



## **SEC Facilitates Departures by Foreign Private Issuers**

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**The SEC's new amendments will make it easier for foreign private issuers to depart from U.S. capital markets and avoid disclosure rules.**

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On March 27, 2007, the United States Securities and Exchange Commission (the "SEC") published its new rules for deregistration by foreign private issuers, as unanimously adopted a week earlier on March 21, 2007. These new rules are in the form of amendments to the current registration regime that governs when a foreign private issuer may terminate the registration of a class of its equity securities and its corresponding duty to file reports, as well as when it may cease its reporting obligations regarding a class of debt or equity securities, all as required under the United States Securities and Exchange Act of 1934, as amended (the "Exchange Act").

Nearly 16 months ago, on December 14, 2005, the SEC originally proposed amendments in this regard. Among other matters, the original amendments used "record" ownership of U.S. residents as the operative standard for deregistration, as well as alternative benchmarks depending on whether the issuer was a "well-known seasoned issuer." The new amendments instead employ a single measure of U.S. daily trading volume as the operative standard for deregistration, regardless of whether the issuer is a well-known seasoned issuer.

### **New Amendments**

In its announcement of the final rules, the SEC confirmed the importance of foreign private issuers to U.S. capital markets and stated that by eliminating conditions that previously had been a deterrent to entry, the new amended rules will encourage participation in U.S. capital markets and increase investor choice. Previously, and as a result of increased globalization of securities markets since the rules were adopted, delisting from a U.S. stock exchange had been a relatively straightforward process, whereas the related deregistration with the SEC was considerably more difficult, if not, under certain circumstances, impossible. Such deregistration is required in order to avoid ongoing SEC reporting obligations.

In addition, the far-reaching impact of the Sarbanes-Oxley Act of 2002, which expanded disclosure obligations to include a wide variety of corporate governance matters, created an even greater incentive for foreign private issuers to depart from the Exchange Act reporting regime. The SEC, however, has stated that it believes easing the burdens of deregistration under the new amended rules will in fact promote capital formation in the U.S. and make U.S. capital markets more attractive to foreign private issuers.

### **Basics of New Exchange Act Rule 12h-6**

- New Rule 12h-6 will, for the first time, allow a foreign private issuer both to terminate its registration of a class of equity securities under both Exchange Act Section 12(g), and its resulting Section 13(a) reporting obligations, and to terminate its reporting obligations under Section 15(d) arising from having had an effective registration statement under the Securities Act.
- New Rule 12h-6 will also permit simplified termination based on relative U.S. investor interest in, rather than record ownership of, securities of foreign private issuers. The new Rule will create a quantitative benchmark for measuring that U.S. investor interest. Instead of measuring the number of record holders of

a class of securities who are also U.S. residents, New Rule 12h-6 will use a trading volume benchmark designed to focus on and measure relative U.S. market interest for such class of securities, as compared with the worldwide average daily trading volume for the same class of securities. If the U.S. average daily trading volume of the class of securities has been no greater than 5% of the average daily trading volume of that same class of securities on a worldwide basis during a recent 12-month period, then deregistration of the securities will be permitted.

- In order to deregister, new Rule 12h-6 will require that foreign private issuers either:
  - delist from the applicable U.S. stock exchange prior to deregistering, or terminate a sponsored American Depository Receipts (“ADR”) facility prior to deregistering, in order to meet the trading volume benchmark as of the date of delisting; or
  - wait 12 months in order to calculate the trading volume benchmark during a “recent 12-month period” required by Rule 12h-6, before proceeding with deregistration in reliance on the trading volume benchmark.
- New Rule 12h-6 will still recognize the currently-required 300-holder “head count” of U.S. resident record holders to enable an issuer to terminate its Exchange Act reporting obligations if it cannot satisfy the new quantitative trading volume benchmark, as long as the issuer meets the Rule’s other conditions.

### **Additional Conditions for Equity Securities**

In addition to the requirements set forth above, New Rule 12h-6 will require the following of foreign private issuers of registered equity securities:

- The issuer must have been an Exchange Act reporting company for at least one year and have filed all required reports, including at least one annual report.
- The issuer must not have sold equity securities in a registered offering in the U.S., except for certain specified or exempted offerings, during the preceding 12 months.
- The issuer must also have maintained a listing for at least one year in a foreign jurisdiction that, at least in part, constitutes the primary trading market for the subject class of equity securities.

### **Other Rule 12h-6 Provisions**

- New Rule 12h-6 will apply to a foreign private issuer that terminated its Exchange Act reporting obligations under the prior rules, before the effective date of Rule 12h-6 (June 4, 2007), as long as it meets specified conditions; or
- In the event of a foreign private issuer that has succeeded to the Exchange Act reporting obligations of another company following a merger, acquisition or other similar transaction, Rule 12h-6 will apply by permitting such issuer to take into account the Exchange Act reporting history of the predecessor company in determining whether it meets the condition for deregistration.

### **Amended Exchange Act Rule 12g3-2(b)**

The SEC has also adopted an amendment to Exchange Act Rule 12g3-2 that will apply the exemption from Exchange Act reporting obligations provided under Exchange Act Rule 12g3-2(b) immediately upon the effectiveness of its termination of reporting under Rule 12h-6, rather than requiring a foreign private issuer to wait at least 18 months following their termination of reporting. For the first time, the Rule 12g3-2(b) exemption will also be available to foreign private issuers with reporting obligations under Exchange Act Section 15(d) arising from having had an effective registration statement under the Securities Act.

However, as a condition to the immediate application of the Rule 12g3-2(b) exemption, a foreign private issuer claiming the exemption thereunder must:

- In the case of a reporting issuer, publish its home country materials required by Rule 12g3-2(b) in English on its website, or by another electronic information delivery system generally available to the public in the primary trading market.
- In the case of a non-reporting issuer, upon application to the SEC and not pursuant to Rule 12h-6, publish its home country materials required by Rule 12g3-2(b) in English on its website, or by another electronic information delivery system generally available to the public in the primary trading market.

The effective date of the new and amended rules will be June 4, 2007. We are available to provide further information and answer any questions that you may have.

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*This Advisory is for informational purposes only and is not intended as legal advice. For more information on the recent deregistration proposal reform or Hughes Hubbard's Capital Markets practice, please contact any of the following attorneys:*

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