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December 10, 2019

Vanessa Countryman, Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release 34-87115; File No. S7-14-19

Dear Ms. Countryman,

We appreciate the opportunity to provide comment on the proposal by the Securities and Exchange Commission (“Commission”) to amend Rule 15c2-11 under the Securities Exchange Act of 1934 (“Exchange Act”).¹

A. Introduction

This comment is focused primarily on **proposed Rule 15c2-11(b)(4), which is virtually identical to present Rule 15c2-11(a)(4)**. These provisions permit a broker-dealer to publish quotations for securities in a quotation medium if the broker-dealer has in its records and has reviewed “the information that, since the beginning of its last fiscal year, the issuer has published pursuant to § 240.12g3-2(b), which the broker or dealer must make available upon request of a person expressing an interest in a proposed transaction in the issuer’s security with the broker or dealer, such as providing the requesting person with appropriate instructions regarding how to obtain the information electronically.”² The proposed rule amendments explicitly condition the availability of this provision upon such information being “current and publicly available.”³

As discussed below, in certain circumstances that are beyond their control, broker-dealers will be in a Catch-22 situation and will be unable to publish quotations for the securities of an issuer qualifying for Rule 12g3-2(b) because the broker-dealer cannot comply with the requirements of proposed Rule 15c2-11(b)(4) and current Rule 15c2-11(a)(4). It is respectfully recommended that the Commission address this conundrum, which would have the benefits of promoting investor protection and enhancing liquidity for securities of EFPIs.

¹ The proposal is contained in Release 34-87115 (September 25, 2019), 84 FR 58206 (“Proposing Release”), <https://www.govinfo.gov/content/pkg/FR-2019-10-30/pdf/2019-21260.pdf>.

² Such issuers are referred to in the proposing release as “exempt foreign private issuers,” and are referred to herein as EFPIs. The broker-dealer also must have a reasonable basis under the circumstances to believe that the information is accurate in all material respects and that the sources of the information are reliable. See Rule 15c2-11(a) and proposed Rule 15c2-11(a)(1)(iii).

³ Proposed Rule 15c2-11(a)(1)(ii).

B. Rule 12g3-2(b)

Rule 12g3-2(b) under the Securities Exchange Act of 1934 exempts foreign private issuers from registering their equity securities under Section 12(g) of the Exchange Act if they comply with the conditions in the exemption.⁴ As relevant here, the exemption requires the issuer to “publish, 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 concerning the issuer that has been made public or has been distributed to its security holders.⁵

The Commission recognized that there is substantial United States investor interest in the securities of foreign companies, and in 2008 amended Rule 12g3-2(b) to facilitate the ability of foreign private issuers to avail themselves of the exemption from Section 12(g) registration.⁶ The objectives of the amendments included encouraging more foreign private issuers to claim the exemption, and “make it easier for broker-dealers to fulfill their obligations under Exchange Act Rule 15c2-11 with respect to the equity securities of a non-reporting foreign private issuer.”⁷

As a condition to claiming the exemption,⁸ the Commission required the electronic publication in English of specified disclosure documents to:

“make it easier for U.S. investors to gain access to a foreign private issuer’s material non-U.S. disclosure documents, and make better informed decisions regarding whether to invest in that issuer’s equity securities through the over-the-counter market in the United States or otherwise. Thus, the adopted amendments should foster increased efficiency in the trading of the issuer’s securities for U.S. investors.”⁹

As noted, the non-U.S. publication of an EFPI’s disclosure documents must be in English. The Commission explained that:

⁴ 17 C.F.R. § 240.12g3-2(b). Claiming the exemption implies that a foreign issuer satisfies the conditions in Section 12(g) requiring registration of its securities and public reporting of information important to U.S. investors. Cf. Release 34-58465 (September 5, 2008), 73 FR 52752, 52752-52753 (“Release 34-58465”), <https://www.govinfo.gov/content/pkg/FR-2008-09-10/pdf/E8-20995.pdf>.

⁵ Rule 12g3-2(b)(1)(iii), (3). To maintain the exemption, the issuer must publish similar information “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.” Rule 12g3-2(b)(2).

⁶ Release 34-58465, 73 FR 52752.

⁷ Id., 73 FR at 52755. See also Release 34-57350 (February 19, 2008), 73 FR 10102, 10115 (“Release 34-57350”) (proposing amendments to Rule 15c2-11 to require broker-dealers to obtain the information that an EFPI “published in order to maintain the Rule 12g3-2(b) exemption.”)

⁸ The current Rule 12g3-2(b) exemptive regime is self-executing, i.e., the issuer is not required to file an application with, or provide notice or information to, the Commission to avail itself of the exemption. Release 34-58465, 73 FR at 52754 n.32. Previously, the foreign issuer was required to submit an application to the Commission with disclosure documents in paper format in order to claim the exemption. See Id., 73 FR at 52759; Release 33-8099 (May 14, 2002), 67 FR 36678, 36685 (“Release 33-8099”), <https://www.govinfo.gov/content/pkg/FR-2002-05-24/pdf/02-12566.pdf>. During the period when submissions to the Commission were required, the Commission decided that they did not have to be submitted via the EDGAR system, but instead should be submitted in paper format. In 2002, the Commission stated that there was less need for electronic filing with the Commission in part because the exemption “afforded only limited access to the U.S. capital markets.” Id., 67 FR at 36685.

⁹ Release 34-58465, 73 FR at 52755. The Commission noted that one of the underlying purposes of the exemption is “to make material information available to investors.” Id., 73 FR at 52756.

“The purpose of this non-U.S. electronic publication condition is to provide U.S. investors with ready access to material information when trading in the issuer’s equity securities in the over-the-counter market.”¹⁰

It was, therefore, clearly contemplated that the English versions of an EFPI’s disclosure documents would be available to U.S. investors and broker-dealers, as discussed below.

C. Rule 15c2-11

When it adopted the 2008 amendments to Rule 12g3-2(b), the Commission also amended Rule 15c2-11 regarding a broker-dealer’s obligation under Rule 15c2-11(a)(4) [and proposed Rule 15c2-11(b)(4)] to make Rule 12g3-2(b) information reasonably available to any person requesting it and expressing interest in a proposed transaction involving the EFPI’s securities. Rule 15c2-11(a)(4) was amended to allow the broker-dealer to provide a requesting person with appropriate instructions regarding how to obtain the information electronically (“the electronic access option”). As the Commission stated:

“This reflects our view that most investors will have ready access to the electronically published documents of Rule 12g3-2(b)-exempt issuers.”¹¹

Accordingly, unrestricted access to an EFPI’s English version disclosure documents is: (1) a condition of the Rule 12g3-2(b) exemption; and (2) necessary for broker-dealers to be able to satisfy the requirement of Rule 15c2-11 and provide an over-the-counter trading market for U.S. investors that have an interest in foreign companies.

D. The Conundrum

1. *Restrictions on information*

It appears that some foreign private issuers claiming the Rule 12g3-2(b) exemption are restricting access by U.S. persons to their disclosure documents. The Financial Industry Regulatory Authority (“FINRA”) noted recently that “some foreign private issuers may prohibit persons not domiciled in their jurisdiction from accessing paragraph [15c2-11](a)(4) information. For example, the issuer’s website may require the investor to confirm or attest they are a resident of, or domiciled in, the non-U.S. jurisdiction prior to being permitted to access the page that contains the paragraph (a)(4) information.”¹² FINRA also stated:

¹⁰ Id., 73 FR at 52758.

¹¹ Id., 73 FR at 52762.

¹² FINRA, Regulatory Notice 19-09 (March 20, 2019), available at <https://www.finra.org/sites/default/files/2019-09/Regulatory-Notice-19-09.pdf>. The Regulatory Notice does not say how many foreign issuers are blocking U.S. access. However, the fact that the issue has drawn SEC staff and FINRA attention indicates that the number may be significant.

The Regulatory Notice does not discuss what may be motivating foreign issuers to restrict access by U.S. persons. It is possible that some issuers are concerned that dissemination of the information to U.S. persons could be viewed as making an “offer” of securities without registration under the Securities Act of 1933. That concern would be misplaced for at least two reasons. It would be another Catch-22 situation if the English language disclosures required to comply with Rule 12g3-2(b), without more, could be the basis for a Section 5 violation. Presumably, the Commission did not intend such a result. Secondly, even if the Web site disclosures could be deemed an offer, the

“SEC staff has advised that paragraph (a)(4) information on such a website would not be considered ‘reasonably available’ to U.S. persons, and, therefore, may not be used by a broker-dealer to fulfill its obligations under Rule 15c2-11(a)(4).”¹³

The SEC staff’s views, as implemented by FINRA, places broker-dealers in a Catch-22 situation. To rely on Rule 15c2-11(a)(4), the broker-dealer must obtain the English version of an EFPI’s disclosure documents and make those documents reasonably available to U.S. investors (“the information access requirement”). If the EFPI makes the English-language documents available on its Web site, but prohibits access by U.S. persons to that information, then a U.S. broker-dealer could not obtain direct access to the information and could not use the electronic access option to satisfy the information access requirement.

The same conundrum would exist under proposed Rule 15c2-11(b)(4), because the information required by that provision must be “publicly available,” which would be a defined term.¹⁴ The Proposing Release specifically provides:

“If such proposed paragraph (b) information is restricted by user name, password, fees, or other restraints, it would not be publicly available.”¹⁵

Accordingly, if an EFPI restricted access to its Web site information as described in Regulatory Notice 19-09, the issuer information is not “reasonably available” as required by present Rule 15c2-11(a)(4) and would not be “publicly available” as required by the proposed amendment to Rule 15c2-11.

Three other possible alternative avenues for satisfying Rule 15c2-11 are discussed in the Proposing Release if compliance with (b)(4) were not possible. However, none of them would be available to broker-dealers if the EFPI restricted access to its information.

2. *Actively-traded securities*¹⁶

Commission has provided guidance as to how foreign issuers can guard against offers and sales made to U.S. persons. See, e.g., Release 33-7516 (March 23, 1998), 63 FR 14806, <https://www.govinfo.gov/content/pkg/FR-1998-03-27/pdf/98-8001.pdf>.

¹³ Id at 2. FINRA also noted that its member firms “cannot rely on a website that restricts access by U.S. persons to the paragraph (a)(4) information to comply with FINRA Rule 6432 [requiring a FINRA member to demonstrate compliance with Rule 15c2-11 prior to publishing a quotation].” Id.

¹⁴ See proposed Rule 15c2-11(e)(4): “*Publicly available* shall mean available on the Commission’s *Electronic Data Gathering, Analysis and Retrieval System* (“*EDGAR*”) or on the website of a qualified interdealer quotation system, a registered national securities association, the issuer, or a registered broker or dealer; *Provided, however*, That *publicly available* shall not mean where access to paragraph (b) information is restricted by user name, password, fees, or other restraints.” 84 FR at 58265.

¹⁵ 84 FR at 58213.

Proposed Rule 15c2-11(f)(5) would provide an exception from the information review requirements of the rule for securities that are highly liquid and the issuer is well capitalized, by satisfying a two-prong test based on (1) the security's average daily trading volume value ("ADTV test"), and (2) the issuer's total assets and unaffiliated shareholders' equity ("assets test").¹⁷ Some foreign issuers would qualify for these tests. However, the proposed provision would contain a proviso that limits the exception to securities where the proposed paragraph (b) information is current and publicly available.¹⁸ As noted above, if the issuer restricts access to its paragraph (b) information, it would not be "publicly available."

3. "Catch-all issuers"

Proposed Rule 15c2-11(b)(5) would apply to the securities of issuers that cannot qualify for the information gathering requirements of proposed paragraphs (b)(1)-(4), the so-called "catch-all issuer provision."¹⁹ The proposed provision is similar to present Rule 15c2-11(a)(5) in terms of information gathering,²⁰ but, under the proposed rule, a broker-dealer could not publish an initial quotation pursuant to (b)(5) unless the specified information were publicly available.²¹ Again, as noted above, if an EFPI restricts access to its paragraph (b) information, it would not be "publicly available."²² If the EFPI restricts access to its information to U.S. persons, that would include U.S. broker-dealers. Therefore, it is unlikely that U.S. broker-dealers would be able to obtain the information necessary to satisfy the information gathering requirements of proposed Rule 15c2-11(b)(5) [and present Rule 15c2-11(a)(5)]. If so, then the "electronic access option" proposed to be added in Rule 15c-2-11(b)(5)(ii) also would be unavailable.²³

4. "Piggyback" provision

Proposed Rule 15c2-11(f)(3) contains the "piggyback" exceptions to the information gathering requirements. As the Commission has noted: "the historical basis for the piggyback provision is that 'regular and continual priced quotations are an appropriate substitute for information about the issuer which would otherwise be relevant in establishing a quotation.'"²⁴ In a significant

¹⁶ This provision is intended to "reduce burdens on broker-dealers where the Rule's goals can be achieved through alternative means." Proposing Release, 84 FR at 58226. However, this and many other intended benefits of the proposals would not be realized if EFPI information were required to be publicly available and the issuer restricts access to its information by U.S. persons. See, e.g., proposed Rules 15c2-11(f)(2)(ii) (exception for quotations representing unsolicited customer orders from issuer insiders); 15c2-11(f)(7) (broker-dealer reliance on compliance with paragraphs (a) through (c) by a "qualified interdealer quotation system" ("QIDQS")); and 15c2-11(f)(8) (broker-dealer reliance on determinations by a QIDQS or a registered national securities association that, inter alia, paragraph (b) information is publicly available and that certain paragraph (f)(3) exceptions are available).

¹⁷ Proposed Rule 15c2-11(f)(5)(ii). See 84 FR at 58226-58229.

¹⁸ 84 FR at 58227-58228.

¹⁹ See 84 FR at 58214-58217.

²⁰ The proposal, however, requires the broker-dealer to obtain some additional information about the issuer.

²¹ 84 FR at 58216 ("[T]he proposed Rule would require that catch-all issuer information be current and made publicly available for a broker-dealer prior to the initial publication or submission of a quotation for the security of a catch-all issuer.")

²² "[A]n exempt foreign private issuer that has not made timely disclosure under Rule 12g3-2(b) would continue to be a catch-all issuer until ... the exempt foreign private issuer timely publishes the required information within the time frames identified in proposed ... paragraph (b)(4)" Proposing Release, 84 FR at 58220.

²³ See Proposing Release, 84 FR at 58215.

²⁴ Proposing Release, 84 FR at 58221 n.85, quoting Release 34-21470 (November 15, 1984), 49 FR 45117, ("1984 Release"), https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1984/11/15/45116-

departure from that historical premise, the piggyback exception applying to quotations for securities of “catch-all issuers” in the proposal would require that the proposed Rule 15c2-11(b)(5) information (with two exceptions) must be current and “made publicly available within six months before the date of publication or submission of such quotation.”²⁵ The Commission notes in particular that “if a[n] ... exempt private foreign issuer fails to comply with its ongoing ... disclosure obligations, a broker-dealer may not rely on the piggyback exception to publish or submit quotations for a security of the issuer, unless the proposed paragraph (b)(5) information were both current and made publicly available.”²⁶ Therefore, if an EFPI fails to make its required disclosures “publicly available” within the proposed timeframe, the piggyback exception would be unavailable even if the required frequency of priced quotations were satisfied.²⁷

E. Breaking the (b)(4) Conundrum

Broker-dealers that seek to provide liquidity for securities of EFPIs would be unable to do so if the issuer restricts access by U.S. persons to the information required by Rule 12g3-2(b), because such information would not be “publicly available” as required by the proposed amendments to Rule 15c2-11. Moreover, according to SEC staff, broker-dealers cannot comply with present Rule 15c2-11(a)(4) in those circumstances.

[45123.pdf#page=2](#). That release, among other things, adopted amendments to Rule 15c2-11 that: (1) rescinded the exclusion from the rule for quotations for securities of foreign private issuers exempt from registration by Rule 12g3-2(b); (2) imposed an information-gathering requirement on broker-dealers seeking to publish quotations for securities of an EFPI; and (3) removed the ability of broker-dealers to comply with the information-gathering requirement in paragraph (a)(1) by obtaining a registration statement on Form F-6. The last aspect is significant because broker-dealers seeking to publish quotations for American Depositary Receipts (“ADR”s) were thereafter required to obtain information about the underlying foreign private issuer, i.e., paragraph (a)(4) information. Those provisions are retained proposed Rule 15c2-11(b). It should be noted that, even the original exclusion in Rule 15c2-11(f)(2) for securities of foreign issuers was premised upon “compliance with the provisions of § 240.12g3-2(b).” See Release 34-9310 (September 13, 1971), 36 FR 18641, 18642,

https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1971/9/18/18639-18643.pdf#page=3.

²⁵ Proposed Rule 15c2-11(f)(3)(ii).

²⁶ Proposing Release, 84 FR at 58220 (footnote omitted). “In this circumstance, a broker-dealer would need to ensure that proposed paragraph (a)(5) information were both current and publicly available before it could rely on the piggyback exception.” Id. (footnote omitted).

²⁷ It is interesting to note that the Commission may not be proposing to abandon completely the historical premise for piggybacking. Proposed Rule 15c2-11(f)(3)(ii) would allow piggybacking following a trading suspension order issued pursuant to Exchange Act Section 12(k) if the security were the subject of priced bid and asked quotations (without a hiatus of more than four business days) during the period from day 31 to day 60 after the end of the trading suspension. See Proposing Release, 84 FR at 58222. The Commission explains that the 60-day period is intended “to reflect the specific policy rationale behind the piggyback exception: Regular and frequent quotations, including regular and frequent two-sided market making, reflect independent supply and demand forces, thereby indication that sufficient information about the issuer of the quoted security is reaching the marketplace.” Id. (citing the 1984 Release). This discussion draws no distinctions among the types securities that are the subject of trading suspensions. Therefore, it is unclear if the “current and publicly available” information requirement for catch-all issuers in paragraph (f)(3)(ii) would apply to a catch-all issuer that was the subject of a trading suspension, although the proviso can be read that way.

This is a situation that the SEC should address in the context of this rulemaking.²⁸ Ensuring that current information about EFPIs is publicly available as required by Rule 12g3-2(b) would further the objectives of the proposed amendments (and the present rule), namely “to promote investor protection, preserve the integrity of the OTC market, and promote capital formation for issuers that provide current and publicly available information to their investors.”²⁹

Almost by definition, a foreign private issuer relying on Rule 12g3-2(b) has sufficient U.S. market interest to require access by U.S. persons to basic disclosures.³⁰ That is why Rule 12g3-2(b) requires public access to issuer disclosures, in English, that are made by the issuer in its primary market. A restriction on access by U.S. persons to this information is incompatible with the requirements of that exemption.³¹

As discussed above, access to Web-based EFPI information (in English) also was intended to facilitate the ability of broker-dealers to comply with the requirements of Rule 15c2-11(a)(4) in order to provide liquidity to U.S. investors in EFPIs. Access to that information by U.S. broker-dealers also would be required to satisfy proposed Rule 15c2-11(b)(4).

Rather than allowing such lack of public availability to deprive U.S. securityholders and other persons of essential issuer information and preclude broker-dealers from providing liquidity to U.S. investors, we respectfully recommend that the Commission consider:

1. Clarifying that “publication” by an EFPI of information required by Rule 12g3-2(b) means that the information must be “publicly available” consistent with the definition of that term in proposed Rule 15c2-11(e)(4), i.e., the issuer may not condition or restrict access by U.S. persons to the documents and information required by Rule 12g3-2(b)(1)(iii) and (2).³²
2. Facilitating the ability of issuers claiming the Rule 12g3-2(b) exemption to submit documentation of required disclosures on the EDGAR system.³³ Proposed Rule 15c2-

²⁸ See 84 FR at 58214 (“Q2. ... Are there any other potential barriers to accessibility [to paragraph (b) information] that the Commission should address? If so, what are they and how should the Commission address them in this rulemaking?”)

²⁹ Proposing Release, 84 FR at 58209.

³⁰ A foreign issuer may voluntarily claim the exemption provided by Rule 12g3-2(b). However, by doing so, the issuer is subject to all of the requirements of the exemption.

³¹ A restriction on access to EFPI information by U.S. persons has wider implications: it also would appear to conflict with the assumption that such information would be available to Qualified Institutional Buyers and thereby would make resales pursuant to Securities Act Rule 144A less efficient. See, e.g., Release 34-58465, 73 FR at 52753; Release 34-57350, 73 FR at 10104. Moreover, it could affect the ability to register American Depositary Receipts on Commission Form F-6, which can depend on whether the “the deposited [foreign issuer] securities are exempt [from the reporting requirements of Sections 13(a) or 15(d) of the Exchange Act] by Rule 12g3-2(b).” See Form F-6, General Instructions, Eligibility Requirements for Use of Form F-6, Section I.A.(3). See also Release 34-57350, 73 FR at 10104, and footnote 24 above.

³² An EFPI cannot claim the exemption if it “no longer satisfies the electronic publication condition of [Rule 12g3-2(b)(2)].” Rule 12g3-2(c)(1). Therefore, an EFPI that prevents U.S. persons from accessing information in English required by Rule 12g3-2(b) arguably would cease to qualify for the exemption.

³³ In 2002, the Commission rejected mandated or permissive filing of Rule 12g3-2(b) documents on EDGAR. Release 33-8099, 67 FR at 36685. At that time, the Commission adopted rule amendments requiring foreign private issuers to file electronically through the EDGAR system most of their securities documents; but, as discussed above,

11(e)(4) defines “public availability” to include information made available on EDGAR. Accordingly, the Commission should consider whether any changes to the EDGAR system are necessary to allow EFPIs to publish their Rule 12g3-2(b) information on the EDGAR system, where it would be available to U.S. investors and broker-dealers.

3. If necessary, providing guidance that publication by an EFPI on its Web site (or on EDGAR) of the information required by Rule 12g3-2(b), without more, would not be considered “offers” under the Securities Act.
4. Ameliorating the Rule 12g3-2(b) conundrum by providing an exception from the requirements of proposed Rule 15c2-11(b) [and present Rule 15c2-11(a)] for publishing quotations in securities of a foreign private issuer that: (1) satisfies the ADTV test in proposed Rule 15c2-11(f)(5);³⁴ (2) is currently traded on a “designated offshore securities market” designated as such by the Commission as satisfying the criteria in Securities Act Rule 902(b)(2);³⁵ and (3) trading in the security is not suspended by a foreign financial regulatory authority.

Thank you again for the opportunity to comment on this important rulemaking. We would be pleased to provide any additional information that the Commission would find useful.

Sincerely,

/S/

Larry E. Bergmann

continued to require Rule 12g3-2(b) information to be filed with the Commission only in paper form. The paper filing requirement was eliminated in 2008, when the Web site publication requirement was substituted. See footnote 8 above.

³⁴ Our recommendation for this exception does not include the assets test in proposed Rule 15c2-11(f)(5), principally because the amount of unaffiliated shareholders’ equity may be difficult to ascertain with regard to foreign issuers. If the Commission believes that an asset test is necessary, we would suggest limiting it to total disclosed assets, such as the equivalent of \$50 million in total assets criterion in the proposed rule.

³⁵ Rule 12g3-2(b)(1)(ii) requires the issuer to maintain a listing of the subject class of securities on “one or more exchanges in a foreign jurisdiction.” “Designated offshore securities market” describes a set of foreign trading venues narrower than “exchanges in a foreign jurisdiction.”