

SEC UPDATE

SEC Proposes New Rules for Foreign Private Issuers to Exit the SEC Reporting System

The SEC has proposed new Rule 12h-6 under the 1934 Act that would allow a foreign private issuer to

- terminate its registration of a class of equity securities under 1934 Act Section 12(g) 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 designed to measure U.S. market interest for that class of securities; 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

Under current rules, a foreign private issuer may exit the 1934 Act registration and reporting regime if the class of the issuer's securities has fewer than 300 record holders who are U.S. residents. Under these rules, a foreign private issuer may find it difficult to terminate its 1934 Act registration and reporting obligations despite the fact that there is relatively little investor interest in the United States. In response to requests on behalf of a number of foreign private issuers, the SEC has proposed new Rule 12h-6.

Equity Securities

A foreign private issuer would be eligible to terminate its 1934 Act registration and reporting obligations regarding a class of equity securities under proposed Rule 12h-6 if it meets the following conditions;

- the issuer has been an 1934 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 1934 Act;
- the issuer has not directly or indirectly sold its securities, with certain exceptions, in the United States in either a registered or unregistered offering under the 1933 Act during the preceding 12 months; and
- during the preceding two years, the issuer has maintained a listing of the securities on an exchange in its home country, as defined for Form 20-F purposes, which constitutes the primary trading market for the securities.

An eligible foreign private issuer would then have to meet one of a set of alternative benchmarks, depending primarily on whether the issuer is a well-known seasoned issuer:

If the issuer is a well-known seasoned issuer, either:

- the U.S. average daily trading volume of the subject class of securities has been no greater than 5 percent of the average daily trading volume of that class of securities in its primary trading market and U.S. residents held no more than 10 percent of the issuer's worldwide public float; or
- regardless of U.S. trading volume, U.S. residents held no more than 5 percent of the issuer's worldwide public float.

If the issuer is not a well-known seasoned issuer, regardless of U.S. trading volume, U.S. residents held no more than 5 percent of the issuer's worldwide public float.

Also, proposed Rule 12h-6 would provide that a foreign private issuer that is unable to meet one of the proposed new benchmarks, but does satisfy the rule's other conditions, could still terminate its 1934 Act registration and reporting obligations regarding a class of equity securities as long as that 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.

The proposals also would apply the exemption under 1934 Act Rule 12g3-2(b) to a foreign private issuer immediately upon its termination of 1934 Act registration and reporting regarding a class of equity securities. Under the exemption, however, a foreign private issuer would have to publish in English the 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. It is intended that a foreign private issuer that regularly posts corporate information on its web site would be able to maintain this exemption.

Debt Securities

A foreign private issuer would be eligible to terminate its Section 15(d) reporting obligations regarding a class of debt securities under proposed Rule 12h-6 if it meets the following conditions:

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

Counting Method

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, proposed Rule 12h-6 would permit an issuer to:

limit its 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; and 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.

New Form 15F

Under proposed Rule 12h-6, a foreign private issuer would have to file new Form 15F with the SEC, certifying the issuer's compliance with the requirements for termination of its 1934 Act reporting obligations and providing specified supporting information. As with the filing of Form 15 under the current rules, the filing of Form 15F would automatically suspend an issuer's reporting obligations. If the SEC has not objected, the suspension would become a permanent termination 90 days after the filing of the Form 15F.

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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