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SEC Reproposes Rules To Facilitate Deregistration by Foreign Private Issuers

On December 22, 2006, the SEC reproposed amendments to the rules governing deregistration which, when effective, would allow foreign private issuers to terminate the registration of a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") and the corresponding duty to file reports under Section 13(a) of the Exchange Act, and to terminate reporting obligations regarding a class of equity or debt securities under Section 15(d) of the Exchange Act, in either case if that issuer meets a benchmark designed to measure relative U.S. market interest for that class of securities.

Unlike the current rule, the reproposed rule is not based on the number of the issuer's U.S. security holders and, unlike the proposed rules, the reproposed rule would apply a single benchmark regardless of the issuer's size and that benchmark would not be based on percentage ownership by U.S. residents. Reproposed Exchange Act Rule 12h-6 would require the comparison of the average daily trading volume of an issuer's securities in the United States with that on its primary trading market. Additionally, the reproposed rule would permit the *termination* of Exchange Act reporting in respect of a class of equity securities under either Section 12(g) or Section 15(d) of the Exchange Act; currently, a foreign private issuer can only suspend, and cannot terminate, a duty to report under Section 15(d) of the Exchange Act.

The reproposed rule would provide U.S. investors with ongoing, ready access through the Internet to material information about a foreign private issuer of equity securities that is required by its home country after it has exited the Exchange Act reporting system.

Because the SEC did not fully address this approach when it originally proposed Rule 12h-6, and because of other proposed changes to Rule 12h-6 not fully discussed in the original rule proposal, the rule is being reproposed. There is a 30-day comment period. The SEC expects to take final action as expeditiously as possible after the end of the comment period with the goal to have new rules effective before June 30, 2007, so that foreign private issuers with calendar year-end fiscal periods have the option to exit the Exchange Act reporting system before the filing deadline for the next annual report on Form 20-F or 40-F.

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SEC Seeks to Remedy Disadvantages to Foreign Private Issuers of Current Regime and Drawbacks of Its Initial Proposal, While Maintaining U.S. Investor Protection

The SEC initially proposed amendments to the current rules governing when a foreign private issuer may exit the Exchange Act reporting regime in December 2005. The proposals were driven by concern that, due to several trends, including the increased internationalization of the securities markets in recent decades, it had become difficult for a foreign private issuer to exit the Exchange Act reporting system even when there is relatively little U.S. investor interest in its U.S.-registered securities. The SEC believed that the burdens and uncertainties associated with terminating registration and reporting under the Exchange Act were creating a disincentive to foreign private issuers accessing the U.S. public capital markets.

In order to remove this disincentive, the SEC proposed amendments to the current Exchange Act exit rules, which allows termination of registration of a class of securities under Section 12(g), and suspension of reporting obligations under Section 15(d), where the subject class of securities is held of record by less than 300 residents in the United States or by less than 500 U.S. residents when the issuer's total assets have not exceeded $10 million on the last day of the issuer's most recent three fiscal years. The originally proposed standard was based primarily on a comparison of an issuer's U.S. public float with its worldwide public float.

The SEC believes that the new proposed standard based on trading volume may be superior to the originally proposed standard because it is a direct measure of the issuer's nexus with the U.S. market, and because trading volume data is easier to obtain than public float or record holder data. These new proposed rules will provide foreign private issuers with the meaningful option of terminating their Exchange Act reporting obligations when, after electing to access the U.S. public capital markets, they find that there is relatively little U.S. investor interest in their U.S.-registered securities.

Reproposed Rule 12h-6

Quantitative Benchmark

The reproposed Rule 12h-6 revises the quantitative benchmark for an issuer of equity securities by permitting a foreign private issuer, regardless of size, to terminate its Exchange Act registration and reporting obligations in respect of a class of equity securities, assuming it meets all of the other conditions of the rule, if the U.S. average daily trading volume[1] ("ADTV") of the subject class of securities has been no greater than 5% of the ADTV of that class of securities in the issuer's "primary trading market" (defined below) during a "recent 12-month period." As defined under the rule, a "recent 12-month period" means a 12-calendar-month period that ended no more than 60 days before the filing of the Form 15F (discussed below).

[1] The reproposed rule does not mandate or specifically specify acceptable information sources for determining ADTV, consistent with other rules that use ADTV as a measure, though this is one aspect of the reproposed rules on which the SEC seeks comment.

One Year Ineligibility Period After Delisting or Termination of ADR Facility

So as not to create an incentive for a foreign private issuer to delist its securities from a U.S. exchange for the purpose of decreasing its U.S. trading volume, and to encourage foreign private issuers to maintain their American Depositary Receipts facilities, the reproposed rule

- requires an issuer that delists in the U.S. prior to deregistering under Rule 12h-6 to meet the trading volume standard at the date of delisting or else wait 12 months before it can proceed with deregistration in reliance on the trading volume standard; and

- requires an issuer that terminates an ADR facility to wait 12 months before seeking deregistration under Rule 12h-6 in reliance on the trading volume standard.

Alternative 300 Holder Condition

As an alternative to the proposed trading volume benchmark provision, reproposed Rule 12h-6 would permit a foreign private issuer to terminate its Exchange Act reporting obligations regarding a class of equity securities if, on a date within 120 days before the filing date of the issuer's Form 15F, it has less than 300 record holders on a worldwide basis, or who are U.S. residents, as long as the issuer meets the rule's other conditions. This alternative would prevent a foreign private issuer that cannot meet the ADTV benchmark from being worse off under the new regime than under the current exit rules. (As discussed below, the SEC has proposed simplifying the method of calculating the 300 holders.)

Prior Exchange Act Reporting Condition

In order to provide investors in U.S. securities markets with a minimum period of time to make an investment decision regarding a foreign private issuer's securities, a foreign private issuer seeking to rely on Rule 12h-6 would have to:

- have at least 12 months of Exchange Act reporting;
- be current (note that this does not mean timely) in its reporting obligations for that period (including any material interim home country documents required to be submitted under Form 6-K); and
- have filed at least one Exchange Act annual report.

If an issuer determines that it has not submitted all Form 6-Ks prior to filing its Form 15F, since the condition requires current, but not timely, filing, the issuer could submit all 6-K filings before filing the Form 15F.

The One-Year Dormancy Condition

Foreign private issuers would be precluded from exiting the Exchange Act reporting system shortly after engaging in U.S. capital raising. In particular, the reproposed rule would

prohibit sales of a foreign private issuer's securities in the United States in a registered offering under the Securities Act of 1933 (the "Securities Act") in the 12 months preceding its exit from the Exchange Act reporting system other than securities issued:

- to the issuer's employees[2];
- by selling security holders in non-underwritten offerings;
- upon the exercise of outstanding rights granted by the issuer if the rights are granted pro rata to all existing security holders of the class of the issuer's securities to which rights attach (though this exception for rights offerings would not extend to standby underwritten offerings or similar arrangements in the United States);
- pursuant to a dividend or reinvestment plan; or
- upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer.

In order to avoid driving private placement financings and other unregistered offerings by foreign companies offshore to the detriment of U.S. investors and U.S. broker-dealers, the reproposed rule would permit unregistered sales of securities that are exempt under the Securities Act, including sales pursuant to Section 4(2), Regulation D, Rule 144A and Rules 801 and 802, and exempt securities under Section 3, including Section 3(a)(10).

Foreign Listing Condition

To help assure that there is a non-U.S. jurisdiction that principally regulates and oversees the issuance and trading of the issuer's securities and the issuer's disclosure obligations to investors, the reproposed rule:

- requires that, with respect to equity securities, for at least the 12 months preceding its exit from the Exchange Act reporting regime, a foreign private issuer must have maintained a listing of the subject class of securities on an exchange in a foreign jurisdiction which, either singly or together with one other foreign jurisdiction, constitutes the primary trading market for the issuer's subject class of securities;
- defines "primary trading market" to mean that at least 55% of the trading in the foreign private issuer's subject class of securities took place in, on or through the

[2] The definition of "employee" is derived from Form S-8, and includes any employee, director, general partner, certain trustees, certain insurance agents, and former employees as well as executors, administrators or beneficiaries of the estates of deceased employees, and a family member of an employee who has received shares through a gift or domestic relations order.

facilities of, a securities market or markets in no more than two foreign jurisdictions during a "recent 12-month period"; and

- requires that, if an issuer aggregates the trading of its securities in two foreign jurisdictions for the purpose of Rule 12h-6, the trading market for the issuer's securities in at least one of the two foreign markets must be larger than the U.S. trading market for the issuer's securities.[3]

Deregistration in Respect of Debt Securities

Reproposed Rule 12h-6 would enable a foreign private issuer to terminate its Exchange Act reporting obligations in respect of a class of debt securities where the issuer has:

- filed or furnished all reporting required under Exchange Act 13(a) or Section 15(d), including at least one Exchange Act annual report; and

- on a date within 120 days before the filing of the Form 15F, its class of debt securities held of record by less than 300 holders either on a worldwide basis or who are U.S. residents.

Revised Counting Method

The reproposed counting method, which would apply only to an issuer of equity securities proceeding under the alternative 300-holder provision, or to a debt securities issuer that must meet the 300 holder standard, would:

- permit an issuer to limit its "look-through" inquiry to brokers, banks and other nominees located in the United States, the issuer's jurisdiction of incorporation, legal organization or establishment and, if different, the jurisdiction of its primary trading market; and

- provide that an issuer that aggregates the trading volume of its securities in two foreign jurisdictions for the purpose of meeting the rule's listing condition will have to look through nominee accounts in both foreign jurisdictions which comprise its primary trading market, and in the United States as well as in its jurisdiction of incorporation (if different from the two jurisdictions that comprise its primary trading market.

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[3] For the purpose of the reproposed primary trading market determination, an issuer would first measure the ADTV of its listed securities aggregated over one or two foreign jurisdictions, then divide this amount by its worldwide ADTV. This denominator would include the ADTV only for those foreign jurisdictions in which the issuer has listed the subject class of securities as well as its U.S. ADTV. Its U.S. ADTV would include all securities of the subject class, whether listed or unlisted.

The SEC has proposed a presumption used in the cross-border rules that where an issuer is unable without unreasonable effort to obtain information as to the amount of securities held by nominees for the accounts of U.S. resident customers, the issuer may assume that the customers are resident in the jurisdiction in which the nominee has its principal place of business.

Application of Rule 12h-6 to Successor Issuers

In order to address the concern expressed by some commenters that the previously proposed rules would prevent an issuer that has succeeded to the Exchange Act reporting obligations of an acquired company pursuant to Rule 12g-3 or 15d-5 from terminating its reporting obligations because of the proposed rule's reporting condition, although the successor issuer satisfies the rule's other requirements, the reproposed Rule 12h-6 would provide that:

- following a merger, acquisition or other similar transaction, a foreign private issuer that succeeded to the Exchange Act reporting obligations of another company could take into account the Exchange Act reporting history of its predecessor when determining whether it met the reporting history condition for deregistration under Rule 12h-6, and may terminate those reporting obligations so long as the successor meets the other conditions applicable to either equity or debt securities, as the case may be; and

- if a previously non-Exchange Act reporting foreign private issuer acquires an Exchange Act reporting company by consummating an exchange offer, merger or other business combination registered under the Securities Act (e.g., using a Form F-4), the acquiror would have to fulfill Rule 12h-6's prior reporting condition without reference to the acquired company's reporting history (since the acquiror would have triggered its own Section 15(d) reporting obligations upon the effectiveness of its Securities Act registration statement).

Application of Rule 12h-6 to Prior Form 15 Filers

In order to ensure that foreign private issuers would not be denied the benefits of the new exit regime simply because they met the requirements for ceasing their Exchange Act reporting obligations under the current rules and followed the only exit procedure available to them, the reproposed rule would:

- extend termination of Exchange Act reporting to a foreign private issuer that, before the effective date of a Rule 12h-6, has already effected the suspension or termination of its Exchange Act reporting obligations after filing a Form 15 without requiring them to meet any quantitative benchmark, or satisfy the prior reporting or dormancy provisions, so long as they also met the following conditions:

- the issuer must currently not be required to register a class of securities under Section 12(g) or be required to file reports under Section 15(d);

- the issuer must file a Form 15F in order to notify investors and alert the SEC that the prior Form 15 filer is claiming the benefits of Rule 12h-6, to have the issuer certify that it meets the conditions of the new rule, and to provide the issuer's Internet Web site address; and

- if its Form 15 applied to a class of equity securities, for at least the 12 months before the filing of its Form 15F, the issuer must have maintained a listing of the subject class of equity securities on an exchange in a foreign jurisdiction, which, either singly or together with another foreign jurisdiction, constitutes the primary trading market for the issuer's class of subject securities.

Public Notice Requirement

In order to alert U.S. investors that have purchased the issuer's securities about the issuer's intended exit from the Exchange Act registration and reporting system, the reproposed rules would:

- require an issuer of equity or debt securities or a successor issuer to publish, either before or on the date that it files its Form 15F, a notice in the United States that discloses its intent to terminate its Section 13(a) or 15(d) reporting obligations;

- require such notice to be published through means reasonably designed to provide broad dissemination of the information to the public in the United States; and

- require the issuer to submit a copy of the notice, either under cover of a Form 6-K before or at the time of filing of the Form 15F, or as an exhibit to Form 15F, to the SEC.

The proposed minimum notice period requirement has been eliminated; the notice must be published before or on the date of the filing of the Form 15F.

Form 15F

In order to provide investors with information regarding an issuer's decision to terminate its Exchange Act reporting obligations, and to assist the SEC staff in monitoring the user of Rule 12h-6, the reproposed rules require a foreign private issuer to file electronically on EDGAR a form:

- certifying that:
    - it meets all of the conditions for termination of Exchange Act reporting specified in Rule 12h-6; and
    - 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; and
- soliciting information regarding:
    - an issuer's Exchange Act reporting history;
    - when it last sold registered securities in the United States other than those excluded from consideration under Rule 12h-6;
    - the primary trading market for an issuer's equity securities that is the subject of the Form 15F;
    - trading volume data for an issuer's equity securities in the United States and in its primary trading market, if applicable;
    - the number of an issuer's 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; and
- requiring material information concerning a Form 15F filer:
    - that is a successor issuer;
    - that is a prior Form 15 filer;
    - that has a primary trading market composed of two foreign jurisdictions; and
    - that may have delisted or terminated an ADR facility prior to filing the Form 15F.

After filing the reproposed Form 15F, the issuer's Exchange Act reporting obligations would be immediately suspended and a 90-day waiting period would commence. If, at the end of the 90-day waiting period, the SEC has not objected to the filing, the suspension would automatically become a termination of registration and reporting. 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 reporting that would have been required had it not filed the Form 15F.

Thereafter, the issuer would have no continuing obligation to make inquiries or perform other work concerning the information contained in the Form 15F, including its assessment of trading volume or ownership of its securities. However, the reproposed Form 15F would require an issuer to undertake to withdraw the form before the date of effectiveness if it has actual knowledge of information that causes it to reasonably believe that, ***at the date of filing*** the Form 15F:

- the ADTV of its subject class of securities in the United States during a "recent 12-month period" exceeded 5% of the ADTV of that class of securities in the issuer's primary trading market during the same period (if the issuer is utilizing this benchmark);

- its subject class of securities was held of record by 300 or more U.S. residents or 300 or more persons worldwide (if the issuer is utilizing this benchmark); or

- it otherwise no longer qualified for termination of its Exchange Act reporting obligations under Rule 12h-6.

Amended Rules 12g-4 and 12h-3

Given the advantages of the reproposed Rule 12h-6 to foreign private issuers wishing to terminate their Exchange Act reporting obligations, the SEC believes that few, if any, foreign private issuers would elect to proceed under the provisions of Rule 12g-4 or Rule 12h-3 that allow a foreign private issuer to terminate its registration of a class of equity securities under Section 12(g) or suspend the duty to file reports under Section 15(d) if the class of securities is held by less than 300 U.S. residents or by 500 U.S. residents and the issuer has had total assets not exceeding $10 million on the last day of each of its most recent three fiscal years. Accordingly, the SEC is proposing amendments to eliminate these provisions in Rule 12g-4 and 12h-3.

Reproposed Rule 12g3-2(b) Amendments

In order to provide U.S. investors with access to material information about an issuer of equity securities following its termination of reporting pursuant to Rule 12h-6, the SEC has reproposed rule amendments that automatically, immediately apply the Rule 12g3-2(b) exemption to a foreign private issuer:

- upon its termination of Exchange Act reporting under Rule 12h-6[4]; and

[4] This provision applies to issuers of equity securities, successor issuers, and prior Form 15 filers.

- upon the condition that it publish in English its home country materials required by Rule 12g3-2(b) on its Internet Web site or through an electronic information delivery system that is generally available to the public in its primary trading market.

With respect to a foreign private issuer that files a Form 15F solely to terminate its reporting obligations regarding a class of debt securities, the reproposed amendment further permits such issuer to apply for the Rule 12g3-2(b) exemption for a class of equity securities any time after the effectiveness of its termination of reporting regarding the class of debt securities.

The Rule 12g3-2(b) exemption received under the reproposed Rule 12g3-2(e) would remain in effect for as long as the foreign private issuer satisfies the rule's electronic publication conditions or until the issuer registers a new class of securities under Section 12 or incurs Section 15(d) reporting obligations by filing a new Securities Act registration statement, which has become effective.

Electronic Publishing of Home Country Documents

In order to make submissions under Rule 12g3-2(b) easier to access, the SEC reproposed Rule 12g3-2(e), which would:

- require an issuer to publish English translations of the following documents on its Internet Web site[5]:
  - its annual report, including or accompanied by annual financial statements;
  - interim reports that include financial statements;
  - press releases; and
  - all other communications and documents distributed directly to security holders of each class of securities to which the exemption relates; and
- require a foreign private issuer of equity securities to disclose in the Form 15F the address of its Internet Web site or that of the electronic information delivery system in its primary trading market on which it will publish the information required under Rule 12g3-2(b).

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[5] While an issuer would be required to post electronically a home country document for a reasonable period of time, what constitutes a reasonable period would depend on the nature and purpose of the home country document. At a minimum, the SEC suggests that companies provide Web site access to their home country reports for at least a 12 month period.

Also in the interest of increasing investor's ability to access an issuer's home country documents, the SEC is reproposing Rule 12g3-2(f) which would:

- permit a foreign private issuer that, upon application to the SEC and not after filing a Form 15F, has obtained or will obtain a Rule 12g3-2(b) exemption to publish its home country documents that it is required to furnish on its Internet Web site or through an information delivery system generally available to the public in its primary trading market; and

- require as a condition to this electronic posting that an issuer would have to comply with the English translation requirements of reproposed Rule 12g3-2(e) and provide to the SEC the address of its Internet Web site or that of the electronic information delivery system in its primary trading market on which it will publish the information required under Rule 12g3-2(b) in its application under that rule or in an amendment to that application.

An applicant will have to continue to submit in paper initial application letters and home country documents submitted in support of its initial application, as the SEC currently does not have an establish means for a non-reporting company to submit these items electronically.

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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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