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SEC Adopts Amendments to Rules Governing Termination of Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act 1934

June 6, 2007

Overview

On March 27, 2007, the SEC adopted amendments to the rules governing when a foreign private issuer¹ may terminate the registration of a class of equity securities under Section 12(g) and the duty to file reports required under Sections 13(a) or 15(d) of the Securities Exchange Act 1934 ("Exchange Act"). The amendments became effective on June 4, 2007.

Under the current rules, a foreign private issuer is generally only permitted to terminate its registration and reporting requirements where it can prove it has less than 300 worldwide record holders of its American Depositary Receipts ("ADRs") or securities or less than 300 beneficial holders who are resident in the U.S. (the "300 holder standard"). This requirement has proven particularly onerous for foreign private issuers largely because they must look through the record ownership of brokers, dealers, banks and other nominees to count the separate number of accounts held by them on behalf of US customers. Additionally, even once a foreign private issuer has satisfied this requirement, the current rules merely provide for the suspension, rather than the termination, of reporting obligations under section 15(d) of the Exchange Act.

The new Exchange Act Rule 12h-6 permits foreign private issuers to terminate registration and reporting requirements by meeting a quantitative benchmark designed to assess relative U.S. market interest in its securities. This benchmark compares average daily trading volume ("ADTV") of the foreign private issuer's securities in the U.S. with its worldwide ADTV using a five percent benchmark. If a foreign private issuer's equity securities trade in the form of ADRs it must calculate the trading volume of its ADRs in terms of the

¹ A "foreign private issuer" as defined by Section 240.3-b of the Exchange Act is any "foreign issuer" (any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country) other than a foreign government 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 United States; and

(2) Any of the following:

(i) The majority of the executive officers or directors are United States citizens or residents;
(ii) More than 50 percent of the assets of the issuer are located in the United States; or
(iii) The business of the issuer is administered principally in the United States.

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number of securities represented by those ADRs. Off-market transactions, including transactions through alternative trading systems, can be included in calculating both U.S. and worldwide ADTV provided the trading volume information regarding these transactions is reasonably reliable and does not duplicate other trading volume information. However, convertible debt and other equity-linked securities are specifically excluded from the trading volume calculation.

Provided a foreign private issuer meets all other requirements of Rule 12h-6, and in a recent 12 month period the U.S. ADTV of the subject class of securities has been no greater than five percent of its worldwide ADTV, the issuer will be relieved of its 12(g) registration requirements and its reporting obligations under Section 13(a) or 15(d) of the Exchange Act.

The rule amendments will also assist U.S. investors in accessing important information about a foreign private issuer of equity securities after it has exited the Exchange Act reporting system by requiring the issuer to post material information on its website.

New Rule 12h-6

Rule 12h-6 delineates a number of conditions that must be satisfied in order for a foreign private issuer to terminate its registration and reporting requirements under the Exchange Act. Foreign equity securities issuers seeking de-registration under Rule 12h-6 must satisfy the following conditions:

- Foreign issuer is required to have listed its securities on one or more exchanges in its primary trading market² for at least 12 months before filing for de-registration;
- Foreign issuer must have at least one year of Exchange Act reporting
- Foreign issuer must be in compliance with the Exchange Act reporting requirements and be current in its reporting obligations for that period
- Foreign issuer must have filed at least one Exchange Act annual report.³

Any equity securities foreign issuer seeking de-registration under Rule 12h-6 is also required to wait 12 months (the "dormancy condition") before filing its de-registration statement on a Form 15-F if it has delisted its class of equity securities from a national securities exchange or automated inter-dealer quotation system in the U.S or terminated a sponsored ADR facility and, at the time of delisting or termination, the U.S. ADTV of the subject class of securities exceeded five percent of its worldwide ADTV for the preceding

² Primary trading market is defined to mean at least 55 percent of the trading in a foreign private issuer's class of securities that is subject of Form 15F took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during a recent 12 month period; and if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the U.S. for the same class of the issuer's securities.

³ However, an issuer may rely on a special financial report filed pursuant to Exchange Act 15d-2 as an Exchange Act annual report for the purpose of the new rule's prior reporting condition.

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12 months. During this 12 month period, a foreign issuer is prohibited from selling securities in the U.S. in a registered offering under the Securities Act, except as specified.⁴

Debt Securities

Issuers of debt securities are still required to satisfy the current 300 holder standard in order to de-register under the new Rule 12h-6. However, Rule 12h-6 introduces a new counting method for determining the number of holders and permits debt securities issuers to permanently terminate, rather than merely suspend as under the current rules, registration and reporting requirements. A foreign debt issuer is required to file or furnish all required reports under Section 15(d) of the Exchange Act and file at least one annual report pursuant to Section 13(a) of the Exchange Act before it can de-register under the new rule.

Termination of Reporting Requirements

Upon filing its Form 15F, an issuer's Exchange Act reporting obligations will be automatically suspended triggering a 90 day waiting period at the end of which, assuming the SEC has no objection, the suspension will become a termination of reporting. The foreign private issuer is required to publish a notice, such as a press release, announcing its intention to terminate its Exchange Act reporting requirements under Rule 12h-6 before or at the time of filing its Form 15F.

A foreign private issuer that filed a Form 15F and suspended or terminated its Exchange Act reporting requirements under the current exit rules before the effective date of Rule 12h-6 may terminate its reporting requirements under the new rule provided it meets the listing conditions and the trading volume standard or the 300 holder alternative standard or, if pertaining to a class of debt securities, meets the rule's 300 holder condition for debt.

300 Holder Standard

Rule 12h-6 retains the current 300 holder standard for Exchange Act de-registration and suspension of reporting obligations by a foreign private issuer. The standard relies on a headcount of the issuer's U.S. securities holders for debt securities' issuers and as an alternative to the trading volume standard for foreign private equity securities' issuers. Under this standard, a foreign private issuer may seek to suspend its registration and reporting requirements if the subject class of securities is held of record by less than 300 persons resident in the U.S (or 500 persons for issuers with \$10 million or less in total assets on the last day of each of the issuer's most recent three fiscal years).

As noted above, Rule 12h-6 introduces a revised counting method that seeks to simplify the standard and allows for termination, rather than mere suspension, of Exchange Act registration and reporting requirements. The new counting method limits the inquiry regarding the amount of securities represented by accounts of customers resident in the U.S. to brokers, dealers, banks and other nominees located in the

⁴ Securities of foreign private issuer are permitted to be 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 are granted pro rata to all existing security holders of the class of the issuer's securities to which the rights attach; pursuant to a dividend or interest reinvestment plan; upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the issuer.

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U.S., the foreign private issuer's jurisdiction of incorporation, legal organization or establishment, and the one or two jurisdictions comprising the issuer's primary trading market(s) if different from the issuer's jurisdiction of incorporation, legal organization or establishment. The issuer may also rely on the assistance of an independent information services provider when determining whether it falls below the 300 holder standard.

Rule 12g3-2(b) Exemption

Rule 12g3-2(b) provides an exemption from Section 12(g) of the Exchange Act for foreign private issuers that have chosen not to access the U.S. capital markets. Following submission of certain information about its home country disclosure requirements and U.S. shareholder information to the SEC, a foreign private issuer relying on this rule will then be exempt from Exchange Act reporting provided it regularly furnishes to the SEC copies of pertinent securities information required by its home country.

Rule 12h-6 extends the Rule 12g3-2(b) exemption to a foreign private issuer, including a successor issuer and prior Form 15 filer, immediately upon its termination of reporting under Rule 12h-6. This represents a change from the current rule which requires a foreign private issuer to wait at least 18 months prior to relying on the Rule 12g3-2(b) exemption.

Furthermore, the exemption will now enable foreign private issuers to post copies of the securities information required by its home country on its website, making this information immediately available to the public, rather than requiring its submission to the SEC.

A foreign private issuer that has filed a Form 15F may be permitted to terminate its Exchange Act reporting obligations regarding a class of debt securities to establish the Rule 12g3-2(b) exemption for a class of equity securities upon the effectiveness of its termination of reporting under Rule 12h-6, by submitting an application for the Rule 12g3-2(b) exemption after filing its Form 15F.

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For further information about Babirak, Vangellow & Carr, P.C., and its lawyers, you may visit our web site at www.bvcpc.com. If you have any question regarding any topic covered in this Corporate Advisor or regarding any corporate finance or related matter, please feel free to contact the following:

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