

SEC Proposes Rule to Facilitate Exit From U.S. Exchange Act Registration & Reporting Requirements

The U.S. Securities and Exchange Commission (SEC) recently published for comment proposed 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 there exists a relatively low level of U.S. market interest in their securities. The current rules for de-registration provide that a non-U.S. company may only de-register 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).² In an attempt to address the concerns raised publicly by representatives of non-U.S. companies and non-U.S. industry associations³ and in response to the increased globalization of U.S. securities markets, the SEC has published proposed new rules intended to facilitate the process for non-U.S. companies to de-register securities under the Exchange Act and to terminate their SEC reporting obligations.

If adopted, the proposed new Rule 12h-6 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,⁴ provided the level of U.S. market interest in the non-U.S. company's registered securities is relatively low. The SEC is proposing to ascertain the level of U.S. market interest for equity securities in terms of trading volume and percentage ownership criteria rather than in terms of 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 by U.S. persons.

Equity Securities

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) would under the new rule be able to terminate the registration of such securities and the ongoing 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 the past two (2) years,
 - (b) has filed or furnished all required reports under the Exchange Act during the past two (2) years, and
 - (c) has filed at least two (2) annual reports 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 or unregistered offering (certain

exceptions to the dormancy condition would apply for sales to employees, certain sales by shareholders in a non-underwritten offering, and private placements of certain commercial paper).

AND

3. HOME COUNTRY LISTING CONDITION

The non-U.S. company has for at least two years maintained a listing of the securities on an exchange in the home market which is the primary trading market for such securities.

AND

4. LEVEL OF U.S. INTEREST CONDITION

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

- U.S. PUBLIC FLOAT AND TRADING VOLUME CRITERIA

*If the non-U.S. company **is** a "well-known seasoned issuer" in the U.S. (Seasoned Issuer in the U.S.),⁵ it must satisfy one of the following:*

- 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 daily trading volume average of such security class in the primary trading market and U.S. residents do not hold more than ten percent (10%) of the worldwide public float of the non-U.S. company's equity securities.

OR

- Regardless of the trading volume in the U.S., U.S. residents hold no more than five percent (5%) of the worldwide public float of the non-U.S. company's equity securities.

*If the non-U.S. company is **not** a Seasoned Issuer in the U.S., regardless of the trading volume in the U.S., a non-U.S. company may satisfy the level of U.S. interest condition if U.S. residents hold no more than five percent (5%) of the worldwide public float of the non-U.S. company's equity securities.*

- RECORD OWNERSHIP CRITERIA

Non-U.S. companies that are unable to satisfy the U.S. public float and trading volume criteria would still be eligible to satisfy the level of U.S. interest condition for a particular class of equity securities if 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 on the next page.)

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 non-U.S. company satisfies all of the following conditions:

Proposed SEC Rule on Exchange Act Requirements

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 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 U.S. residents hold no more than the applicable threshold percentage of its worldwide public float or 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 incorporation, and
- if different, the primary trading market of the non-U.S. company.

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 business, assists in the collection and determination of the number of shareholders and any other related information.

De-Registration Process

Under the proposed new Rule 12h-6, once a non-U.S. company determines that it satisfies the requirements to de-register 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 and the suspension of the non-U.S. company's obligations would become permanent if the SEC has not objected within 90 days of filing. A means for requesting acceleration of the 90-day review period is being contemplated.

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., not later than 15 business days before the 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).

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 that applies to the SEC for the Rule 12g3-2(b) exemption (prior to having of record 300 or more U.S. persons as owners of its equity securities) and submits to the SEC, on a current basis, the materials required by Rule 12g3-2(b). Under the current rules, this exemption is not available to a

non-U.S. company that has 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 de-registration standards but remain, for a period of at least 18 months, subject to possible U.S. registration and reporting requirements (*i.e.*, if as a result of trading activity more than 500 U.S. persons 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 de-registration standards and wishes to avail itself of the benefits of the 12g3-2(b) exemption would be required to publish in English on its web site 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). Under current rules, to maintain the Rule 12g3-2(b) exemption, materials must be physically mailed to the SEC.

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/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 See our Client Alert of April 2005 entitled "European Organizations Propose New Deregistration Framework to SEC."
- ⁴ 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.
- ⁵ Pursuant to Rule 405 under the Securities Act, a "Well-Known Seasoned Issuer" is generally defined as an issuer who (i) meets the registrant requirements to use short form registration statements with the SEC (typically an issuer subject to SEC reporting for at least one full year), and (ii) has a worldwide public float of equity securities of U.S.\$700 million or more (or has registered within the preceding three years a primary offering for cash of at least U.S.\$1 billion in non-convertible securities other than common equity).

Should you have any questions on the subject of the new rule, or wish us to comment on your behalf about the proposed new rule, please contact Herman H. Raspé at (212) 336-2301 (hhraspe@pbwt.com), Karen M. McCarthy at (212) 336-2529 (kmmccarthy@pbwt.com), or Jean-Claude Lanza at (212) 336-2022 (jlanza@pbwt.com).

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