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SEC Adopts New Rules under which Foreign Private Issuers Can Cease to be SEC Reporting Companies

Foreign private issuers that find the cost of SEC registration outweighs the benefits of a U.S. listing or are considering accessing the U.S. public markets but are concerned that "once in, they may not be able to get out," will now be able to rely on a set of exit provisions that are easier to satisfy should they wish to terminate their SEC reporting obligations. After proposing a new exit regime in December 2005, and re-proposing a substantially revised regime a year later, the SEC has finally adopted new Exchange Act Rule 12h-6, which permits a foreign private issuer meeting specified conditions to terminate its Exchange Act registration and reporting obligations. The SEC has also modified Rule 12g3-2(b) so as to permit foreign private issuers to benefit from the exemption thereunder immediately upon the effectiveness of termination of reporting obligations pursuant to Rule 12h-6.

The new deregistration provisions are effective 60 days after publication in the *Federal Register*.

I. Foreign Private Issuer Deregistration

Under the previous regime for terminating registration, a foreign private issuer could terminate its registration (and thereby immediately cease filing Exchange Act reports with the SEC) with respect to a class of securities only if it had fewer than 300 holders of such class of securities in the United States. To calculate the number of U.S. security holders, the foreign private issuer had to undertake a cumbersome analysis that "looked through" record ownership of brokers, dealers, banks or other nominees on a worldwide basis to identify beneficial owners resident in the United States. The development of electronic book-entry clearance and settlement made this calculation costly, time-consuming and at times difficult.

In addition, a foreign private issuer that had registered a class of securities under an effective registration statement could not permanently terminate its reporting obligations under Section 15(d) of the Exchange Act; instead, if such issuer had fewer than 300 U.S. holders of such class of securities, it could only suspend its Exchange Act obligations (with the potential that the suspension could be overridden if the class subsequently were to be held of record by more than 300 U.S. holders).

In December 2005, the SEC proposed new rules in respect of termination of registration and reporting requirements of foreign private issuers. In response to comments, in December 2006, the SEC re-proposed amendments to such rules basing the requirement for deregistration on a quantitative benchmark that measures the relative U.S. market interest for the class of securities of such issuer by comparing the average daily trading volume ("ADTV") of the securities in the United States to the ADTV in its primary trading market. The SEC has now adopted the rules substantially as re-proposed with two noteworthy differences: (i) the trading volume benchmark is measured against the worldwide ADTV rather than the ADTV in the issuer's primary trading

market and (ii) the calculation of trading volume includes trading in off-exchange markets. Termination will require the filing of a new Form 15F with the SEC.

II. New Exchange Act Rule 12h-6

Conditions for Equity Securities Issuers

Quantitative Benchmark. New Rule 12h-6 permits a foreign private issuer, regardless of size, to terminate its Exchange Act registration and reporting obligations with respect to a class of equity securities if the U.S. ADTV of the subject class of securities has been 5% or less of the worldwide ADTV of that class of securities during a 12-calendar month period that ended no more than 60 days before the filing of the Form 15F and it meets all of the other conditions of the rule. The test does not look to the number of U.S. holders or the percentage of securities held by such holders.

In the calculation of ADTV, the final rule considers both on-exchange and off-exchange trading of the subject class of equity securities for the calculation of *both* the U.S. ADTV and the worldwide ADTV. For the numerator, the issuer must include in its calculation of U.S. ADTV both on-exchange and off-exchange transactions in the United States. For the denominator, the issuer may include in its calculation of worldwide ADTV both on-exchange and off-exchange transactions, including over-the-counter trades and trades through alternative trading systems, provided that the information concerning off-exchange trading has been obtained from publicly available sources or third-party information service providers that the issuer has reasonably relied on in good faith and as long as the off-exchange information does not duplicate any other trading volume information regarding the subject class of securities. No specific source of data is mandated for either U.S. ADTV or worldwide ADTV.

For purposes of Rule 12h-6, the term "equity security" excludes convertible debt and other equity-linked securities, which are defined as any debt security convertible into an equity security, any debt security that includes a warrant or right to subscribe for an equity security, such warrant or right, any put, call, straddle or other option of privilege that gives the holder the option of buying or selling a security but does not obligate it to do so.

Termination of Listing or ADR Program. If an issuer has terminated its listing on a U.S. exchange or terminated a sponsored ADR facility and, at the time of delisting or termination, the U.S. ADTV exceeded the 5% benchmark under Rule 12h-6, such issuer must wait 12 months from the delisting or termination before filing Form 15F in reliance on Rule 12h-6 (this condition will not apply, however, to an issuer that delisted in the United States or terminated its sponsored ADR facility prior to March 21, 2007, the date of adoption of the final rules by the SEC).

Foreign Listing. An issuer must have maintained a listing of the subject class of equity securities in one or more markets in a foreign jurisdiction that, either singly or together with one other foreign jurisdiction, constitutes a "primary trading market" for the subject class of securities, for at least 12 months preceding the filing of the Form 15F. "Primary trading market" is defined to mean that at least 55% of the trading in the issuer's subject class of securities took place in or through the facilities of a securities market or markets (in no more than two foreign jurisdictions) during a 12-calendar month period that ended no more than 60 days before the filing of the Form 15F. For purposes of this condition, the issuer may aggregate trading in the same class of securities

on all of its markets within a single foreign jurisdiction or in no more than two foreign jurisdictions, as long as the trading in one of the foreign jurisdictions is greater than the trading in the United States.

One-Year Dormancy. An issuer may not have sold its securities in a registered public offering under the Securities Act during the 12 months preceding the filing of Form 15F. Securities issued (i) to the issuer's employees, (ii) by selling security holders in non-underwritten offerings, (iii) pursuant to a dividend or interest reinvestment plan, (iv) upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer, are excluded from the dormancy requirement. In addition, the issuer can sell securities pursuant to section 4(2), Regulation D, Rule 144A, Rules 801 and 802 and exempted securities under section 3(a)(10) of the Securities Act without triggering a one-year dormancy period.

Prior Exchange Act Reporting. An issuer must (i) have been an Exchange Act reporting company for at least 12 months preceding the filing of Form 15F; (ii) be current in its reporting (the issuer is not required to have timely filed or furnished all the reports during such 12-month period, as a result of which if it determines that it should have filed or furnished one or more Form 6-Ks it can do so before it files a Form 15F without impairing its ability to rely on Rule 12h-6); and (iii) have filed or furnished at least one Exchange Act annual report (which may be, for purposes of complying with Rule 12h-6, a special financial report filed with the SEC under Rule 15d-2) before filing a Form 15F for deregistration under Rule 12h-6.

Alternative Test

The SEC has retained a 300-holder test so as not to disadvantage issuers that cannot rely on the ADTV test. This alternative test is part of new Rule 12h-6. The test is met if the issuer has fewer than 300 record holders in the United States or worldwide on a single day with 120 days before filing of the Form 15F.

Issuers relying on this test may use a revised method of "look through" counting that limits the inquiry as to the securities represented by accounts of customers resident in the United States to brokers, dealers, banks and other nominees in the issuer's jurisdiction of incorporation, legal organization or establishment, and the one or two jurisdictions comprising the issuer's primary trading market if different from such issuer's jurisdiction of incorporation, legal organization or establishment. In case an issuer, after reasonable inquiry, is unable without unreasonable effort to obtain information about the amount of securities held by a nominee for the accounts of customers resident in the United States, such issuer is permitted to presume that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

Rule 12h-6's listing condition applies to issuers relying on the 300-holder alternative test. However, because the general trigger for deregistration (fewer than 300 U.S. resident holders of record) remains in place, a foreign issuer that has been acquired (for example in a "going private" transaction) can nonetheless deregister notwithstanding that it has no local listing.

Transition

A foreign private issuer that, before March 21, 2007, delisted a class of equity securities from a national securities exchange or an inter-dealer quotation system in the United States or terminated a sponsored ADR facility, may file a Form 15F in reliance on the new rule even if, at the time of delisting or termination, its U.S. ADTV has exceeded 5% of the worldwide ADTV in the preceding 12 months under Rule 12h-6.

Conditions for Debt Securities

Under the new rule, a foreign private issuer can terminate its Exchange Act reporting obligations regarding a class of debt securities (including non-convertible, non-participating preferred securities) if the following conditions are satisfied:

(i) the issuer has filed or furnished all reports required by Section 13(a) or Section 15(d) of the Exchange Act, including at least one annual report pursuant to Section 13(a) of the Exchange Act; and
(ii) 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.

New Deregistration Process

Public Notice. Under the new rule, an issuer must publish and disseminate, either before or on the date it files its Form 15F, a notice in the United States that discloses its intent to terminate its Exchange Act reporting obligations. Such notice must be submitted to the SEC under cover of Form 6-K before or at the time of the filing of the Form 15F, or as an exhibit to such Form.

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

Form 15F. By signing and filing Form 15F, a foreign private issuer will certify that (i) it meets all of the conditions for termination of Exchange Act reporting obligations and (ii) there are no classes of securities other than those that are the subject of the Form 15F in respect of which the issuer has Exchange Act reporting obligations.

Suspension. Upon the filing of Form 15F, an issuer's Exchange Act reporting obligations are automatically suspended and a 90-day waiting period is triggered. If, at the end of the 90-day period, the SEC has no objections, the suspension will automatically become a termination of registration and Exchange Act reporting obligations. If the SEC denies the Form 15F or the issuer withdraws it, within 60 days of the date of denial or withdrawal, the issuer is required to file or submit all reports that would have been required if it had not filed the Form 15F. Even though the issuer does not have a continuing obligation to make inquiries regarding, or to update, the information included in the Form 15F, the Form requires an issuer to undertake to withdraw its Form 15F before the date of effectiveness if such issuer has actual knowledge of information that

causes it reasonably to believe it does not meet the criteria of the exemption claimed at the date of the filing of the Form 15F.

III. Exchange Act Rule 12g3-2(b) Amendments

The SEC has adopted amendments to Rule 12g3-2(b) to permit foreign private issuers of equity securities to be covered by the Rule 12g3-2(b) exemption immediately upon the effectiveness of deregistration under Rule 12h-6, rather than having to wait 18 months for such exemption to apply (as was the requirement).

IV. New Exchange Act Rule 12g3-2(e)

Electronic Posting of Home Country Documents. Rule 12g3-2(e) permits an issuer, upon application to the SEC and not after filing Form 15F, that has obtained or will obtain a Rule 12g3-2(b) exemption, to publish its home country documents that it is required to furnish on a continuous basis under Rule 12g3-2(b)(1)(iii) on its Internet web site or through an electronic information delivery system generally available to the public in its primary trading market, rather than furnish them in paper to the SEC (as was the requirement).

An issuer that chooses to post its materials electronically must provide English translations of (i) its annual report (including the financial statements); (ii) interim reports that include financial statements; (iii) press releases; and (iv) communications and documents distributed to security holders to which the exemption relates, as well a prominent link on its web site directing investors to such information (in case the issuer's web site or the information delivery system are not in English). In addition, the issuer must disclose in its application for the Rule 12g3-2(b) exemption the address of its Internet web site or that of the electronic information delivery system in its primary trading market on which the issuer will publish the information required. The SEC suggests that issuers continue to provide web site access to their home country reports for a minimum of 12 months after posting.

The initial application and the home country documents that are submitted to the SEC with the application will have to be submitted to the SEC in paper as the SEC does not have an alternative means for non-reporting companies to submit documents.

V. Other Considerations

The SEC has clarified that after effectiveness of the Form 15F, a foreign private issuer may rely on Rule 701 to cover unsold securities that had previously been covered by a Form S-8.

Provision under Rules 12g-4(a)(2) and 12h-3(b)(2), which allowed a foreign private issuer to terminate the registration of a class of securities or suspend the duty to file reports if the class were held by (a) fewer than 300 U.S. residents or (b) fewer than 500 U.S. residents and the issuer had total assets not exceeding $10 million on the last day of each of its most recent three fiscal years, have been eliminated. Note, however, that the general trigger for deregistration available to domestic and foreign issuers alike that have fewer than 300 holders of record (worldwide) remains in place; deregistration under either Rule 12g-4 or 12h-3 requires the filing of a Form 15.

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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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