a public reporting company, or establishing an exemption from registration under Rule 12g3-2(b) of the Exchange Act. The requirement to either register the securities or utilize the exemption applies even if the foreign issuer has no assets in the United States, did not actively sell its securities to U.S. shareholders, and has no other connection with the United States.

In order to qualify for the Rule 12g3-2(b) exemption under the current rules, a non-reporting issuer must initially submit written materials to the SEC in paper, including a list of the issuer's non-U.S. disclosure obligations, information concerning its U.S. shareholders, and paper copies of its non-U.S.

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5 The SEC notes that if this amendment is adopted, the SEC would propose a compliance date that would provide issuers with sufficient time to transition to the Item 18 requirements.

6 The SEC noted that foreign private issuers listed on NYSE are already subject to a similar requirement.

7 Item 304(b) requires disclosure of similar, material transactions to those that led to disagreements with the former accountants and whether such transactions were accounted for in a manner different from what the former accountants thought was required.

8 Currently, a foreign private issuer may chose to list this information on its website rather than including it in its annual report.

9 Domestic issuers are required to provide this information on Form 8-K. Foreign private issuers currently only need to include this information in registration statements, not in annual reports or on Form 6-K.

disclosure documents published since the beginning of its most recently completed fiscal year.

Under the SEC's Rule 12g3-2(b) proposal, paper submission requirements will be eliminated, and the Rule 12g3-2(b) exemption will be automatically granted to foreign private issuers that meet certain conditions, which do not depend on the number of the foreign private issuer's U.S. security holders, and which would require a foreign private issuer to publish certain non-U.S. disclosure documents electronically, in English, on the Internet.

In order for an issuer to qualify for the Rule 12g3-2(b) exemption, as proposed:

- it must not have any Exchange Act reporting obligations under Section 13(a) or 15(d) of the Exchange Act;
- it must maintain a listing of the subject securities on one or more exchanges in one or two foreign jurisdictions comprising its primary trading market;
- the U.S. trading volume for the subject securities must be no greater than 20% of its worldwide trading volume for its most recently completed fiscal year, or the issuer must be claiming the Rule 12g3-2(b) exemption in connection with its deregistration under Rule 12h-6 of the Exchange Act; and
- it must publish certain non-U.S. disclosure documents in English, required since the beginning of its most recently completed fiscal year, on its Internet website or through an electronic information delivery system that is generally available to the public in its primary trading market, unless claiming the Rule 12g3-2(b) exemption in connection with or recently following its deregistration.

Furthermore, as proposed by the SEC, in order for an issuer to maintain its Rule 12g3-2(b) exemption:

- it must electronically publish certain non-U.S. disclosure documents in English for subsequent fiscal years on an ongoing basis;
- it must continue to maintain its foreign listing;
- it must continue to meet the trading volume threshold for its most recently completed year other than the year in which it first claims the Rule 12g3-2(b) exemption; and
- it must not otherwise incur any Exchange Act reporting obligations.

The Rule 12g3-2(b) proposal would establish a three-year transition period to accommodate a currently exempt issuer that could lose the exemption upon the effective date of the revised rule because it did not satisfy the trading volume threshold. That issuer would have to register under Section 12 of the Exchange Act, if it could not qualify for the proposed exemption, no later than three years from the effective date of the proposed rule amendments. This transition period should grant affected issuers sufficient time to prepare for and complete the Section 12 registration process.

In addition, the Rule 12g3-2(b) proposal would also establish a three-month transition period following the proposed amendment's effectiveness, during which the SEC staff would continue to process paper submissions under Rule 12g3-2(b), in order to provide issuers with sufficient time to develop their electronic publishing capabilities and investors to determine how best to access the electronic publications of Rule 12g3-2(b)-exempt companies. Once the three-month transition period expires, the SEC would no longer process paper submissions under Rule 12g3-2(b).

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The SEC generally publishes proposed rule changes for public comment, which is a mandatory step in the process of adopting final rule changes. The final rule changes may significantly differ from the proposed rule changes. We will monitor SEC action on these proposals and advise you in a future *Capital Markets Bulletin*.

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IF YOU HAVE ANY QUESTIONS OR COMMENTS ABOUT THIS NEWSLETTER, PLEASE FEEL FREE TO CONTACT GARY J. WOLFE (212-574-1223) OR ROBERT E. LUSTRIN (212-574-1420), OR EMAIL BY TYPING IN THE ATTORNEY'S LAST NAME FOLLOWED BY *@SEWKIS.COM*

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