

# JONES DAY

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February 24, 2006

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-9303

## **Re: File Number S7-12-05**

Dear Mr. Katz:

In Release No. 34-53020, the Securities and Exchange Commission solicits comments on, among other things, whether consideration should be given to "methods of compliance with Rule 12g3-2(b), such as Web site postings, as an alternative to the submission of paper documents to the Commission" as well as "[h]ow would such alternative methods operate in practice, and how would Commission staff oversee compliance".

On behalf of our Australian clients Foster's Group Limited and Qantas Airways Limited, we support the Commission's consideration of an internet-based system and are writing to suggest a specific internet-based method for complying with the information requirements (the "Information") of Rules 12g3-2(b)(1)(i) and (iii). Our proposal would facilitate the more efficient dissemination, storage and retrieval of the Information in a manner that will benefit investors, issuers and the Commission.

### **Overview of Rule 12g3-2(b)**

Rule 12g3-2(b) provides an exemption from the registration requirements of Section 12(g) of the Securities Exchange Act of 1934, as amended, for foreign private issuers that furnish specified information to the Commission.

A foreign private issuer seeking to qualify for this exemption must furnish to the Commission in its initial submission:

- under Rule 12g3-2(b)(1)(i), information since the beginning of the issuer's last fiscal year that 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.

- under Rule 12g3-2(b)(1)(ii), a list identifying the information referred to above and stating when and by whom it is required to be made public, filed with a stock exchange or distributed to security holders.
- information, to the extent known or which can be obtained without unreasonable effort or expense, relating to the number of holders of each class of equity securities resident in the United States, the amount and percentage of each class of equity securities held by U.S. residents, the circumstances in which those securities were acquired and the date and circumstances of the most recent public distribution of securities.<sup>1</sup>

Also after any fiscal year in which any changes occur in the kind of information referred to in the list furnished under Rule 12g3-2(b)(1)(ii), an issuer must furnish to the Commission a revised list reflecting such changes.<sup>2</sup>

Under Rule 12g3-2(b)(1)(iii), during each subsequent fiscal year in which it seeks to rely on the exemption, an issuer must furnish to the Commission information of the kind initially furnished under Rule 12g3-2(b)(1)(i) promptly after such information is made or required to be made public. Only information material to an investment decision is required to be furnished.<sup>3</sup>

Rule 12g3-2(b)(4) requires that documents submitted to the Commission be in English or a translation or summary in English be provided.

The information furnished is not deemed “filed” with the Commission or otherwise subject to the liabilities of Section 18 of the Exchange Act<sup>4</sup>. The furnishing of such information does not constitute an admission for any purpose that the issuer is subject to the Exchange Act.<sup>5</sup>

## Background

In adopting Rule 12g3-2(b) in 1967, the Commission commented that information concerning foreign private issuers may not be available in the United States.<sup>6</sup> Accordingly, from time to time, the Commission publishes a list indicating the foreign private issuers that have claimed the exemption provided by Rule 12g3-2(b) “to assist in making brokers, dealers, and investors aware that some form of

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<sup>1</sup> Rule 12g3-2(b)(1)(v)

<sup>2</sup> Rule 12g3-2(b)(1)(iv)

<sup>3</sup> Rule 12g3-2(b)(3)

<sup>4</sup> Rule 12g3-2(b)(4)

<sup>5</sup> Rule 12g3-2(b)(5)

<sup>6</sup> Release No. 34-8066, April 28, 1967

relatively current information concerning the issuers included in this list is available in the [Commission's] public files."<sup>7</sup>

Pursuant to Rule 15c2-11 under the Exchange Act, it is unlawful for a broker-dealer to publish a quotation for a security unless the broker-dealer has certain information regarding the issuer in its records and, based upon a review of such information, has a reasonable basis under the circumstances for believing that the information is accurate in all material respects, and that the sources of the information are reliable.<sup>8</sup> In the case of foreign private issuers exempt from the registration requirements of Section 12(g) by reason of compliance with Rule 12g3-2(b), the rule provides that the requisite information is such information furnished by the issuer to the Commission since the beginning of the issuer's last fiscal year.<sup>9</sup>

Historically, foreign private issuers could satisfy the requirements of Rules 12g3-2(b)(1)(i) and (iii) only by submitting the Information to the Commission in paper form.

#### **Advantages of internet-based system over current paper system**

An internet-based system offers the following advantages over the current paper-based system of complying with Rules 12g3-2(b)(1)(i) and (iii):

- quicker dissemination of, and easier access to, financial and other material information about foreign private issuers;
- reduce the administrative burden on foreign private issuers of complying with the rule; and
- eliminate the burden on the Commission of storing the Information.

These advantages will benefit investors, broker-dealers, foreign private issuers and the Commission. Due to the convenience of the internet, we believe that many U.S. broker-dealers and investors who obtain Information about foreign private issuers already do so via the websites of issuers and third parties rather than spending the money and effort to obtain copies from the Commission's reading room.

#### **Proposal**

We propose that the Commission consider a new rule providing that an issuer shall be deemed in compliance with Rules 12g3-2(b)(1)(i) and (iii) if the issuer makes all Information since the beginning of its last fiscal year reasonably accessible directly via its website or indirectly via a hyperlink from its website to an electronic information delivery system that is available free of charge to the public. To help the Commission staff know which issuers avail themselves of this new rule rather than

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<sup>7</sup> Release No. 34-51893, June 21, 2005

<sup>8</sup> Rule 15c2-11(a)

<sup>9</sup> Rule 15c2-11(a)(4). The broker-dealer must also make this information reasonably available upon request to any person expressing an interest in a proposed transaction in the security with such broker-dealer.

submit the Information via paper form, issuers could be required to notify the staff of their election to comply with the Information requirement via this new rule.

We believe that the Information should be available directly or indirectly via an issuer's website because that is the place (rather than a third party website) where many investors begin a search for information about a company. As the Commission has stated in adopting electronic filing of reports under Section 16 of the Exchange Act (and as discussed further below), the Information should be available without undue burden, including without requiring an investor to pay a fee for access to the Information.

The "direct" option of making the Information available on the issuer's website may be preferable for those issuers who make announcements in a language other than English or whose announcements are not available free of charge from the website of an electronic information delivery system.

The hyperlink option may be preferable for issuers whose Information is available on the websites of their primary stock exchange or securities regulator in English and free of charge. This option may appeal to issuers who prefer not to post and maintain all Information on their own websites since the beginning of their last fiscal year.

The Commission staff could monitor compliance by periodically reviewing the websites of issuers that do not submit Information in paper to the Commission. Failure to have Information available as proposed via the internet would have the same ramifications associated with the failure to submit Information in paper format to the Commission under the current paper system.

Our proposal would only affect the means through which foreign private issuers comply with Rules 12g3-2(b)(1)(i) and (iii). All other information required by Rule 12g3-2(b) would continue to be provided in paper format directly to the Commission.

We believe that the Commission should continue its practice of maintaining and periodically publishing a list of those foreign private issuers that claim the exemption pursuant to Rule 12g3-2(b).

### **Policy underlying recent Commission rulemaking supports our proposal**

#### **Proposed Rule 12g3-2(e)(2)**

In Release 34-53020, the Commission proposes a new Rule 12g3-2(e)(2) that would require foreign private issuers that terminate registration under Section 12(g) of the Exchange Act under proposed new Rule 12h-6 to publish the Information on their websites or through an electronic information delivery system generally available to the public in its primary trading market. In the Release, the Commission acknowledges that paper submissions are difficult to access.

### **EDGAR for foreign registrants**

As the Commission noted in adopting mandatory EDGAR filing for foreign registrants in 2002, “[i]nvestors have also come to expect electronic access to financial and business information about public companies, regardless of their country of origin...”.<sup>10</sup> Although the cost and administrative burden of mandatory EDGAR filing is not warranted for Rule 12g3-2(b) issuers,<sup>11</sup> the benefits associated with electronic filing could be achieved by permitting an issuer to furnish Information through its website.

### **Electronically filing of reports under Section 16**

In 2003, the Commission adopted amendments to mandate the electronic filing and website posting, by issuers with corporate websites, of beneficial ownership reports filed by officers, directors and principal security holders under Section 16(a) of the Exchange Act. The Commission has taken the position that an issuer may satisfy the requirement to post Section 16(a) filings by providing access directly, or by hyperlinking to a third party service provided certain conditions are met.

Broadly, these conditions require the hyperlink to provide access to the information:

- within the required time;
- free of charge;
- in its entirety;
- without undue burden;
- including exhibits or attachments;
- through the issuer’s usual website for disseminating information to investors; and
- directly or provide access to a list of the required information.

Our proposal would satisfy these conditions. As discussed above, our proposal would involve an issuer posting the Information on its website or indirectly via a hyperlink from its website to an electronic information delivery system available free of charge to the public.

### **Conclusion**

Our proposed amendment to Rule 12g3-2(b) would provide U.S. broker-dealers and investors with more convenient, cost-efficient and timely access to Information of foreign private issuers than the current process of paper submissions.

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<sup>10</sup> Release No. 34-45922, May 14, 2002

<sup>11</sup> The Commission has expressed the view that, due to the limited access to the U.S. capital markets afforded to a Rule 12g3-2(b) issuer and the fact that such an issuer is not subject to the U.S. disclosure requirements for reporting companies under the Exchange Act, it was not appropriate to require Information to be submitted via EDGAR. See Release No. 34-45922.

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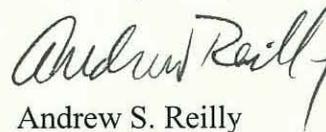
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Our proposal would also ease the administrative burden for issuers in complying with the requirements of Rules 12g3-2(b)(1)(i) and (iii). Finally, we believe that the Commission would benefit from greater efficiency in handling and retrieving the Information.

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Please feel free to contact me at +61-2-8272-0501 if you would like to discuss this letter.

Very truly yours,



Andrew S. Reilly

cc: Richard M. Kosnik  
(Jones Day)