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Date: October 5, 2008
To: Interested Persons
Re: Amendments to Rule 12g3-2(b): The Foreign Private Issuer Exemption

Effective October 10, 2008, the U.S. Securities and Exchange Commission (the “SEC”) will amend Rule 12g3-2(b) (the “Amendments”)¹ under the U.S. Securities Exchange Act of 1934, as amended (the “Exchange Act”) in a manner that significantly changes how a foreign private issuer (“FPI”)² establishes and maintains an exemption pursuant to that rule. This memorandum discusses the Amendments. We note that this memorandum does not discuss the application of Rule 12g3-2(b) to FPIs that are claiming the exemption thereunder in connection with, or following, a recent Exchange Act deregistration. The exemption may apply differently in those circumstances.

I. Executive Summary

The Amendments provide that the Rule 12g3-2(b) exemption is automatically available to any FPI and introduce the following changes:

- require the FPI to maintain at least one listing of its securities in a jurisdiction outside the United States that constitutes the FPI’s primary trading market;
- discontinue paper filings and require FPIs to publish the required information electronically; and
- expand the scope of information and documents requiring full English translation.

In addition, the adopting release emphasizes the need for prompt publication of the required disclosure information.

¹ For your reference, we attach a summary of steps that should be taken to claim the exemption under amended Rule 12g3-2(b) as Exhibit A. We also attach a copy of the text of amended Rule 12g3-2(b) as Exhibit B. The adopting release can be found at <http://www.sec.gov/rules/final/2008/34-58465.pdf>.

² The term “foreign private issuer,” as defined under Rule 3b-4 of the Exchange Act, means any foreign issuer other than a foreign government, except an issuer that has more than 50% of its outstanding voting securities directly or indirectly held of record by residents of the United States and to which any one of the following applies: (i) the majority of the executive officers or directors of the issuer are U.S. citizens or residents; (ii) more than 50% 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.

II. Background of the Rule 12g3-2(b) Exemption

Section 12(g) of the Exchange Act requires an issuer to file with the SEC within 120 days after the fiscal year end a registration statement regarding a class of its equity securities if, as of the last day of that fiscal year, the number of worldwide holders of record of those equity securities exceeds 500 and its assets exceed \$1 million. Rule 12g3-2(b) is one of several exemptions adopted by the SEC to grant an FPI relief from the registration requirements of Section 12(g).³

An FPI that is not subject to or is exempt from Section 12(g) may nevertheless choose to comply with the requirements for the exemption under Rule 12g3-2(b) for a number of reasons, including: (i) to avoid an unintentional violation of the registration requirements of Section 12(g) in the event that its equity securities become widely held in the United States;⁴ (ii) to establish a sponsored, Level I American depository receipts (“ADR”) program;⁵ or (iii) to facilitate secondary market trading of equity or debt securities it sells pursuant to Rule 144A of the U.S. Securities Act of 1933 (the “**Securities Act**”).⁶ Regardless of the specific reason, it is clear that the Rule 12g3-2(b) exemption has become an important part of U.S. securities law compliance for many FPIs.

The Amendments can be viewed as part of a larger effort by the SEC to update and modernize its regulation of FPIs. Other initiatives within that framework include amendments adopted in March 2007 to the delisting and deregistration rules, changes to the Exchange Act reporting obligations of FPIs, and revisions to the cross-border tender offer, rights offering and business combination rules. Key features of the Amendments, including eligibility requirements based upon the maintenance of a non-U.S. listing in the FPI’s primary trading market and the shift toward mandatory electronic disclosure, are

³ Other exemptions include the Rule 12g-1 exemption for an issuer with less than \$10 million in assets and the Rule 12g3-2(a) exemption for an FPI with fewer than 300 holders resident in the United States, in each case as of the last day of its most recently completed fiscal year. Before claiming the Rule 12g3-2(b) exemption, an FPI may wish to evaluate whether it is eligible to claim one of these other exemptions. Furthermore, if the class of the FPI’s securities is held by fewer than 500 record holders worldwide, no registration obligation arises under Section 12(g) of the Exchange Act.

⁴ A violation of the registration requirements of Section 12(g) of the Exchange Act may expose an FPI to a risk of injunctive or monetary sanctions and criminal prosecution, depending upon the circumstances.

⁵ It is a condition to the effectiveness of a Form F-6 registration statement pursuant to which sponsored Level I ADR programs are established that the issuer of the deposited shares be an Exchange Act reporting issuer or exempt from registration under the Exchange Act pursuant to Rule 12g3-2(b).

⁶ Under Rule 144A, the issuer of the securities must be an Exchange Act reporting issuer, satisfy the Rule 12g3-2(b) exemption or agree to provide to current or prospective investors, upon request, certain information specified in Rule 144A.

extensions or variations of concepts adopted in connection with the March 2007 delisting and deregistration rules.⁷

III. Claiming the Rule 12g3-2(b) Exemption

An FPI seeking to claim the amended Rule 12g3-2(b) exemption for a class of its equity securities will no longer be required to submit an application to the SEC. Instead, an FPI may claim the exemption automatically as long as it satisfies the following eligibility requirements:

- *Foreign Listing in Primary Trading Market.* The FPI currently maintains a listing of the subject class of securities on one or more exchanges in a non-U.S. jurisdiction that, either singly or together with the trading of those securities in another foreign jurisdiction, constitutes the primary trading market for such securities;
- *No Existing Reporting Obligations.* The FPI is not subject to the reporting obligations of Sections 13(a) or 15(d) of the Exchange Act; and
- *Electronic Disclosure Requirements.* The FPI has published electronically in English specified non-U.S. disclosure documents dating back to the first day of its most recently completed fiscal year.

A. Potential Issues Relating to the Foreign Listing Requirement

The new foreign listing and primary trading market eligibility requirements are not likely to present immediate issues for most FPIs currently relying on the Rule 12g3-2(b) exemption. However, the development of alternative trading markets for trading off the primary exchange, a trend encouraged by the gradual breaking down of regulatory, information and other barriers, could create issues in the future. In addition, the new eligibility requirements have the potential to create other issues, such as the following:

- an FPI whose equity securities trade entirely in over-the-counter or inter-dealer markets will not be eligible for the exemption;
- some classes of equity securities, including those issued by special purposes entities that are not listed, or are listed on a non-U.S. exchange

⁷ For additional information on these initiatives, see the newsflashes at the following hyperlinks: <http://www.dpw.com/1485409/newsflashes/09.05.08.cross.border.rules.htm> (cross-border rules); <http://www.dpw.com/1485409/newsflashes/08.28.08.FPI.htm> (foreign issuer reporting enhancements); and <http://www.dpw.com/1485409/dpw/03.21.07.newsflash.dereg.html> (foreign issuer deregistration rules).

but do not meet the primary trading market requirements, will not be eligible for the exemption;⁸ and

- trading of an FPI's securities in multiple jurisdictions as a result of the continuing globalization of trading markets may prevent the issuer in the future from meeting the "primary trading market" requirement if the trading is too widely dispersed.

B. Foreign Listing in Primary Trading Market

1. Maintaining a Foreign Listing

In order to qualify for the Rule 12g3-2(b) exemption, an FPI will need to maintain a listing of the subject class of securities on one or more exchanges in a non-U.S. jurisdiction that, either singly or together with the trading of the same class of the FPI's securities in another foreign jurisdiction, constitutes the primary trading market for such securities. The stated purpose of the foreign listing condition is to help ensure that there is a non-U.S. jurisdiction that principally regulates and oversees the trading of the issuer's securities and the issuer's disclosure obligations.

To constitute a "primary trading market," at least 55% of the trading needs to take place on or through the facilities of a securities market or markets in a single foreign jurisdiction, or in no more than two foreign jurisdictions, during the FPI's most recently completed fiscal year. If the FPI aggregates the trading of its subject class of securities in two foreign jurisdictions for the purposes of reaching the 55% threshold, the trading of the FPI's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the FPI's securities. Measurement of trading for the "primary trading market" determination under the amended Rule 12g3-2(b) will need to be done on an annual basis.

2. Measuring the Trading Volume Threshold

Measurement of trading for the "primary trading market" determination is by reference to the average daily trading volume (the "ADTV") of the subject class of securities in the relevant market or markets (the numerator) against its worldwide ADTV (the denominator). For purposes of calculating the numerator, the FPI may choose to include only on-exchange transactions or both on-exchange and off-exchange transactions in the relevant foreign jurisdiction or jurisdictions. If it includes off-exchange transactions in the numerator, it will need to include those in the denominator as well, as follows: the denominator will be the sum of:

⁸ If the securities are held in global form in a securities clearing system, the number of record holders may never exceed 500 and therefore remain below the registration threshold.

- U.S. ADTV, which must include both on-exchange and off-exchange transactions in the United States; plus
- non-U.S. ADTV, which must include on-exchange transactions outside of the United States and any off-exchange transactions included in the numerator.⁹

The sources of trading volume information upon which the FPI may rely includes publicly available sources, market data vendors and other commercial information service providers. However, the FPI must have reasonably relied on those sources in good faith, and the information must not duplicate any other trading volume information obtained from exchanges and other sources.

C. No Existing Reporting Obligation

The Amendments retain the requirement that an FPI seeking to establish a Rule 12g3-2(b) exemption must not already have an existing reporting obligation under either Section 13(a) or 15(d) of the Exchange Act.¹⁰ Accordingly, an FPI that has listed any securities in the United States, registered a class of equity securities under Section 12(g) of the Exchange Act or made a registered public offering of equity or debt securities would not be eligible for the exemption, unless it subsequently terminated its Exchange Act registration and reporting requirements.

Certain FPIs have been specifically exempted from the Exchange Act registration and reporting obligations by order of the SEC even though their equity securities are currently listed on Nasdaq.¹¹ However, this special exemption is scheduled to expire on August 1, 2009. An FPI currently relying upon this special exemption should note that, in order to maintain compliance with U.S. securities laws, on or before that date it must either register its Nasdaq-listed securities under the Exchange Act or delist its securities from Nasdaq.

D. Electronic Disclosure Requirements

⁹ The FPI may also, but is not required to, include off-exchange transactions from other non-U.S. jurisdictions in the denominator. We expect that FPIs will not include those transactions in the calculation, however, since such an inclusion would only reduce the overall percentage of trading that takes place in the relevant jurisdiction or jurisdictions making up the numerator.

¹⁰ Section 13(a) imposes a reporting obligation on an issuer that has registered a class of securities under Section 12 of the Exchange Act, generally because its securities are listed in the United States or because the number of its worldwide and United States security holders of record is higher than 500 and 300, respectively. Section 15(d) imposes reporting obligations on an issuer that has filed a registration statement which has become effective under the Securities Act, *i.e.*, made a registered offering of its securities in the United States.

¹¹ Section 12(a) of the Exchange Act prohibits transactions in any security on a national securities exchange unless a registration is effective as to such security for such exchange. In 2006, Nasdaq became recognized by the SEC as a national securities exchange in the United States.

To qualify for the amended Rule 12g3-2(b) exemption, an FPI must publish electronically in English certain material information dating back to the first day of its most recently completed fiscal year. The Amendments eliminate the old requirement that, in order to claim the Rule 12g3-2(b) exemption, an FPI must submit written materials, typically in the form of a letter application to the SEC. Now, an FPI may claim the Rule 12g3-2(b) exemption automatically, provided that it meets each of the eligibility requirements under the new rule. **No submission of information to the SEC is required. FPIs currently submitting information to the SEC in paper form must shift to electronic publication in order to maintain the exemption.**

1. Scope of Information Disclosure Obligations

The Amendments do not expand the scope of information required to be published to establish an exemption under Rule 12g3-2(b). An FPI still needs to publish electronically in English any information that, since the first day of its most recently completed fiscal year, it:

- has made or is required to make public, pursuant to the law of the country of its domicile or in which it is incorporated or organized;
- 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; or
- has distributed or is required to distribute to its security holders (collectively, “**Non-U.S. Disclosure Information**”).

Furthermore, under the Amendments, an FPI is still only required to publish Non-U.S. Disclosure Information if it is material to an investment decision regarding the subject class of securities. The rule continues to specify examples of material information, including financial condition or results of operations, changes in business, acquisitions or dispositions of assets, issuance, redemption or acquisitions of its securities, changes in management or control, the granting of options or the payment of other compensation to directors or officers, or transactions with directors, officers or principal security holders.

2. Electronic Publishing Requirement

Traditionally, FPIs claiming an exemption under Rule 12g3-2(b) were required to furnish paper copies of the required information to the SEC. In March 2007, in an attempt to modernize the information disclosure requirements under the exemption, the SEC gave FPIs claiming the Rule 12g3-2(b) exemption the option to voluntarily publish the required information electronically instead of submitting it in paper form. Now, under the amended Rule 12g3-2(b), an FPI will no longer have the option to furnish paper copies of Non-U.S. Disclosure Information to the SEC, but will be required to electronically publish such information by either:

- posting the information on its Internet website; or
- disclosing the information through an electronic delivery system generally available¹² to the public in its primary trading market.

The Amendments do not address how long the Non-U.S. Disclosure Information must remain accessible. We suggest that an FPI publishing such information on its Internet website post it in the investor relations section and keep the information accessible for at least two years. We also suggest that an FPI maintain a record (which need not be public) of the information it has published electronically for Rule 12g3-2(b) purposes, so that it can respond to any SEC inquiry or investor claim. The regular maintenance of such a record might serve as a useful reminder to the FPI's compliance staff that the information disclosure requirements of Rule 12g3-2(b) must be satisfied on an ongoing basis. An FPI publishing information pursuant to, or otherwise claiming, the amended Rule 12g3-2(b) exemption may but need not identify such information as being published pursuant to the rule. An informal survey of a number of FPIs that, as a result of a recent Exchange Act deregistration, are already publishing Non-U.S. Disclosure Information electronically on their websites to claim the Rule 12g3-2(b) exemption indicates that none of those FPIs identify information as being published pursuant to the rule.

3. English-Language Disclosure Requirements

An FPI claiming the amended Rule 12g3-2(b) exemption must not only publish in English any material Non-U.S. Disclosure Information, but must also, at a minimum, electronically publish full English translations of the following documents if they are written in a foreign language and are material to an investment decision regarding a class of securities to which the exemption relates:

- annual report, including or accompanied by annual financial statements;
- interim reports that include financial statements;
- press releases; and
- all other communications and documents distributed directly to holders of the subject class of securities.

The adopting release says that, generally, if an FPI could submit an English summary for a non-U.S. disclosure document under cover of Form 6-K¹³

¹² Under the amendments, "generally available" means that the public in the primary trading market has ready access to the reports and other documents maintained on its system. It is unclear whether disclosure in English via an electronic delivery system that is generally available to the public in the FPI's primary trading market but is not navigable in English will satisfy the information disclosure obligations of Rule 12g3-2(b).

or pursuant to Exchange Act Rule 12b-12(d)(3) (assuming the FPI were an SEC reporting company), it can do so when claiming or maintaining the Rule 12g3-2(b) exemption. Under Form 6-K and Exchange Act Rule 12b-12(d)(3), an English summary (instead of a full English translation) of a report required to be furnished and made public under the laws of the issuer's home country or the rules of the issuer's home country stock exchange is permitted as long as it is not a press release and is not required to be, and has not been, distributed to the issuer's security holders, except that annual and interim reports, press releases and other communications and documents listed in the immediately preceding paragraph may not be summarized. Unconsolidated financial information about a parent company may be summarized.

Amended Rule 12g3-2(b) no longer permits an FPI to furnish English versions or adequate English summaries of press releases and other communications or materials distributed directly to security holders in lieu of English language translations. In addition, an FPI claiming the Rule 12g3-2(b) exemption will no longer be able to submit brief descriptions in English of documents for which no English translation, version or summary has been prepared. These changes may require an FPI to publish English translations of documents that it had previously been able to either describe in English or submit in the form of an English version or summary.

As noted above, no translation of a document is required if it contains no information that is material to an investment decision. If an FPI issues a press release containing a summary of the relevant material information about an event or matter, the FPI might conclude that certain documents which otherwise would need to have been fully translated need not be published or translated at all under Rule 12g3-2(b) because the press release has already conveyed the material information. It is not clear whether the SEC would endorse this approach.

For purposes of amended Rule 12g3-2(b), any permitted English summary must fairly and accurately summarize the terms of each material provision of the foreign language document and fairly and accurately describe the terms that have been omitted or abridged.

4. Time Period for Which Information Must Be Published

In order to claim the exemption under Rule 12g3-2(b), an FPI must publish all of its Non-U.S. Disclosure Information dating back to the first day of

¹³ To claim the Rule 12g3-2(b) exemption, an FPI is essentially required to submit the same categories of information that a U.S. reporting FPI is required to furnish to the SEC on Form 6-K. In addition, both Rule 12g3-2(b) and Form 6-K require only that material information need be furnished.

its most recently completed fiscal year.¹⁴ Thus, assuming a December 31 fiscal year end, an FPI wishing to claim the exemption as of December 15, 2008 will need to electronically publish the required information dating back to January 1, 2007, whereas an FPI wishing to claim the exemption as of January 15, 2009 will need to electronically publish the required information dating back to January 1, 2008.

The Amendments will not require an FPI that is simply transitioning to the new rule to amend or supplement any prior submissions or publications made under the old rule. However, an FPI wishing to newly claim the exemption under the amended Rule 12g3-2(b) will need to publish all of its Non-U.S. Disclosure Information in a manner that satisfies the new rule.

5. Elimination of the 120-Day Deadline

Prior to the Amendments, an FPI with more than \$10 million in assets, 500 worldwide holders of record and 300 U.S. resident holders as of the last day of its most recently completed fiscal year, was required to file a registration statement with the SEC or establish an exemption under Rule 12g3-2(b) within 120 days of such date. An FPI that failed to do so within that time frame would have been in violation of the Exchange Act until it filed a registration statement with the SEC. That FPI would also have been barred from establishing a Rule 12g3-2(b) exemption in the future.

The Amendments permit an FPI to claim the exemption at any time, provided it satisfies each of the eligibility requirements. The Amendments do not, however, change the 120-day deadline for filing a registration statement under Section 12(g). Accordingly, although the exemption may be claimed at any time, an FPI that has incurred a registration obligation under that section would still need to either file a registration statement with the SEC or qualify for the Rule 12g3-2(b) exemption within the 120-day period to avoid violating the Exchange Act.

IV. Maintaining the Exemption

In order to maintain the Rule 12g3-2(b) exemption in accordance with the Amendments, an FPI must continue to satisfy each of the conditions for establishing the exemption. In other words, the FPI must:

- continue to maintain at least one listing of its securities in a jurisdiction outside of the United States that constitutes its primary trading market;
- not incur any Exchange Act reporting obligations; and

¹⁴ This is similar to the initial information disclosure requirements under the current Rule 12g3-2(b), except that such information must be furnished to the SEC in the FPI's initial written application rather than published.

- continue to publish electronically, in English, its material Non-U.S. Disclosure Information promptly after the information has originally been made public.

With respect to the last point, for information not originally disclosed in English, the SEC has stated that what constitutes “promptly” depends on the type of document and the amount of time required to prepare an English translation. However, the SEC notes that it typically requires an issuer to electronically publish a copy of a material press release on or around the same business day of its original publication.

The SEC declined to adopt a specific period for curing non-compliance with any of the conditions needed to maintain the Rule 12g3-2(b) exemption. The SEC noted in the adopting release, however, that an issuer that finds itself not in compliance with any of those conditions must either re-establish compliance with the rule in a “reasonably prompt” manner or else register under the Exchange Act.

V. Liability for Information

The Amendments will not change the liability to which an FPI is exposed with respect to information disclosed under the exemption. Information published pursuant to the exemption will continue to expose the FPI to liability for fraudulent misstatements or omissions contained therein under the anti-fraud provisions of the U.S. federal or state securities laws, such as Rule 10b-5 under the Exchange Act. Rule 10b-5 creates a private right of action against a person knowingly or recklessly making untrue or misleading statements or omissions in connection with the purchase or sale of any security.

In addition, as under the current rule, none of the information published pursuant to the exemption will be deemed “filed” with the SEC. Accordingly, an FPI will not be exposed to liability under Section 18 of the Exchange Act, which creates a private right of action against a person for false and misleading statements of material fact in documents “filed” pursuant to the Exchange Act.

Because many FPIs claiming the Rule 12g3-2(b) exemption will likely choose to satisfy the electronic publishing requirement by posting Non-U.S. Disclosure Information to their website, we would like to remind FPIs about liability generally for information so posted. The SEC takes the position, as expressed in its April 28, 2000 release regarding the use of electronic media, that issuers are liable for the accuracy of statements that “reasonably can be expected to reach investors or the security markets regardless of the medium through which the statements are made, including the Internet.” This is true not only for information furnished electronically pursuant to Rule 12g3-2(b), but for all information generally accessible on an issuer’s website. It may also be true for hyperlinked third-party information. Liability for third-party information that is hyperlinked from an issuer’s website may arise if the issuer has “explicitly or implicitly endorsed or approved the information,” which in the case of implicit

endorsement or approval will depend on the facts and circumstances of the particular situation. An FPI should accordingly take care when adding, and should periodically test, hyperlinks on its website to third-party information and, to the extent not already utilized, consider including an explicit disclaimer of any endorsement or approval of such hyperlinked information.

An FPI should also consider including, to the extent not already utilized, a forward-looking statement legend on its website and information it publishes under Rule 12g3-2(b). Although including a forward-looking statement legend on paper submissions made under the old rule could prove useful should litigation be brought against the issuer by U.S. investors in a U.S. federal court that recognizes the “bespeaks caution” doctrine, an FPI claiming the Rule 12g3-2(b) exemption may determine, whether it employed such a legend in the past or not, that the greatly increased accessibility by U.S. investors to information it publishes electronically makes such a legend more desirable going forward.¹⁵

VI. Transition Rules

The SEC adopted two transition rules applicable to FPIs that currently claim the Rule 12g3-2(b) exemption.

A. Paper Submissions

Amended Rule 12g3-2(b) eliminates paper submissions of information to the SEC. However, the SEC will continue to accept paper filings for three months after the effective date, *i.e.*, until January 10, 2009. After this three-month transition period, paper submissions will not be accepted and an FPI will be required to comply with the mandatory electronic publication requirements of Rule 12g3-2(b).

B. Section 12 Registration

The second transition rule applies to any FPI that is exempt under Rule 12g3-2(b) prior to the effective date of the Amendments if that FPI will no longer

¹⁵ Companies that are subject to the reporting requirements of the Exchange Act can benefit from legislative safe harbors when they make forward-looking statements that are accompanied by sufficient cautionary language. The safe harbors are modeled after the so-called “bespeaks caution” doctrine adopted by a number of U.S. courts to protect the disclosure of forward-looking information based on the inherent unreliability of the information or the existence of accompanying disclaimers. The safe harbors protect a forward-looking statement from private actions if it satisfies certain conditions, including that the statement be identified as forward-looking and “accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially” from those in the forward-looking statement. Although the legislative safe harbor applies only to statements made by U.S. reporting companies, officers, directors or employees of such issuers and certain other persons, the practice of including a forward-looking statement legend by a non-U.S. reporting issuer could prove useful should litigation be brought against the issuer by U.S. investors in a U.S. federal court that recognizes the “bespeaks caution” doctrine.

qualify under the amended rule because, for example, it no longer maintains a foreign listing or its principal foreign trading market comprises less than 55% of its worldwide trading and, therefore, does not meet the definition of primary trading market under the amended rule. Any such FPI may continue to rely on the Rule 12g3-2(b) exemption for up to three years, *i.e.*, until October 10, 2011, conditional upon its compliance with the remaining eligibility requirements. At the end of the three-year transition period, any such FPI will need to file a registration statement with the SEC if it is unable to meet all of the amended rule's conditions or fails to qualify under another exemption from Section 12(g).

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We hope that this memorandum has been helpful in explaining the Amendments. Should you have any comments or questions concerning these Amendments or any other topic addressed in this memorandum, please do not hesitate to contact us.

**Summary of Steps to Be Taken
to Claim an Exemption Under Amended Rule 12g3-2(b)**

Assuming the FPI is not subject to the reporting obligations under the Exchange Act and currently maintains a listing of the subject class of securities on one or more exchanges in a non-U.S. jurisdiction that, either singly or together with the trading of those securities in another foreign jurisdiction, constitutes the primary trading market for such securities, to claim an exemption under amended Rule 12g3-2(b) the FPI should:

- select the date for claiming the exemption (the “**Effective Date**”);
- identify the first day of its most recently completed fiscal year (the “**Start Date**”);
- consider what information since the Start Date will constitute Non-U.S. Disclosure Information that is material to an investment decision regarding the subject class of securities;
- if that information has been prepared in a foreign language, determine the extent to which English language summaries of such information are both desired and permitted;
- make preparations to translate (or prepare English language summaries to the extent desired and permitted) such information by the Effective Date¹⁶;
- select a permitted information delivery system for electronically posting all required Non-U.S. Disclosure Information;
- if the selected system is the issuer’s website, designate a location for posting such information and determine whether to identify the information as being published pursuant to Rule 12g3-2(b) and whether to include hyperlink or forward-looking statement disclaimers;¹⁷

¹⁶ It is unclear whether a failure to have all such documents translated by the effective date will prevent reliance upon the exemption if there is insufficient time to promptly prepare all of the necessary translations between the date an FPI decides to claim the exemption and the effective date.

¹⁷ There is no requirement to publish such documents in a single location. If an FPI already publishes annual reports and interim reports in English and places them in a specific location on its website and does the same with press releases, such publication will satisfy the requirements of the amendments. However, if an FPI will need to include English translations or summaries of other documents that are prepared solely for purposes of Rule 12g3-2(b), a designated location may prove to be useful.

- by the Effective Date, electronically post in English all required Non-U.S. Disclosure Information to the selected electronic information delivery system; and
- establish a system for identifying, translating (or summarizing), posting and recording required Non-U.S. Disclosure Information going forward.

Text of Amended Rule 12g3-2(b)

* * * * *

(b)(1) A foreign private issuer shall be exempt from the requirement to register a class of equity securities under section 12(g) of the Act (15 U.S.C. 78l(g)) if:

(i) The issuer is not required to file or furnish reports under section 13(a) of the Act (15 U.S.C. 78m(a)) or section 15(d) of the Act (15 U.S.C. 78o(d));

(ii) The 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 foreign jurisdiction, constitutes the primary trading market for those securities; and

(iii) The issuer has published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, information that, since the first day of its most recently completed fiscal year, it:

(A) Has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;

(B) Has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and

(C) Has distributed or been required to distribute to its security holders.

Note 1 to Paragraph (b)(1): For the purpose of paragraph (b) of this section, primary trading market means that at least 55 percent of the trading in the subject class of securities on a worldwide basis took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year. If a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of this paragraph, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the same class of the issuer's securities. When determining an issuer's primary trading market under this paragraph, calculate average daily trading volume in the United States and on a worldwide basis as under Rule 12h-6 under the Act (§240.12h-6).

Note 2 to Paragraph (b)(1): Paragraph (b)(1)(iii) of this section does not apply to an issuer when claiming the exemption under paragraph (b) upon the

effectiveness of the termination of its registration of a class of securities under section 12(g) of the Act, or the termination of its obligation to file or furnish reports under section 15(d) of the Act.

Note 3 to Paragraph (b)(1): Compensatory stock options for which the underlying securities are in a class exempt under paragraph (b) of this section are also exempt under that paragraph.

(2)(i) In order to maintain the exemption under paragraph (b) of this section, a foreign private issuer shall publish, on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, the information specified in paragraph (b)(1)(iii) of this section.

(ii) An issuer must electronically publish the information required by paragraph (b)(2) of this section promptly after the information has been made public.

(3)(i) The information required to be published electronically under paragraph (b) of this section is information that is material to an investment decision regarding the subject securities, such as information concerning:

- (A) Results of operations or financial condition;
- (B) Changes in business;
- (C) Acquisitions or dispositions of assets;
- (D) The issuance, redemption or acquisition of securities;
- (E) Changes in management or control;
- (F) The granting of options or the payment of other remuneration to directors or officers; and
- (G) Transactions with directors, officers or principal security holders.

(ii) At a minimum, a foreign private issuer shall electronically publish English translations of the following documents required to be published under paragraph (b) of this section if in a foreign language:

- (A) Its annual report, including or accompanied by annual financial statements;
- (B) Interim reports that include financial statements;
- (C) Press releases; and

(D) All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

(c) The exemption under paragraph (b) of this section shall remain in effect until:

(1) The issuer no longer satisfies the electronic publication condition of paragraph (b)(2) of this section;

(2) The issuer no longer maintains a listing of the subject class of securities on one or more exchanges in a primary trading market, as defined under paragraph (b)(1) of this section; or

(3) The issuer registers a class of securities under section 12 of the Act or incurs reporting obligations under section 15(d) of the Act.

(d) Depositary shares registered on Form F-6 (§239.36 of this chapter), but not the underlying deposited securities, are exempt from section 12(g) of the Act under this paragraph.