MAYER BROWN ROWE & MAW

Securities Update

SEC Facilitates Exit from US Securities Regulation by Non-US Issuers

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Overview

The US Securities and Exchange Commission (the "SEC") has adopted changes to its rules that govern when a non-US issuer that is a "foreign private issuer" may terminate registration of its equity securities under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") and the corresponding obligation to file reports under Section 13(a) of the Exchange Act, and when the issuer may cease its reporting obligations regarding a class of equity or debt securities under Section 15(d) of the Exchange Act.[1] The rule changes include adoption of new Rule 12h-6 under the Exchange Act and new Form 15F for termination of Exchange Act registration and reporting obligations.

The new rules became effective as of June 4, 2007. (See Release No. 34-55540; International Series Release No. 1301.)

The rule changes respond to concerns that have been widely voiced in the last several years, especially since the enactment of the Sarbanes-Oxley Act of 2002, that US capital markets have become unattractive to non-US issuers. One frequently cited element of this concern was the difficulty faced by non-US issuers seeking to exit the US capital markets regulatory system when the level of US investor interest in the issuers' securities did not warrant the compliance and other costs involved in being a participant in the US markets. In adopting its new exit rules, the SEC stated that it recognizes the importance of non-US issuers to the US capital markets and expects that the new deregistration rules will promote capital formation in the United States and make US markets more attractive to foreign companies without sacrificing important investor protections.

Background

A foreign private issuer is required to register a class of its equity securities under Section 12(g) of the Exchange Act if the securities are held of record by 500 or more persons worldwide, 300 or more of whom are persons resident in the United States, and the issuer has $10 million or more in assets. In addition, if an issuer, foreign or domestic, registers any debt or equity securities in connection with an offering of securities under the Securities Act of 1933, the issuer will be subject, pursuant to Section 15(d) of the Exchange Act, to the periodic reporting requirements under the Exchange Act at least through the end of the calendar year in which the registration becomes effective. Issuers are also required to register a class of securities under Section 12(b) of the Exchange Act if the securities are listed on a US securities exchange, but the new rules do not apply to deregistration under Section 12(b).

Under the SEC's previous deregistration requirements, a foreign private issuer could only exit the Exchange Act's registration and reporting regime if the relevant class of the issuer's securities had less than 300 holders of record who were US residents (or had fewer than 500 persons resident in the United States where the issuer's total assets were less than $10 million for each of the three preceding fiscal years). In the case of securities held by nominees or in "street name," foreign private issuers often found the "look through" rules used to determine whether they had US shareholders difficult to implement and could not always clearly determine whether they qualified to terminate their registration. In practice, foreign private issuers also found the 300-US shareholder threshold to be very low in the context of

increasingly global securities markets and prevalent internet trading. Furthermore, foreign private issuers could only suspend, but not terminate, a duty to report under Section 15(d) of the Exchange Act, which meant they would have to continually monitor their number of US resident shareholders and risked again becoming subject to Exchange Act reporting requirements if at the end of any fiscal year that number reached or exceeded 300 US resident holders.

In light of such issues, many European and other non-US issuers and commentators urged the SEC to modify its exit rules to provide a more realistic basis for determining whether sufficient US investor interest existed to justify subjecting foreign private issuers to the Exchange Act's reporting and registration requirements, which also exposed the issuers to liability under the Sarbanes-Oxley Act.

New Exchange Act Rule 12h-6

New Exchange Act Rule 12h-6 permits the termination of Exchange Act registration and reporting obligations regarding a class of equity securities by a foreign private issuer that meets quantitative benchmarks designed to measure relative US market interest for that class of securities. Rule 12h-6 also enables a foreign private issuer to file Form 15F and terminate its Exchange Act reporting obligation regarding a class of debt securities. Rule 12h-6 applies only to Section 12(g) registration (and not, as noted above, to Section 12(b) registration relating to securities listed on US securities exchanges). The requirements for termination of Section 12(g) registration and related reporting obligations for equity securities and of Section 15(d) reporting obligations for debt securities are described separately in the following paragraphs.

Conditions for Deregistration of a Class of Equity Securities

- *New "trading volume" test.* A foreign private issuer is now eligible to terminate its Exchange Act registration and reporting obligations regarding a class of equity securities if the average daily trading volume of that class of securities in the United States for a 12-month period, ending within 60 days of the filing of a deregistration application on Form 15F, is not greater than 5% of the average daily trading volume of the securities on a world-wide basis for the same period. The calculation of the worldwide average daily trading volume may include off-market transactions (such as on or through the "Pink Sheets" or OTC Bulletin Board) so long as the trading volume information used is reasonably reliable and not duplicative of other trading volume information. This is a one-time test with no continuing obligation of inquiry, but the issuer must alert the SEC if it becomes aware of trading volume changes before the termination is effective. For purposes of the trading volume test under Rule 12h-6, "equity security" does not include convertible debt and other equity-linked securities.

- *Alternative 300-holder test.* A foreign private issuer may instead rely on the less than 300-holder test to terminate Exchange Act registration and reporting obligations in respect of class of equity securities if the class is held of record by less than either 300 persons worldwide or 300 persons resident in the United States. Under the SEC's new rules, however, foreign private issuers relying on the less than 300-holder test may use a modified counting method that limits the "look through" inquiry, with respect to nominee or street name holders regarding the number of their underlying customers who are resident in the United States, to brokers, dealers, banks, and other nominees located in the United States, the issuer's jurisdiction of incorporation and, if different, the jurisdiction comprising the issuer's primary trading market. Previously, this "look through" inquiry was required to be done on a worldwide basis. Issuers may assume that customers of nominees outside the United States are not resident in the United States. Issuers may also rely on information from independent service providers in the business of providing security holder information.

- *History of Exchange Act reporting.* A foreign private issuer seeking to terminate Exchange Act registration and reporting obligations pursuant to Rule 12h-6 must have been a reporting company under Section 13(a) or 15(d) of the Exchange Act for at least 12 months, have satisfied its Exchange Act reporting obligations, and have filed at least one Exchange Act annual report.

- *Absence of SEC registered offerings.* During the 12-month period preceding the Form 15F filing for termination of Exchange Act registration and reporting obligations, the foreign private issuer must not, subject to certain exceptions, have sold securities in an offering registered under the Securities Act of 1933. This does not include registered offerings of securities: (1) to the foreign private issuer's employees, (2) by selling security holders in non-underwritten offerings, (3) upon the exercise of outstanding

rights granted by the foreign private issuer if the rights are granted pro rata to all existing security holders of the class of the foreign private issuer's securities to which the rights attach, (4) pursuant to a dividend or interest reinvestment plan, or (5) upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants. Offerings of securities pursuant to an exemption from the registration requirements of the Securities Act, such as private placements or offerings under Rule 144A, are also not included.

- *12-month listing requirement.* A foreign private issuer must, for at least 12 months preceding a Form 15F filing for termination of Exchange Act registration or reporting obligations, have maintained a listing of the subject class of securities on one or more non-US securities exchanges that, either singly or jointly, constitute the primary trading market for those securities. A "primary trading market" is one or more securities markets in a non-US jurisdiction (or no more than two non-US jurisdictions) where at least 55% of the trading in the foreign private issuer's class of securities took place in the preceding 12-month period provided that the trading volume in the issuer's securities in at least one of the two non-US jurisdictions is larger than the trading volume in the United States for the same class of securities.

Conditions for Terminating Reporting Obligations for Debt Securities

A foreign private issuer may terminate its Exchange Act reporting obligations regarding a class of debt securities if the issuer:

- Has a class of debt securities held of record by less than either 300 persons worldwide or 300 persons who are US residents; and

- Has filed or furnished all reports required under Section 13(a) or Section 15(d) of the Exchange Act, including at least one Exchange Act annual report.

The new 5% trading volume test may not be used by foreign private issuers seeking to terminate Exchange Act reporting obligations for a class of debt securities. However, for purposes of meeting the less than 300-holder test, the revised "look-through" inquiry described above applies.

Deregistration Process and Other Requirements

- *Certification of compliance with Rule 12h-6.* To terminate Exchange Act registration and reporting obligations pursuant to Rule 12h-6, a foreign private issuer must file Form 15F with the SEC (electronically via the agency's EDGAR filing system) to certify that it has met the requirements of Rule 12h-6 and has no other Exchange Act registration and reporting obligations with respect to any other class of securities. The form must also include certain other information, including the sources of trading volume information used to determine eligibility to file the form and the address of the issuer's web site, or of the electronic information delivery system in its primary trading market, on which it will publish the information required to comply with Rule 12g3-2(b) (as described below).

- *Effect of filing Form 15F.* Upon the filing of Form 15F with the SEC, the foreign private issuer's Exchange Act registration and reporting obligations will be immediately suspended. If the SEC does not raise any objections before the end of a 90-day waiting period, then the issuer's Exchange Act registration and reporting obligations will permanently terminate.

- *Public notice requirement.* A foreign private issuer must issue a press release or other public announcement of its intention to terminate its Exchange Act registration and reporting obligations pursuant to Rule 12h-6 either before or at the time of filing Form 15F with the SEC. The issuer must also include a copy of this notice under cover of a Form 6-K before or at the time of filing its Form 15F or, alternatively, as an exhibit to the Form 15F.

- *Potential 12-month waiting period.* A foreign private issuer must wait at least 12 months before it may file Form 15F to terminate Exchange Act registration and reporting obligations pursuant to Rule 12h-6 if the foreign private issuer has delisted a class of equity securities from a US national securities exchange (e.g., NYSE or NASDAQ) or automated inter-dealer quotation system or terminated a sponsored American Depository Receipts facility and does not, at the time of delisting or termination, meet the trading volume test described above. This requirement is intended to discourage an issuer from delisting its securities so as to reduce the level of US trading interest and thereby meet the 5% or less US trading volume test.

- *Filings made before effectiveness of new rules.* A foreign private issuer that has, before June 4, 2007, terminated an Exchange Act registration or suspended Exchange Act reporting obligations under the SEC's prior rules may have those obligations terminated pursuant to new Rule 12h-6 if: (1) it files a Form 15F with the SEC, and (2) in the case of equity securities, meets the Rule 12h-6 listing requirement and either the 5% trading volume test or the less than 300-holder test, or in the case of debt securities, meets the less than 300-holder test. The benefit to a former Section 15(d) reporting issuer of being treated as having proceeded under Rule 12h-6 is that it would obtain termination, rather than mere suspension, of its Section 15(d) reporting obligations with respect to a class of equity or debt securities. A former Section 12(g) registered issuer could also benefit from being treated as having proceeded under new Rule 12h-6 as it would be able to claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of its Rule 12h-6 termination rather than having to wait for 18 months (as described below).

- *Successor issuers.* Rule 12h-6 is available for foreign private issuers who succeed to the Exchange Act reporting obligations of another issuer after a merger, acquisition, or other similar transaction by permitting the successor issuer to take into account the Exchange Act reporting history of its predecessor to determine whether it meets the conditions for deregistration under Rule 12h-6.

Availability of Rule 12g3-2(b) exemption

Concurrently with adopting its new deregistration requirements, the SEC also expanded the availability of Exchange Act Rule 12g3-2(b) under which foreign private issuers (even if they have 300 or more US resident holders) can claim an exemption from Exchange Act registration provided they are not listed on a US securities exchange or inter-dealer quotation system (subject to certain grandfather rights) and furnish home country disclosure to the SEC in English. The changes permit a foreign private issuer to claim the Rule 12g3-2(b) exemption: (1) immediately upon its termination of Exchange Act reporting under Rule 12h-6, rather than having to wait 18 months as previously required, and (2) upon the condition that it publish its home country materials required by Rule 12g3-2(b) in English on its internet website or through an electronic information delivery system that is generally available to the public in its primary trading market. The changes also permit a non-Exchange Act reporting company that has received, or will receive, the Rule 12g3-2(b) exemption, upon application to the SEC and other than pursuant to Rule 12h-6, to publish its required home country documents in English on its website or through an electronic information delivery system in its primary trading market, rather than submitting them in paper to the SEC as previously required.

Conclusion

In its adopting release, the SEC stated that it believed that approximately one-third of SEC-registered foreign private issuers may meet the trading volume test for deregistration. It is likely that foreign private issuers will conduct individual assessments to determine whether to take advantage of the eligibility to deregister offered by the new rules based on a cost-benefit analysis of having a US listing and other relevant factors. In particular, many foreign private issuers will want to know whether the SEC will eliminate the requirement for US GAAP reconciliation of financial statements of foreign private issuers that have been prepared in accordance with International Financial Reporting Standards (IFRS), a change some expect to substantially reduce the costs to such issuers of registering and reporting under the Exchange Act. The SEC has recently proposed new rules to remove the US GAAP reconciliation requirement and has set the stage for foreign issuers to be allowed to report in IFRS. Once the proposed rules go through the required public comment process, they are widely expected to be adopted by the SEC.

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1 A foreign private issuer is any non-governmental issuer formed outside the United States, other than one that has more than 50% of its outstanding voting securities held by US residents and as to which one of the following is true: (1) a majority of the issuer's executive officers or directors are US residents or citizens, (2) more than 50% of the issuer's assets are located in the United States, or (3) the issuer's business is administered principally in the United States.

If you have any questions regarding these developments, we would be pleased to discuss them with you. For more information, please contact any of the attorneys listed on the next page or any other member of our corporate and securities group.

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