

SEC UPDATE

SEC Proposes New Rules for Foreign Private Issuers to Deregister under the U.S. Securities Exchange Act of 1934

The SEC has proposed new rules regarding the termination of a foreign private issuer's registration of a class of securities and related reporting obligations under the U.S. Securities Exchange Act of 1934 (the "Exchange Act"). Under current rules, foreign private issuers often find it difficult to terminate Exchange Act registration and reporting obligations even when there is relatively little interest among U.S. investors. The proposed rules would permit the termination of Exchange Act registration and reporting obligations relating to a class of securities by a foreign private issuer that meets specified criteria designed to measure U.S. market interest for those securities.

Specifically, the SEC has proposed new Rule 12h-6 under the Exchange Act that would allow a foreign private issuer to:

- terminate its registration of a class of equity securities under Section 12(g) of the Exchange Act and its resulting Section 13(a) reporting obligations or terminate, and not merely suspend, its Section 15(d) reporting obligations regarding a class of equity securities as long as the issuer meets specified criteria; and
- terminate, and not merely suspend, its Section 15(d) reporting obligations regarding a class of debt securities as long as it meets conditions similar to the current requirements for suspending its reporting obligations relating to that class of debt securities.

Background – No Easy Exit from the Exchange Act Reporting Regime

Under the current Exchange Act reporting regime, a foreign private issuer may seek termination of its registration (and thereby immediately cease to file Exchange Act reports with the SEC) with respect to a class of securities, only if it has fewer than 300 holders of that class of securities resident in the United States. This 300-securityholder limit presents several difficulties, including:

- **How to count the issuer's security holders:** Under the current rules, a foreign private issuer must look through the record ownership of brokers, dealers, banks or other nominees on a worldwide basis (wherever located and wherever in the chain of ownership), and make inquiries of all nominees to determine the customers resident in the United States. With the development of electronic book-entry clearance and settlement, foreign private issuers have often found it difficult and costly to arrive at an accurate count of shareholders resident in the United States.
- **How to remain under the 300-securityholder limit:** Under the current rules, a foreign private issuer that has registered securities under an effective Securities Act registration statement cannot permanently terminate its reporting obligations under section 15(d). Even if a foreign private issuer has less than 300 security holders, it can only suspend the Exchange Act reporting obligations and must determine at the end of each fiscal year whether the number of U.S. resident

security holders or total number of record holders has increased enough to trigger anew its Exchange Act reporting obligations.

For a further discussion on the difficulties of exiting the Exchange Act reporting regime under the current rules, see [“No Easy Exit: The Challenges for Non-U.S. Issuers Seeking to Delist”](#) (Wall Street Lawyer, Vol. 7, No. 12, May 2004), which is also available at www.paulweiss.com.

Deregistration Criteria under Proposed Rules

Equity Securities. Under proposed Rule 12h-6, a foreign private issuer could terminate its Exchange Act reporting regarding a class of equity securities if the following conditions are satisfied:

- the issuer has been an Exchange Act reporting company for the past two years, has filed or furnished all reports required for this period, and has filed at least two annual reports under Section 13(a) of the Exchange Act;
- the issuer’s securities have not been sold in the United States in either a registered or unregistered offering under the Securities Act during the preceding 12 months other than securities: (1) sold to the issuer’s employees, (2) sold by selling security holders in non-underwritten offerings, (3) sold in exempt transactions under Section 3 of the Securities Act, except section 3(a)(10), or (4) constituting obligations having a maturity of less than nine months at the time of issuance and offered and sold in transactions exempt from registration under Section 4(2) of the Securities Act (so-called “4(2) commercial paper”);
- for the preceding two years, the issuer has maintained a listing of the subject class of securities on an exchange in its home country, which constitutes the primary trading market (being a securities market that represents at least 55% of the trading) for the securities; and
- the issuer meets one of four thresholds –
 1. if the issuer is a “well-known seasoned issuer,” the U.S. average daily trading volume of the subject class of securities has been no greater than 5% of the average daily trading volume of that class of securities in its primary trading market during a recent 12 month period (ending no more than 60 days before the Form 15F filing date, which is the form that a foreign private issuer would have to file to certify that it meets the conditions for terminating its Exchange Act registration and reporting obligations), and U.S. residents held no more than 10% of the issuer’s worldwide public float at a date within 60 days before the end of that same period; or
 2. if the issuer is a “well-known seasoned issuer,” regardless of U.S. trading volume, U.S. residents held no more than 5% of the issuer’s worldwide public float at a date within 120 days before the filing date of the Form 15F; or
 3. if the issuer is not a “well-known seasoned issuer,” regardless of U.S. trading volume, U.S. residents held no more than 5% of the issuer’s worldwide public float at a date within 120 days before the filing date of the Form 15F; or
 4. regardless of the issuer’s status as a “well-known seasoned issuer,” U.S. trading volume and U.S. resident ownership as a percentage public float, the subject class of securities is held of record by fewer than 300 persons on a worldwide basis or fewer than 300 persons resident in the United States at a date within 120 days before the filing date of the Form 15F.

A “well-known seasoned issuer” is an issuer that has a worldwide public float for voting and non-voting common equity of \$700 million. The prong of the “well-known seasoned issuer” definition that measures non-convertible securities other than equity does not apply to proposed Rule 12h-6. It should be noted that because an MJDS filer is not eligible to be a “well-known seasoned issuer,” a Canadian issuer that files its Exchange Act annual report on Form 40-F under the MJDS would not be able to terminate its Exchange Act registration and reporting obligations under the well known seasoned issuer provisions of the proposed rules.

It should also be noted that the one year “dormancy” requirement (which requires the issuer to not have sold securities in the United States in either a registered or unregistered offering during the preceding 12 months) would not be met if an issuer had conducted offerings under Section 4(2) (the standard private placement exemption (other than commercial paper or offerings to employees), Rule 144A, or Rule 801 or 802 (involving cross-border rights offerings or exchange offers). Regulation S offerings, however, would not affect the dormancy condition. Corporate restructurings and acquisitions using the fairness procedures of Section 3(a)(10) of the Securities Act would also affect the dormancy condition.

Debt Securities. Proposed Rule 12h-6 would permit a foreign private issuer to terminate its Exchange Act reporting regarding a class of debt securities (including non-convertible, non-participating preferred securities) if the following conditions are satisfied:

- the issuer has filed or furnished all required reports under Section 15(d) of the Exchange Act, including at least one annual report pursuant to Section 13(a) of the Exchange Act; and
- at a date within 120 days before the filing date of the Form 15F, the class of debt securities is either held of record by fewer than 300 persons on a worldwide basis or fewer than 300 persons resident in the United States.

Counting Method under Proposed Rules. As discussed above, in determining the number of U.S. resident holders of a class of securities, the current rules require looking through the record ownership maintained by brokers, dealers, banks or other nominees and counting the number of separate accounts held by them on behalf of U.S. customers. This has been an extremely difficult investigation for many foreign private issuers to complete.

In order to facilitate a foreign private issuer’s determination regarding whether U.S. residents hold no more than the applicable threshold percentage of its worldwide public float or whether the number of its U.S. resident equity or debt securities record holders meets the applicable threshold condition, the SEC has proposed to allow foreign private issuers to limit their inquiry regarding the amount of securities represented by accounts of customers resident in the United States to brokers, dealers, banks and other nominees located in the United States, the foreign private issuer’s jurisdiction of incorporation, legal organization, or establishment and, if different, the jurisdiction of the foreign private issuer’s primary trading market. The proposed rules are intended to restrict the issuer’s search to those jurisdictions that represent the most probable locations for brokers, dealers, banks and other nominees to hold the issuer’s securities on behalf of U.S. customers.

In addition, a foreign private issuer may assume that the customers are the residents of the jurisdiction in which the nominee has its principal place of business if, after reasonable inquiry, the issuer is unable without unreasonable effort to obtain information about the amount of securities represented by accounts of customers resident in the United States.

The SEC also acknowledged that many issuers use third party service providers to obtain information relating to the identification of their security holders. Under the proposed rules, when calculating the number of its U.S. resident security holders, a foreign private issuer may rely in good faith on the assistance of an

independent information services provider that in the regular course of business assists issuers in determining the number of, and collecting other information regarding, their shareholders.

Deregistration Process under Proposed Rules

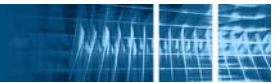
Under the proposed rules, a foreign private issuer must file a new Form 15F that provides several items regarding the issuer's decision to terminate its Exchange Act reporting obligations and information that would help the SEC staff to assess whether the issuer meets the requirements for termination of Exchange Act reporting duties. The new Form 15F would provide for the following items:

- certification that the issuer meets all of the conditions for termination of Exchange Act reporting specified in the proposed rules;
- certification that there are no classes of securities other than those that are the subject of the Form 15F regarding which the issuer has Exchange Act reporting obligations;
- the issuer's Exchange Act reporting history;
- when the issuer last sold securities in the United States other than those excluded from consideration under the proposed rules;
- the primary trading market for the issuer's equity securities being deregistered;
- whether the issuer is a well-known seasoned issuer;
- trading volume data for a well-known seasoned issuer's securities, both in the United States and in its primary trading market;
- the issuer's worldwide public float and the portion held by U.S. residents determined pursuant to the proposed rules with respect to the equity securities being deregistered, if applicable;
- the number of equity or debt securities record holders, if applicable; and
- the classes of equity and debt securities, if any, that are the subject of the Form 15F.

In addition, a foreign private issuer must publish a press release in the United States no later than fifteen business days prior to the filing of the Form 15F to disclose the issuer's intent to terminate its Exchange Act reporting obligations, and must submit a copy of the press release either as a Form 6-K or as an exhibit to the Form 15F.

Upon the filing of the new Form 15F, the foreign private issuer's Exchange Act reporting obligations would automatically be suspended. If the SEC has not objected, the suspension would become a permanent termination 90 days after the filing of the Form 15F. An issuer may request in writing via EDGAR that the SEC staff accelerate the effectiveness of the issuer's termination of Exchange Act registration and reporting prior to the 90th day.

If the SEC denies the Form 15F or the issuer withdraws it, within 60 days of the date of the denial or withdrawal, the issuer would be required to file or submit all reports that would have been required had it not filed the Form 15F.



12g3-2(b) Exemption from Further Exchange Act Reporting under Proposed Rules

Under the proposed rules, immediately upon the effectiveness the termination of Exchange Act reporting duties, a foreign private issuer would be able to establish the Rule 12g3-2(b) exemption for a class of equity securities that is the subject of a Form 15F (and not, as currently is required, have to wait 18 months). In order to establish this exemption, the foreign private issuer (that has terminated its reporting obligations under the proposed rules) would have to publish in English the home country materials required by Rule 12g3-2(b) on its Internet website or through an electronic information delivery system that is generally available to the public in its primary trading market (instead of submitting materials to the SEC on an ongoing basis). (The ability to post home country materials on a website or through an electronic delivery system is only available to foreign issuer using the Form 15F procedure and not to any other foreign private issuer seeking a 12g3-2(b) exemption with no prior SEC reporting history.)

For a foreign private issuer (that has terminated its reporting obligations under the proposed rules) to satisfy the Rule 12g3-2(b) exemption, the foreign private issuer would have to publish electronically on an ongoing basis English translations of at least the following home country documents:

- its annual report, including or accompanied by annual financial statements;
- interim reports that include financial statements;
- material press releases; and
- all other material communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

The foreign private issuer would also have to disclose in its Form 15F the address of its website or the electronic information delivery system on which it will publish its home country materials.

By establishing the Rule 12g3-2(b) exemption under the proposed rules, a foreign private issuer could continue to maintain a “Level 1” ADR facility after the termination of Exchange Act reporting duties.

For a further discussion on how a foreign private issuer may avoid registering under the Exchange Act pursuant to the Rule 12g3-2(b) exemption, see [“Update: Rule 12g3-2\(b\) Exemption from SEC Reporting” \(April 6, 2004\)](#), which is available at www.paulweiss.com.

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Please note that this memorandum addresses rules that are currently proposed by the SEC. The SEC is currently soliciting comments to the proposed rules. The comment period will end on February 28, 2006. After comments are received, the SEC staff will prepare a final set of new rules (which may be modified from the proposed set of rules) for approval by the SEC Commissioners. Once approved, the effective date could be immediate or subject to a transition period.

This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to any member of the Paul, Weiss Securities Group, including:

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