

April 2008 / Special Alert

A legal update from Dechert's Corporate and Securities Group

SEC Proposes Amendments to Rules Relating to Foreign Private Issuers

The U.S. Securities and Exchange Commission (the "SEC") proposed two sets of amendments to its rules relating to foreign private issuers on February 19, 2008, and February 29, 2008,¹ intended to improve the accessibility of the U.S. public capital markets to such issuers, as well as enhance the information that is readily available to potential U.S. investors. The proposed amendments are part of a series of initiatives the SEC plans to put forth in the near future to change disclosure requirements applicable to foreign private issuers in light of market developments and new technologies and to eliminate unnecessary barriers to the U.S. capital markets.

Proposed Amendments to Rule 12g3-2(b)

On February 19, 2008, the SEC published proposed amendments seeking to encourage more foreign private issuers to claim the Rule 12g3-2(b) exemption, which exempts foreign private issuers from certain reporting requirements under the Securities Exchange Act of 1934 (the "Exchange Act"), so long as certain corporate information is submitted to the SEC. The exemption allows a foreign private issuer to have more than 300 shareholders in the United States without registering under the Exchange Act and, as a result, its equity securities (ordinarily in the form of Level I American Depository

Receipts (ADRs)) can trade in the United States on an unlisted basis in the over-the-counter market.

Currently, for a foreign public issuer to obtain exemption status under Rule 12g3-2(b), a non-reporting foreign private issuer must submit a written application to the SEC that includes, among other things, a list of the information that the issuer must disclose publicly pursuant to its home jurisdiction laws or stock exchange rules along with paper copies of documents containing information the issuer was required to publish during its last fiscal year. If the issuer is granted the exemption, the issuer must submit the required non-U.S. disclosure documents in paper form on a continuous basis to effectively maintain the exemption.

The proposed amendments by the SEC seek to eliminate the paper submission requirements by enabling a foreign private issuer to claim the Rule 12g3-2(b) exemption so long as it meets the following conditions:

- the issuer has no reporting obligations under Section 13(a) or 15(d) of the Exchange Act;
- the issuer maintains a listing on one or more foreign exchanges that constitutes the primary trading market for the securities;
- either:
 - the average daily trading volume in the United States for the issuer's most recent fiscal year has been no greater than 20 percent of the

¹ Exemption From Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, SEC Release No. 34-57350 (February 19, 2008); Foreign Issuer Reporting Enhancements, SEC Release No. 33-8900 (February 29, 2008).

average daily trading volume on a world-wide basis; or

- the issuer has terminated its registration or its reporting obligations under Section 12(g) or 15(d) of the Exchange Act; and
- the issuer has published the specified non-U.S. disclosure documents on its web site or through an electronic information delivery system generally available to the public in its primary trading market.

Thus, the proposed amendments would provide that a foreign private issuer that exceeds the 300 U.S. shareholder threshold could automatically claim the exemption without submitting any documents to the SEC.

To maintain the 12g3-2(b) exemption, the proposed rules would require the issuer to continue to publish the specified non-U.S. disclosure documents, on an ongoing basis, on its web site or through an electronic information delivery system generally available to the public in its primary trading market.

The SEC believes that by enabling foreign private issuers to claim the Rule 12g3-2(b) exemption automatically, without regard to the number of U.S. shareholders, the proposed amendments should improve the accessibility of the U.S. capital markets to foreign private issuers. The SEC further believes that requiring the electronic publication of the non-U.S. disclosure documents should make it easier for investors to gain access to a foreign private issuer's material documents and thus make better informed investment decisions. Issuers, however, remain concerned that they must continuously monitor their compliance with the conditions of the exemption (particularly in respect of the issuer's trading volume in the United States), or they could find themselves subject to full Exchange Act reporting requirements.

The SEC is seeking comments on these proposals by April 25, 2008.

Proposed Amendments to Foreign Issuer Reporting Requirements

On February 29, 2008, the SEC released a second set of proposed amendments known as the Foreign Issuer

Reporting Amendments, which propose several changes to the reporting obligations of foreign private issuers, specifically relating to Form 20-F. This form is used by foreign private issuers to register a class of securities under the Exchange Act and to file annual reports.

The most significant amendment proposed by the SEC is the acceleration of the reporting deadlines for annual reports filed on Form 20-F by foreign private issuers: from six months after the issuer's fiscal year-end to 90 days in the case of accelerated and large accelerated filers, and 120 days for all other issuers.

The shortening of the filing deadline may cause some problems for foreign private issuers who have grown accustomed to the generous amount of time given them by the SEC to produce their 20-F, particularly in respect of need for issuers to reconcile their accounts to U.S. GAAP, to prepare English translations, and to comply with home jurisdiction requirements. The SEC feels, however, that an accelerated deadline will improve the delivery and flow of information to U.S. investors, levelling the playing field between U.S. and foreign private issuers and increasing market efficiency. Concerns have been expressed, however, that the 90-day deadline proposed by the SEC for filing the annual report would require the 20-F to be filed sooner than the typical issuer's home jurisdiction annual report.

The SEC also proposed the following amendments:

- permit reporting foreign issuers to assess their eligibility to use the special forms and rules available to foreign private issuers on an annual basis rather than on a continuous basis that is currently required;
- amend Form 20-F by eliminating an instruction to Item 17 that permits certain foreign private issuers to omit segment data from their U.S. GAAP financial statements; and
- amend Rule 13e-3 of the Exchange Act, which pertains to going private transactions by reporting issuers or their affiliates, to reference the recently adopted deregistration and termination of reporting rules applicable to foreign private issuers.

The SEC release further solicited comments on other possible amendments to Form 20-F annual report and registration forms used by foreign private issuers, including:

- eliminating the availability of the limited U.S. GAAP reconciliation option contained in Item 17 of Form 20-F for foreign private issuers that are only listing a class of securities on a U.S. national exchange or only registering securities under Section 12(g) of the Exchange Act and not conducting a public offering; and
- requiring a foreign private issuer to disclose the following information:
 - any changes in and disagreements with the foreign private issuer's certifying accountant;
 - fees, payments, and charges paid by holders of ADRs to depositaries, as well

as any payments made to the foreign private issuers whose securities underlie the ADRs;

- any significant differences in the corporate governance practices of listed foreign private issuer compared to the practices of domestic companies under the relevant exchange's listing standards; and
- financial information for completed acquisitions that are significant at the 50% or greater level, measured according to Rule 1-02(w) of Regulation S-X.

Taken together, these proposals are aimed at modernizing the filing requirements for foreign private issuers and reflect, in part, greater international agreement on accounting and disclosures matters.

The SEC is seeking comments on these proposals by May 12, 2008.

Practice group contacts

For more information please, contact one of the Dechert lawyers listed or the Dechert attorney with whom you regularly work. Visit us at www.dechert.com/corporateandsecurities.

Bonnie A. Barsamian
New York
+1 212 698 3520
bonnie.barsamian@dechert.com

James A. Lebovitz
Philadelphia
+1 215 994 2510
james.lebovitz@dechert.com

Andrew Case
London
+44 20 7184 7532
andrew.case@dechert.com

Wayne Rapozo
London
+44 20 7184 7671
wayne.rapozo@dechert.com

Adam M. Fox
New York
+1 212 649 8732
adam.fox@dechert.com

David S. Rosenthal
New York
+1 212 698 3616
david.rosenthal@dechert.com

Thomas J. Friedmann
Washington, D.C.
+1 202 261 3313
thomas.friedmann@dechert.com

Brian D. Short
Philadelphia
+1 215 994 2737
brian.short@dechert.com

Christopher G. Karras
Philadelphia
+1 215 994 2412
christopher.karras@dechert.com

© 2008 Dechert LLP. All rights reserved. Materials have been abridged from laws, court decisions, and administrative rulings and should not be considered as legal opinions on specific facts or as a substitute for legal counsel. This publication, provided by Dechert LLP as a general informational service, may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

U.S. Austin • Boston • Charlotte • Hartford • Newport Beach • New York • Philadelphia
Princeton • San Francisco • Silicon Valley • Washington, D.C. • **EUROPE** Brussels
London • Luxembourg • Munich • Paris • **ASIA** Hong Kong