The New Deregistration Rules for Foreign Private Issuers

On June 4, 2007, the U.S. Securities and Exchange Commission (the “Commission”) implemented new rules\(^1\) that liberalize the deregistration process for foreign private issuers.\(^2\) In contrast, the current deregistration provisions governing U.S. registrants will remain in place.

Foreign private issuers that have securities listed on a U.S. stock exchange or have issued securities pursuant to a U.S. registration statement are subject to the periodic reporting requirements under the U.S. Securities Exchange Act of 1934 (the “Exchange Act”). These periodic reporting requirements principally consist of an annual report on Form 20-F or Form 40-F, including, to the extent required, a U.S. GAAP reconciliation of the financial statements, and the need to furnish to the Commission of various home country documents (as explained further below).

Under the previous rules, eliminating the Exchange Act reporting requirements was difficult. The new rules will significantly increase the number of existing foreign private issuers that are able to terminate their U.S. reporting obligations. This rule change should also provide assurance to companies that are considering listing securities on a U.S. stock exchange or raising capital through a U.S. registered offering that there is an enhanced means of terminating ongoing reporting obligations in the future. As discussed further below, the new rules could also facilitate cross-border exchange offers by foreign private issuers where the target’s shares are listed in the U.S.

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\(^1\) The final rules were adopted by new Exchange Act rule 12h-6. See Commission Release no. 34-55540, dated March 27, 2007.

\(^2\) The term **foreign private issuer** means any foreign issuer other than a foreign government except an issuer meeting the following conditions:

1. More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the U.S.; and

2. Any of the following:
   
   i. The majority of the executive officers or directors are U.S. citizens or residents;
   
   ii. More than 50 percent of the assets of the issuer are located in the U.S.; or
   
   iii. The business of the issuer is administered principally in the U.S.
Previously, a foreign private issuer had to have fewer than 300 holders of record worldwide or fewer than 300 holders resident in the U.S. in order to deregister. The new rule provides an alternative test for deregistering equity securities based on the ratio of an issuer’s U.S. trading volume over its worldwide trading volume. If the U.S. average daily trading volume of an issuer over a recent 12-month period is no greater than 5% of its worldwide trading volume, and if it meets other conditions, it will be able to terminate its reporting obligations. However, if a foreign private issuer deregisters its equity securities pursuant to this trading volume threshold, it will have to, on a continuous basis, electronically publish in English certain materials that it is required to furnish or disseminate in its home country.

The new rules will apply different deregistration conditions for equity securities and debt securities. They will also permit foreign private issuers permanently to terminate (rather than only suspend) all of their reporting obligations under the Exchange Act.

The new rules entered into effect on June 4, 2007, which means that foreign private issuers that meet the deregistration conditions can avoid filing a Form 20-F for 2006.

**Equity Securities**

To be able to deregister a class of equity securities under the new rules, a foreign private issuer must meet: (1) each of three general conditions set forth below and (2) either the trading volume threshold or one of the 300-holder thresholds.

A foreign private issuer that deregisters equity securities pursuant to the new rules will automatically receive the exemption under Exchange Act rule 12g3-2(b) (described in detail below). Absent this exemption, a foreign private issuer deregistering under the new rules would have to re-register its equity securities under section 12(g) of the Exchange Act if, as of a financial year-end after the deregistration, it had 500 or more shareholders and 300 or more U.S. resident shareholders (and more than $10 million in assets).

General Conditions:

1. **Prior Exchange Act Reporting Condition**: The foreign private issuer must have:
   - been an Exchange Act reporting company for at least 12 months preceding the deregistration;
   - filed or furnished all reports required for this period; and
• filed at least one annual report on Form 20-F (or Form 40-F), or a special financial report (filed with the Commission pursuant to Rule 15d-2).

2. **Home Country Listing Condition**: For the preceding year, the issuer must have maintained a listing of the subject class of securities on one or more exchanges in a non-U.S. jurisdiction that, either alone or together with the trading in one other non-U.S. jurisdiction, constitutes the *primary trading market* for the securities.

"Primary trading market" means that at least 55% of the trading in the foreign private issuer's relevant class of equity securities took place in a single or in no more than two non-U.S. jurisdictions during a recent 12-month period that ended no more than 60 days before the filing of the deregistration form. Multiple exchanges within one jurisdiction may be aggregated for this purpose. If an issuer wants to aggregate the trading volumes in two non-U.S. jurisdictions for this purpose, at least one of those jurisdictions must have a larger trading volume in the relevant security than the trading volume in the U.S.

Trading volume related to equity-linked securities, such as convertible debt securities, options and warrants, should be excluded when calculating the trading volume under the rule.3

3. **One Year Dormancy Condition**: The issuer must not have sold its securities in the U.S. in a registered offering during the preceding 12 months, except for securities that are issued:

   • to the issuer's employees;

   • by selling security holders in non-underwritten offerings;

   • upon the exercise of outstanding rights granted by the issuer if the rights have been granted pro rata to all existing security holders of the relevant class (except when issued pursuant to a standby underwritten offering or other similar arrangement in the U.S.);

   • pursuant to a dividend or interest reinvestment plan (except when issued pursuant to a standby underwritten offering or other similar arrangement in the U.S.); or

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3 Specifically, the following types of securities should be excluded: (i) debt securities that are convertible into an equity security; (ii) debt securities that include a warrant or right to subscribe for or purchase an equity security; (iii) any such warrant or right; or (iv) any put, call, straddle, or other option or privilege that gives the holder the option of buying or selling a security but not require the holder to do so.
• upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer (except when issued pursuant to a standby underwritten offering or other similar arrangement in the U.S.).

Alternative Exit Thresholds:

1. **Trading Volume Threshold:** The U.S. average daily trading volume ("ADTV") of the relevant class of equity securities for a recent 12-month period (that ended no more than 60 days before the filing of the deregistration form) must be no greater than 5% of the average daily trading volume of that class of securities on a worldwide basis for the same period.

   In the case of the U.S. ADTV, an issuer must include both the on-exchange and (over the counter) off-exchange U.S. trading. In the case of the worldwide ADTV, an issuer must include the on-exchange ADTV and may, to the extent the trading figures are reliable and not duplicative, include the (over the counter) off-exchange trading in non-U.S. jurisdictions. Trading volume related to equity-linked securities, such as convertible debt securities, options and warrants, should be excluded when calculating the trading volume under the rule.\(^4\) If an issuer's equity securities are traded in the form of American Depositary Receipts ("ADRs"), it must calculate the trading volume of its ADRs in terms of the number of securities represented by those ADRs.

   • **One Year Ineligibility Period After Delisting or Termination of ADR Facility.** A foreign private issuer that has delisted (voluntarily or involuntarily) a class of equity securities from a U.S. national securities exchange or automated inter-dealer quotation system or terminated its sponsored ADR program with respect to a class of equity securities must wait at least one year from the date of the delisting or termination of the ADR program before it may file the deregistration form in order to deregister a class of equity securities.

   • The requirement to wait one year does not apply if:

\(^4\) Specifically, the following types of securities should be excluded: (i) debt securities that are convertible into an equity security; (ii) debt securities that include a warrant or right to subscribe for or purchase an equity security; (iii) any such warrant or right; or (iv) any put, call, straddle, or other option or privilege that gives the holder the option of buying or selling a security but not require the holder to do so.
o at the time of the delisting or termination of the ADR program, the U.S. ADTV of the subject class of equity securities did not exceed 5% of the issuer's worldwide ADTV for the preceding 12 months; or

o the issuer delisted its equity securities or terminated its ADR program before March 21, 2007.

2. **300 Holder Threshold**: Alternatively, a foreign private issuer may deregister a class of equity securities if, on a date within 120 days before the filing of the deregistration form, that class of equity securities was held of record either by:

- fewer than 300 persons on a worldwide basis; or

- fewer than 300 persons resident in the U.S.

**Debt Securities**

Under the new rules, a foreign private issuer may deregister a class of debt securities if:

- it has filed or furnished all required Exchange Act reports (i.e., not just for the preceding year as is the case for equity securities), including at least one annual report on Form 20-F (or Form 40-F); and

- on a date within 120 days before the filing of the deregistration form the class of debt securities is held of record either by:

  - fewer than 300 persons on a worldwide basis; or

  - fewer than 300 persons resident in the U.S.

**Method for Counting Security Holders**

Consistent with the previous rules, a foreign private issuer will have to look through brokers, dealers, banks and other nominees for purposes of calculating the number of holders resident in the U.S. This can be burdensome on issuers, particularly if a significant number of shares are held by broker-dealers and other nominees on behalf of their clients. To ease the burden on issuers when calculating the number of U.S. holders, they will only have to look through brokers, dealers, banks and other nominees located in:

- the U.S.;
• the foreign private issuer’s jurisdiction of incorporation; and

• if different, the jurisdiction (or two jurisdictions) that comprises the foreign private issuer’s primary trading market.

In contrast, the previous rules had no safe harbor in terms of the jurisdictions in which the look-through search had to be conducted.

The new rules also explicitly allow an issuer to rely in good faith on the assistance of an independent information services provider when calculating the number of its U.S. resident security holders. Moreover, if, after reasonable inquiry, an issuer is unable without unreasonable effort to obtain information about the number of U.S. resident security holders, it may assume that the customers are residents of the jurisdiction in which the nominee has its principal place of business. An issuer will, however, have to count securities as owned by U.S. holders when publicly filed reports of beneficial ownership or other reliable information that is provided to the issuer indicates that the securities are held by U.S. residents.

A foreign private issuer that is terminating its reporting obligations because its securities are held of record by fewer than 300 persons on a worldwide basis will not have to look through brokers, dealers, banks and other nominees (though an issuer whose securities are held through a deposit agreement or similar arrangement (e.g., the Depository Trust Company in the U.S.) would have to calculate each participant in such arrangement as a record holder).

**Debt and Equity Issuers That Do Not Meet the New Deregistration Conditions**

A foreign private issuer that does not satisfy the general conditions of the new rules (e.g., because it has no home country listing) will still be able to avail itself of the current deregistration rules applicable to U.S. companies. The deregistration rules that apply to U.S. companies, which are not being amended, require that the issuer have fewer than 300 holders of the relevant security on a worldwide basis (or fewer than 500 holders where the total assets of the issuer have not exceeded $10 million on the last day of each of the issuer’s three most recent fiscal years). Consistent with the calculation method for the number of worldwide holders under the new rules, there is no requirement to look through nominees when calculating the number of holders (though an issuer whose securities are held through a deposit agreement or similar arrangement (e.g., the Depository Trust Company in the U.S.) would have to calculate each participant in such arrangement as a record holder). The exit threshold that is based on 300 U.S. resident holders will not be available to such issuers.
Prior Form 15 Filers

The new rules will enter into effect on June 4, 2007. An issuer that has suspended its reporting obligations with respect to an equity security (by filing the previous deregistration form - Form 15) before that date can terminate such obligations under the new rules if it:

- meets the home-country listing condition of the new rules;
- meets one of the exit thresholds under the new rules; and
- files a Form 15F under the new rules.

If an issuer has suspended its reporting obligations with respect to a debt security under the previous rules, it can terminate such obligations under the new rules if it:

- meets one of the 300-holder thresholds for debt securities under the new rules; and
- files a Form 15F under the new rules.

These rules will enable issuers to terminate reporting obligations that they could only suspend under the previous rules.

Successor Issuer Status – Effect on M&A Transactions

Under the new rules, a foreign private issuer that, following a business combination transaction where shares are used as consideration for the purchase price, has succeeded to the U.S. registration or reporting obligations of another issuer will be able to assume the reporting history of the acquired company and deregister immediately after the relevant acquisition if:

- the acquired company has met the prior Exchange Act reporting condition; and
- the acquiror meets the other deregistration conditions.

Consequently, if a foreign private issuer that is not an Exchange Act reporting company acquires a company that is an Exchange Act reporting company and uses its own shares as consideration in the acquisition, the acquiror will be able to deregister without regard to the trading volume of the acquired company (since only the acquiror’s trading volume will be relevant for purposes of meeting the trading volume threshold and the home-country listing requirement). In addition, if the successor issuer could not assume the reporting history of the acquired company, it would have to wait at least until it had filed one
annual report on Form 20-F (or Form 40-F) before it could deregister because of the prior Exchange Act reporting condition.

However, if the issuance of the acquiror’s shares in a business combination is required to be registered under the U.S. Securities Act of 1933 (the "Securities Act"), the one-year dormancy condition will still have to be met. Consequently, the ability to use the reporting history of the acquired company will only have practical import in M&A transactions where the issuance of the shares that are used as consideration for the purchase price is exempt from registration under the Securities Act (e.g., under Rule 802 or Section 3(a)(10)).

New Form 15F

The new rules will require a foreign private issuer to file a Form 15F deregistration form certifying that it meets the conditions for deregistration. Unlike the previous Form 15, Form 15F also requires a foreign private issuer to provide specified disclosure relating to these conditions.

Filing a Form 15F will immediately suspend the issuer’s Exchange Act reporting obligations and commence a 90-day waiting period. If the Commission has not objected to the filing within the waiting period, the suspension will become a permanent termination. The rules also require a foreign private issuer to publish, at least 15 business days before filing the Form 15F, a notice in the U.S. disclosing its intent to terminate its Exchange Act reporting obligations and submit a copy of the notice to the Commission.

After filing a Form 15F, an issuer will have no continuing obligation to make inquiries or perform other work concerning the deregistration conditions.

Rule 12g3-2(b) Exemption

The new rules also liberalize the requirements for the availability to a foreign private issuer of the Rule 12g3-2(b) exemption from Exchange Act reporting obligations. Under Rule 12g3-2(b), a foreign private issuer may avoid registering its equity securities under section 12(g) of the Exchange Act (i.e., no Exchange Act reporting obligations even though there are more than 300 U.S. resident shareholders) if, before being obligated to register under that section, it seeks an exemption by submitting to the Commission various materials that are made public in its home market. These materials include information that the issuer: (a) has made or is required to make public pursuant to the law of its home country; (b) has filed or is required to file with a stock exchange on which its securities are traded (and which was made public by such exchange); and (c) has distributed or is required to distribute to its security holders. The exemption has not been available if, among other conditions, a foreign private issuer has, and has had during the prior 18 months: (1) any securities listed on a U.S. securities exchange or
otherwise registered under section 12(g) or (2) a periodic reporting obligation (suspended or active) under the Exchange Act as a result of having made a public offering in the U.S.

Under the new rules, a foreign private issuer (including issuers described under the sections “Prior Form 15 Filers” and “Successor Issuer Status - Effect on M&A Transactions” above) will receive the exemption immediately upon termination of registration of a class of equity securities. The 12g3-2(b) exemption will also be available for a class of equity securities immediately upon an issuer's deregistration of its debt securities (i.e., no 18-month waiting period will apply).

To maintain the Rule 12g3-2(b) exemption, a foreign private issuer must on a continuous basis publish the home country materials listed above. While under the old Rule 12g3-2(b) issuers were required to furnish those materials to the Commission in paper format, the new rules require issuers to publish the materials either on the company's website or on an electronic information delivery system that is generally available to the public in the issuer's primary trading market. If the home country documents are not in English, the issuer must, at a minimum, electronically publish English translations of the following documents:

- its annual report, including annual financial statements;
- interim reports that include financial statements;
- press releases; and
- all other material communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

In addition, a deregistering foreign private issuer must disclose in a Form 15F deregistration form the address of its website or that of the electronic information delivery system in its primary trading market on which it will publish the above home country documents. The issuer must keep the documents on the website for a reasonable period of time and, at a minimum, for 12 months. Issuers that received the 12g3-2(b) exemption under the old rules can shift to electronic filing under the new rule by providing the Commission with the address of the relevant website. Non-reporting issuers that wish to receive the exemption must submit a letter application to the Commission.

The exemption will remain in effect for as long as a foreign private issuer satisfies the electronic publication condition or until it registers a new class of equity securities under the Exchange Act.

The purpose of the extension of Rule 12g3-2(b) is to provide U.S. investors with access to material information about an issuer of equity securities following its termination of reporting. Any U.S. trading in the issuer's securities after the termination can only occur through the over-the-counter markets such as
that maintained by Pink Sheets LLC. In addition, an issuer will be able to maintain a sponsored ADR facility with respect to its securities that are exempted under Rule 12g3-2(b) so long as the ADRs are only traded over-the-counter in the U.S.

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5 A foreign private issuer’s equity securities will still need to be registered under the Exchange Act to be included on the OTC Bulletin Board.
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