

SEC Re-Proposes Rules to Facilitate Exit From U.S. Exchange Act Registration & Reporting Requirements

Client Alert

The U.S. Securities and Exchange Commission (SEC) recently re-proposed and published for comment new rules intended to facilitate the process by which non-U.S. companies may terminate the registration of their securities under the U.S. Securities Exchange Act of 1934, as amended (Exchange Act), and their ongoing SEC reporting obligations under the Exchange Act.¹

Historically, non-U.S. companies have found it difficult to terminate the registration of their securities and their SEC reporting obligations under the Exchange Act even if their securities have been delisted from the applicable U.S. exchange or automated trading system and the U.S. market interest in their securities is relatively low.² The current rules for deregistration provide that a non-U.S. company may only deregister securities under the Exchange Act if the registered class of its securities has fewer than 300 U.S. resident record holders (or, alternatively, fewer than 300 record holders worldwide).³ In an attempt to address the concerns raised publicly by representatives of non-U.S. companies and non-U.S. industry associations⁴ and in response to the increased globalization of U.S. securities markets, the SEC published new proposed rules intended to facilitate the process for non-U.S. companies to deregister securities under the Exchange Act and to terminate their SEC reporting obligations on December 30, 2005.⁵

In response to significant comments received to the December 2005 rule proposals and the ongoing public debate about the difficulty of exiting the U.S. public markets (and the hurdles this creates for non-U.S. companies who are interested in accessing the U.S. capital markets), the SEC re-proposed new rules on December 22, 2006 addressing the deregistration conditions and processes. In these re-proposed rules, the SEC also addresses the regulatory uncertainties that exist under the current deregistration regime for non-U.S. companies who have completed the deregistration process but may nevertheless become subject to U.S. reporting obligations if, as a result of trading activity, U.S. ownership exceeds certain thresholds.⁶

If adopted, the re-proposed new deregistration rules would allow a non-U.S. company to terminate the Section 12(g) registration of a class of its securities, as well as its Sections 13(a) and 15(d) reporting obligations,⁷ provided the level of U.S. market interest in the non-U.S. company's registered securities is low relative to the trading volume in the "primary trading market" of the securities outside the U.S. The SEC is proposing to ascertain the level of U.S. market interest for *equity* securities in terms of trading volume criteria as an alternative to the traditional numeric standard of record ownership. In the case of *debt* securities, the SEC proposes to gauge the level of U.S. market interest in terms of traditional numeric standards of record ownership.

Equity Securities

The new proposed rules would permit a non-U.S. company that has a class of equity securities registered under the Exchange Act (or is otherwise subject to SEC reporting obligations with respect to a class of its equity securities) to terminate both the registration of its securities and its Exchange Act reporting obligations if all of the following conditions are met:

1. EXCHANGE ACT REPORTING CONDITION

The non-U.S. company:

- (a) has been an Exchange Act reporting company for at least the preceding 12 consecutive months,
- (b) has filed or furnished all required reports under the Exchange Act during the past 12 consecutive months, and
- (c) has filed at least one (1) annual report under the Exchange Act.

AND

2. DORMANCY CONDITION

The non-U.S. company has not directly or indirectly sold its securities in the U.S. during the preceding 12 months in a *registered* offering. Offerings exempt from registration are excluded from the dormancy condition and certain exceptions to the dormancy condition apply for registered sales of equity securities to employees, by shareholders in a non-underwritten offering, pursuant to *pro rata* rights offers, in connection with dividend or interest reinvestment plans, as a result of conversions of convertible securities and pursuant to exercises of outstanding transferable warrants.

AND

3. NON-U.S. LISTING CONDITION

The non-U.S. company has for at least the past consecutive 12 months maintained a listing of the securities on an exchange outside the U.S. which, alone or together with the trading of such securities on another non-U.S. exchange, constitutes the "primary trading market" for such securities. (See discussion on page 4 of "Primary Trading Market.")

AND

4. LEVEL OF U.S. INTEREST CONDITION

The non-U.S. company must meet the level of U.S. interest condition by satisfying *either* the applicable U.S. trading volume criteria *or* the record ownership criteria described below.

- U.S. TRADING VOLUME CRITERIA

- The average daily trading volume in the U.S. for the security class in question during a recent 12-month period is not greater than five percent (5%) of the average daily trading volume of such security class in the primary trading market,
- The company has *not*, in the 12 months preceding the filing of the deregistration form (Form 15F), terminated a sponsored American Depositary Receipts facility, *and*
- The company has *not* delisted its equity securities from a U.S. exchange or trading system in the prior 12 months *unless* at the time of delisting the U.S. average daily trading volume of that class of equity securities for the preceding 12 months did not exceed 5% of the average daily trading volume in the primary trading market.

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OR

- **RECORD OWNERSHIP CRITERIA**
Non-U.S. companies that are unable to satisfy the U.S. trading volume criteria would still be eligible to satisfy the level of U.S. interest condition for a particular class of equity securities if, on a date within 120 days before the filing date for Form 15F, such class is held of record by fewer than 300 persons on a worldwide basis or by fewer than 300 U.S. residents. (See discussion of "Methodology For Counting U.S. Ownership" below.)

Debt Securities

A non-U.S. company that has a class of debt securities registered under the Exchange Act (or is otherwise subject to SEC reporting obligations with respect to a class of its debt securities) may terminate the registration of such securities and the ongoing Exchange Act reporting obligations if such company satisfies all of the following conditions:

1. **EXCHANGE ACT REPORTING CONDITION**

The non-U.S. company:

- (a) has filed or furnished all reports required under the Exchange Act during the past year, and
- (b) has filed at least one (1) annual report under the Exchange Act.

AND

2. **RECORD OWNERSHIP CONDITION**

The debt securities for which the non-U.S. company's registration and reporting obligations are to be terminated are held of record, on a date within 120 days before the filing date of Form 15F, by fewer than 300 persons worldwide or fewer than 300 U.S. residents.

Methodology For Counting U.S. Ownership

In response to continued pressure about the difficulties in ascertaining the level of U.S. ownership under current rules, the SEC will allow non-U.S. companies to determine whether the number of U.S. resident equity or debt securities holders meets the applicable threshold by limiting the review of securities held in accounts of customers resident in the U.S. to brokers, dealers, banks, and other nominees located in:

- the U.S.,
- the non-U.S. company's jurisdiction of organization, and
- if different, the primary trading market of the non-U.S. company.⁸

Non-U.S. companies would also be permitted to rely in good faith on the information provided by an independent service provider which, in the regular course of its business, assists in the collection and determination of the number of shareholders and any other related information.

Mergers and Acquisitions

If, as a result of a merger, consolidation, exchange of securities, acquisition of assets or otherwise, a non-U.S. company becomes subject to the reporting obligations under the Exchange Act (as a successor to the acquired entity), it may nevertheless terminate its Exchange Act reporting obligations, if

1. As to equity securities, it satisfies the Exchange Act Reporting Condition, the Non-U.S. Listing Condition, and the Level of U.S. Interest Condition, each described on page 2.

and

2. As to debt securities, it meets the Exchange Act Reporting Condition and the Record Ownership Condition, each described on page 3.

The re-proposed rules allow the successor/acquiring entity to take into account the reporting history of the target company in determining eligibility for deregistration.

Primary Trading Market

For purposes of determining the trading level of equity securities in the "primary trading market" of a non-U.S. company, the SEC proposes to define primary trading market to mean:

- At least 55% of the trading of the non-U.S. company's securities took place *on no more than two* (2) non-U.S. exchanges during the preceding 12-month period,
AND
- The trading market of at least one of the two non-U.S. exchanges (if two are in fact used) must be larger than the trading market in the U.S.

Deregistration Process

Under the re-proposed deregistration rules, once a non-U.S. company determines that it satisfies the requirements to deregister under the Exchange Act, it may file a Form 15F with the SEC wherein the non-U.S. company must certify that it meets the applicable requirements and provide the required supporting information. The filing of Form 15F would immediately suspend the reporting obligations of the non-U.S. company. The suspension of the non-U.S. company's reporting obligations as a result of deregistration would become permanent if the SEC has not objected within 90 days after the filing of Form 15F. A means for requesting acceleration of the 90-day review period is being considered.

As a condition to termination of SEC reporting obligations in connection with the filing of Form 15F, the non-U.S. company will be required to publish in the U.S., before or on the date of filing of Form 15F, a notice of its intent to terminate its SEC reporting obligation in such manner as to achieve broad dissemination to the public in the U.S. (*i.e.*, by means of press release) and to file such notice with the SEC.

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Prior Terminations

The SEC proposes to make the benefits of the re-proposed deregistration rules available to non-U.S. companies who have filed the requisite deregistration form with the SEC prior to the re-proposed rules becoming effective.⁹ In order to secure the benefit of the re-proposed deregistration rules, the non-U.S. company must satisfy the following conditions:

- File Form 15F,
- Must not be required to register a class of securities or file reports under the Exchange Act, and
- Must, for at least 12 consecutive months before filing the Form 15F, have maintained, as to any equity securities subject to Form 15F, a listing on a non-U.S. exchange which constitutes the primary trading market for these securities.

Rule 12g3-2(b) Exemption

Rule 12g3-2(b) under the Exchange Act provides an exemption from registration under Section 12(g) of the Exchange Act to a non-U.S. company upon application to the SEC (prior to having of record 300 or more U.S. persons as owners of its equity securities). Under the current rules, this exemption is not available to a non-U.S. company that had a class of securities registered under the Exchange Act in the preceding 18 months or triggered U.S. reporting obligations as a result of an offering of securities registered under the Securities Act. This limitation has created significant uncertainty to non-U.S. companies who are able to meet current deregistration standards but remain, for a period of at least 18 months, subject to possible U.S. Exchange Act registration and reporting requirements (*i.e.*, if, as a result of trading activity, more than 500 U.S. persons come to hold their equity securities, which triggers the registration requirement under Section 12(g) of the Exchange Act and the reporting requirements under the Exchange Act).

The SEC proposes to make the exemption under Rule 12g3-2(b) available to a non-U.S. company *immediately* upon termination of the registration of a class of securities under the Exchange Act and termination of the non-U.S. company's reporting obligation under the Exchange Act. Under Rule 12g3-2(b), a non-U.S. company that meets the new deregistration standards and wishes to avail itself of the benefits of the 12g3-2(b) exemption would be required to publish on its website (or through a publicly available electronic information system in its primary trading market) the materials currently required to be submitted to the SEC under Rule 12g3-2(b) and publish English versions of some of these materials. (See discussion of "English Translations" on page 6.) Under the current rules, in order to maintain the Rule 12g3-2(b) exemption, the issuer must physically mail its materials to the SEC. The website or electronic information system proposed to be used must be specified in the Form 15F filed with the SEC.

Existing Rule 12g3-2(b) Exemptions

Non-U.S. companies who currently maintain Rule 12g3-2(b) exemptions would, under the proposed rules, no longer be required to physically mail materials to the SEC but would, instead, be able to satisfy their 12g3-2(b) exemption obligations by publishing the applicable materials on their websites or through an electronic information system in its primary trading market.

In order to avail itself of the electronic publication facility, a non-U.S. company who maintains a 12g3-2(b) exemption will be required to take the following actions:

1. NOTICE TO THE SEC
Provide the SEC with the address of its website (or the name of the electronic information system to be used for electronic publication).
AND
2. ELECTRONIC PUBLICATION
Publish all materials currently being submitted to the SEC on the website or the electronic information system (see English translation requirements below).
AND
3. ENGLISH TRANSLATIONS
Publish English translations of each of the following documents:
 - Annual Reports (including financial statements)
 - Interim Reports (including financial statements)
 - Press Releases
 - All communications and documents distributed directly to the applicable security holders.

Should you have any questions on the subject of the re-proposed new rules, or wish us to comment on your behalf about the re-proposed new rules, please contact Herman H. Raspé at 212.336.2301 (hhraspe@pbwt.com) or Karen M. McCarthy at 212.336.2529 (kmmccarthy@pbwt.com).

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Endnotes

- ¹ For purposes of this client alert, the term "non-U.S. company" is intended to mean a "Foreign Private Issuer" (as such term is defined in the rules adopted by the SEC under the Exchange Act).
- ² SEC reporting obligations typically arise as a result of the registration of securities under the Exchange Act (*i.e.*, in connection with the listing of the securities on a U.S. exchange or as a result of market interest in the securities giving rise to a company having more than 500 U.S. shareholders of record) or as a result of the registration of a public offering of securities under the U.S. Securities Act of 1933, as amended (Securities Act).
- ³ Non-U.S. companies whose total assets have not exceeded U.S.\$10 million on the last day of their most recent three (3) fiscal years may deregister their securities under the Exchange Act if fewer than 500 U.S. resident record holders (or, alternatively, fewer than 500 record holders worldwide) own the registered class of securities.
- ⁴ See our Client Alert of April 2005 entitled "European Organizations Propose New Deregistration Framework to SEC" at www.pbwt.com/resources/alerts.
- ⁵ See our Client Alert of January 2006 entitled "SEC Proposes Rule to Facilitate Exit from U.S. Exchange Act Registration and Reporting Requirements" for a description of the rules proposed by the SEC in December 2005 at www.pbwt.com/resources/alerts.
- ⁶ The re-proposed rules may be found at the SEC's website, www.sec.gov, under Release No. 34-55005 (December 22, 2006).
- ⁷ Section 13(a) reporting obligations are triggered upon registration of securities under the Exchange Act, which in turn is triggered either upon the listing of the securities on a U.S. exchange (under Section 12(b) of the Exchange Act) or upon equity securities being held by 500 or more U.S. persons (under Section 12(g) of the Exchange Act). Section 15(d) reporting obligations are generally triggered upon registration with the SEC of securities being offered to the public in the U.S. and are "suspended" if the securities are held of record by fewer than 300 persons as of the applicable statutory determination date.
- ⁸ If more than one non-U.S. market is used to meet the Non-U.S. Listing Condition, the review of securities held in customer accounts of brokers, dealers, banks and other nominees must cover both markets included in the Non-U.S. Listing Conditions.
- ⁹ These benefits include the termination rather than suspension of Exchange Act reporting for non-U.S. companies subject to Section 15(d) of the Exchange Act and the availability of the 12g3-2(b) exemption without the current 18-month delay.

This client alert is provided for general informational purposes only and should not be construed as specific legal advice. Please contact any of the attorneys listed above if we can provide assistance regarding the matters discussed herein.

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