

SEC PROPOSES AMENDMENTS TO RULES FOR DELISTING AND DEREGISTRATION

The U.S. Securities and Exchange Commission (SEC) has proposed for comment amendments to certain of its rules and Form 25 to implement a new procedure for delisting a class of securities from a national securities exchange and withdrawing of a class of securities from registration under Section 12(b) of the U.S. Securities Exchange Act of 1934, as amended (Exchange Act).¹ The intent of the proposed amendments is to reduce the regulatory burden on the exchanges and on issuers and to make more information regarding delisting and deregistration available to the public on the EDGAR database of the SEC. Comments on the proposed amendments must be submitted to the SEC by July 22, 2004.

Delisting and deregistration of a class of securities typically occurs in two distinct circumstances: exchange-initiated (i.e. on account of a failure to meet exchange listing requirements) or issuer-initiated (i.e. on account of an issuer's desire to eliminate ongoing listing and reporting requirements). These scenarios are treated separately below.

Exchange-Initiated Delisting/Deregistration

Currently, if an exchange desires to delist and deregister a class of securities of an issuer, Rule 12d 2-2 requires the exchange to file an application with the SEC to delist and deregister the class of securities, and such delisting and deregistration does not become effective until the SEC issues an order to that effect. The new procedure proposed for exchange-initiated delisting and deregistration of a class of securities would require the exchange to complete the exchange's own internal processes for delisting a security (which would need to comply with an amended Rule 12d 2-2, as discussed below) after which the exchange would file a Form 25 (which will be amended as discussed below) with the SEC. The delisting of the security would be effective 10 days after the Form 25 is filed with the SEC, and the deregistration under Section 12(b) of the Exchange Act would be effective 90 days after the filing of the Form 25.²

¹ One of the triggering events for registering securities under the Exchange Act is the listing of securities on a U.S. exchange or trading system. (See Section 12(b) of the Exchange Act).

² The duty to file periodic reports under Section 13(a) of the Exchange Act on account of registration under Section 12(b) of the Exchange Act would be suspended upon the effective date of the *delisting* even though the duty to file such reports arises from registration of a class of securities under

The proposed amendments would include amending Rule 12d 2-2 to require that certain steps be included in the exchange delisting process. Since the SEC will no longer be required to effectively grant delisting/deregistration, it is critical that the procedures of the exchanges be fair. The proposed amendments would require each exchange to provide:

- (i) notice to the issuer of the exchange's decision to delist its securities;
- (ii) an opportunity for appeal to the exchange's board of directors, or to a committee designated by the board; and
- (iii) public notice of the exchange's final determination to delist a class of securities by means of a press release and posting on the website of the exchange not less than 10 days before the delisting becomes effective.

If the amendments proposed by the SEC are adopted, each exchange would need to review its procedures and, to the extent necessary to comply with these amendments, amend its own rules.

Issuer – Initiated Delisting/ Deregistration

In order for an issuer to seek deregistration of a class of its securities under Section 12(b) of the Exchange Act (i.e. on account of an issuer-initiated delisting), Rule 12d 2-2 under the Exchange Act requires an issuer to submit an application to the SEC in accordance with the rules of the applicable exchange, at which point the SEC publishes the application for public comment by interested persons. The application of the issuer is not effective until the SEC issues an order after expiration of the public comment period. The new procedure proposed for issuer-initiated delisting and deregistration would allow an issuer to delist and deregister a class of its securities by filing an application on Form 25. The delisting of the securities would be effective 10 days after the Form 25 is filed with the SEC and the deregistration would be effective 90 days after filing the Form 25 with the SEC.

Section 12(b) of the Exchange Act. All other obligations arising from registration under Section 12(b) of the Exchange Act would continue until the effective date of the *deregistration* (i.e. the obligation to comply with the tender offer rules under the Exchange Act and the obligation of a 5% or more shareholder to file a Schedule 13 D under Section 13(d) of the Exchange Act). It should be noted that an issuer may still have a duty to file periodic reports under Section 13(a) of the Exchange Act if such class of securities is actually registered under Section 12(g) of the Exchange Act (i.e. on account of having 500 or more security holders in the United States) or would be required to be registered under Section 12(g) of the Exchange Act but for the exception to Section 12(g) provided for exchange-listed securities. In addition, even if an issuer is not registered or required to be registered under Section 12(g) of the Exchange Act, Section 15(d) of the Exchange Act requires an issuer who has filed a registration statement under the Securities Act of 1933, as amended (i.e. on account of an initial public offering in the U.S.), to continue to file periodic reports under Section 13(a) of the Exchange Act until such time as its securities are held of record by less than 300 persons in the U.S.

Because the issuer no longer would be required to file an application for delisting/deregistration of a class of its securities, the amendments to Rule 12d2-2 of the Exchange Act would require an issuer who wishes to delist/deregister a class of its securities to make certain representations on the Form 25 filed with the SEC which would include that:

- (i) the issuer has complied with the applicable exchange's rules for delisting and deregistering and applicable state laws;
- (ii) the issuer has submitted written notification of its intent to withdraw its security from the exchange, including a statement setting forth a description of the security involved together with a statement of all material facts relating to the reasons for filing such application for delisting and deregistration; and
- (iii) the issuer has issued public notice of its intent to delist and deregister its security by means of a press release and, if it has a publicly accessible website, posting on the issuer's website not less than 10 days prior to the date the application on Form 25 for delisting becomes effective.

Delay of Effectiveness by the SEC

The proposed amendments to the delisting and deregistration process result in automatic effectiveness of the delisting and deregistration of a class of securities after the passage of the specified time periods. For the protection of investors, the SEC might find it necessary to delay the effectiveness of such delisting and deregistration and therefore proposes to amend Rule 12d 2-2 (d) to provide that the SEC may postpone the effectiveness of a deregistration by written notice to the exchange or issuer (during the applicable waiting period) in order to determine if the proper steps have been taken prior to the filing of the Form 25 or if other terms or conditions should be imposed on the delisting/deregistration for the protection of investors.

Form 25 Amendments


In order to effectuate the amendments discussed above Form 25 will need to be amended. The SEC proposes to amend Form 25 so that it may be utilized by either an exchange or an issuer. The proposed Form 25 would also include a new set of general instructions which would repeat many of the statutory requirements in order to provide guidance and clarity for persons utilizing Form 25. The new instructions to Form 25 would also provide that it must be filed by EDGAR and therefore be publicly available.

The SEC expects that the proposed streamlined procedure for delisting and deregistration of a class of securities would benefit issuers, exchanges and investors by, among other things, providing a

uniform method for delisting and deregistration under Section 12(b) of the Exchange Act, clarifying procedures for delisting and deregistration and providing easy access to the public to information regarding the registration and listing status of an issuer via the EDGAR database.

Should you have any questions about the delisting/deregistration proposal, or wish us to comment on the proposed amendments on your behalf, please contact Herman Raspé at (212) 336-2301 (hhraspe@pbwt.com) or Karen McCarthy at (212) 336-2529 (kmmccarthy@pbwt.com).

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