

Alert

SEC Liberalizes Exemption from Registration for Non-U.S. Companies under Rule 12g3-2(b)

The U.S. Securities and Exchange Commission (SEC) has adopted amendments to Rule 12g3-2(b) that significantly liberalize the exemption afforded to certain non-U.S. companies from registration of their equity securities under the U.S. Securities Exchange Act of 1934, as amended (Exchange Act).¹ These amendments are expected to facilitate the trading in the U.S. of equity securities of non-U.S. companies that are not listed on SEC registered securities exchanges including trading of Level I and unsponsored American Depositary Shares in the U.S. "over-the-counter" market (Pink Sheets).

By way of summary and background, under Section 12g of the Exchange Act, the equity securities of any company (including a non-U.S. company) that has more than 500 shareholders worldwide must be registered with the SEC. Non-US companies are exempt from this registration requirement to the extent that they have less than 300 U.S. shareholders.² Before the recent amendments, however, the SEC afforded to non-U.S. companies an additional exemption from the registration requirement of Section 12(g) of the Exchange Act (12g3-2(b) exemption) upon written application to the SEC and subject to the non-U.S. company providing to the SEC English language copies of certain home-country disclosure documents. The 12g3-2(b) exemption was typically granted if on application the non-U.S. company was able to represent to the SEC that its equity securities were held by no more than 300 U.S. persons. To maintain the 12g3-2(b) exemption, the SEC required that the non-U.S. company submit to the SEC a copy (in English) of its home-country disclosure documents. Once obtained and subject to the ongoing delivery of the home-country disclosure documents to the SEC, the 12g3-2(b) exemption enabled the non-U.S. companies to surpass the U.S. ownership limits without triggering the need to register the equity securities with the SEC.³

The 12g3-2(b) exemption has for more than 40 years enabled non-US companies to support the trading of their equity securities in the United States in the over-the-counter market without having to register their securities with SEC and without having to satisfy the SEC reporting obligations (i.e. U.S. GAAP reconciliation/Sarbanes-Oxley compliance). Increasingly, however, the application process for the 12g3-2(b) exemption, the numerical criteria for obtaining this exemption and the method for maintaining the exemption became the subject of significant criticism on account of the ongoing developments in the capital markets, including globalization of the markets, advances in technology, and increased U.S. investor interest in equity securities of non-U.S. companies.

With the most recent amendments to Rule 12g3-2(b) the SEC has enhanced the ability of non-U.S. companies to rely on the 12g3-2(b) exemption as follows:

- Automatic Availability of the Exemption
- New Eligibility Standards

- Electronic Publication
- Availability of the Exemption for Successor Entities

Automatic Exemption

Non-U.S. companies will no longer be required to formally apply to the SEC in order to rely on the 12g3-2(b) exemption. The application process and the SEC staff review of the application is being eliminated. Instead, the exemption will be available immediately upon determining that the non-U.S. company satisfies the new regulatory criteria for the exemption.

New Eligibility Standards

Non-U.S. companies will be able to rely on the 12g3-2(b) exemption upon satisfying the following criteria:

- Non-U.S. Listing Requirement

The equity securities of the non-U.S. company must be listed on one or more stock exchanges outside the U.S. that constitute the issuer's "primary trading market."

- Primary Trading Market

At least 55% of the worldwide trading volume of the equity security during the non-U.S. issuer's most recently completed fiscal year must have taken place on no more than 2 stock exchanges outside the U.S.⁴

If the primary trading market consists of 2 non-U.S. markets, the trading volume of the relevant security in one of those non-U.S. trading venues must be greater than the trading volume in the U.S.

- No other Exchange Act Reporting Obligations

The exemption is available for a non-U.S. company's equity securities only if the company has not otherwise triggered an Exchange Act registration or reporting obligation.

The non-U.S. company would trigger Exchange Act registration and reporting obligations if it listed one of its securities on a U.S. exchange or it registered an offer of securities with the SEC (which has resulted in triggering SEC reporting obligations under the Exchange Act).

If the other Exchange Act registration and reporting requirements were at some point triggered, the 12g3-2(b) exemption would be available immediately upon the effectiveness of Exchange Act deregistration or suspension of Exchange Act reporting obligations without the need to satisfy any waiting period.

Electronic Publication

The non-U.S. company must publish its non-U.S. disclosure documents on its website or on an electronic information delivery system generally available to the public in its primary trading market.⁵

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The electronic publication requirement must be satisfied as to all non-U.S. disclosure documents made public, filed and distributed to shareholders from the first day of the non-U.S. company's most recently completed fiscal year.

At a minimum the following non-U.S. disclosure documents that are published electronically must be translated into English: annual reports (including financial statements), interim reports (including financial statements), press-releases and communications and documents distributed directly to the holders of the relevant equity securities.

Electronic publication of English summaries of the non-U.S. disclosure documents are acceptable in limited circumstances.⁶

Successor Entity Exemption

The 12g3-2(b) exemption will now be available to "successor entities." In the past, entities who issued shares in connection with a merger, consolidation, exchange of securities or acquisition of assets with or from an Exchange Act reporting company succeeded to the reporting status of the Exchange Act reporting company and could not obtain a 12g3-2(b) exemption.

Transition Periods

The SEC has adopted a 3 year transition period for non-U.S. companies that currently qualify and maintain a 12g3-2(b) exemption but that may not, under the amended exemption standards, qualify for the exemption (i.e. in the absence of a non-U.S. listing for their equity securities). Non-U.S. companies who currently maintain a 12g3-2(b) exemption but do not meet the amended standards will not be grandfathered.

The SEC will accept paper submissions of non-U.S. disclosure documents from non-U.S. companies who maintain a 12g3-2(b) exemption and make the non-U.S. disclosure documents available in the SEC public reference room for a 3 month transition period. Thereafter, paper submissions will not be processed by the SEC and non-U.S. companies who continue to make Rule 12g3-2(b) submission in paper form and do not publish the documents electronically will no longer be able to claim the 12g3-2(b) exemption.

Loss of Exemption

The 12g3-2(b) exemption will remain in effect for a non-U.S. company until the non-U.S. company:

- no longer electronically publishes the specified non-U.S. disclosure documents,
- no longer maintains a listing of the applicable security on one or more non-U.S. exchanges that constitute the "primary trading market" for that security, or
- registers a class of its securities under the Exchange Act or otherwise incurs Exchange Act reporting obligations.

Amendment to Form F-6

The SEC has amended the requirements applicable to Form F-6 (the registration statement for American Depositary Shares) to enable F-6 filers in the context of unsponsored ADR programs to represent the 12g3-2(b) exempt status of the issuer of the deposited securities on the basis of "reasonable, good faith belief after exercising reasonable diligence."

Should you have any questions or comments concerning these amendments to Rule 12g3-2(b), you may contact Herman H Raspé at 212.336.2301 (hhraspe@pbwt.com) or Karen McCarthy at 212.336.2529 (kmmccarthy@pbwt.com).

Endnotes

- ¹ For purposes of this Client Alert, the term "non-U.S. company" is intended to mean "Foreign Private Issuer" (as such term is defined in the rules adopted by the SEC under the Exchange Act). The amendments to Rule 12g3-2(b) may be found at the SEC's website, www.sec.gov, under Release 34-58465.
- ² See Rule 12g3-2(a).
- ³ The 12g3-2(b) exemption did not, however, exempt non-U.S. companies from the SEC registration and reporting obligations (under Sections 12(b) and 15(d) of the Exchange Act) triggered by the listing of equity securities on a U.S. exchange or the filing of a registration statement in connection with a public offer of equity securities to U.S. persons or in the U.S. The amendments to Rule 12g3-2(b) recently adopted by the SEC do not exempt non-U.S. companies from registration of securities under Section 12(b) or reporting under Section 15(d).
- ⁴ The SEC has noted that non-U.S. companies newly listed on a non-U.S. exchange will be able to rely on the 12g3-2(b) exemption.
- ⁵ The relevant non-U.S. disclosure documents consist of information that was: (i) made public (or required to be made public) under the laws of the country of incorporation, organization or domicile, (ii) filed (or required to be filed) with the principal stock exchange in the primary trading market and that has been made public by such exchange, and (iii) distributed (or required to be distributed) to security holders. Electronic publication may be limited to information that is material to an investment decision relating to the applicable equity securities.
- ⁶ Electronic publication of English language summaries in lieu of full English translations will be permitted of not inconsistent with the English summary standards in Form 6-K or Rule 12b-12(d)(3).



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