PROSKAUER ROSE LLP®

Client Alert

A report for clients and friends of the Firm

March 2007

SEC Facilitates Foreign Private Issuer Deregistration Under the Exchange Act

On March 21, 2007, the Securities and Exchange Commission (SEC) adopted changes to the rules that govern when a foreign private issuer may terminate the registration of a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 (the Exchange Act) and the duty to file reports under Section 13(a) of the Exchange Act. The SEC also adopted rules changing when a foreign private issuer may terminate its reporting obligations regarding a class of equity or debt securities under Section 15(d) of the Exchange Act.

For the text of the adopted rule changes, go to http://www.sec.gov/rules/final.shtml and click on Release No. 34-55540.

The effective date of the rule changes will be 60 days from their publication in the Federal Register.

The Current Rules

Under the current rules, a foreign private issuer may exit Exchange Act registration and reporting obligations if its class of securities has less than 300 record holders who are United States residents. A foreign private issuer can only suspend, and cannot terminate, its duty to file periodic reports under Section 15(d) of the Exchange Act.

Under the current rules, a foreign private issuer may have difficulty terminating its Exchange Act registration and reporting obligations. The SEC believes that due to the increased globalization of the securities markets, this may be true even when there is relatively little interest in a foreign private issuer's securities in the United States.

The Rule Changes

New Rule 12h-6 will permit a foreign private issuer to terminate its Exchange Act reporting regarding a class of equity securities under Section 12(g) or Section 15(d) of the Exchange Act if the foreign private issuer meets a new benchmark designed to measure market interest in that class of securities in the United States.

In the alternative, a foreign private issuer may still terminate its Exchange Act reporting if its class of securities has less than 300 record holders who are United States residents.

Trading Volume Standard

New Rule 12h-6 will permit a foreign private issuer to terminate its Exchange Act registration and reporting obligations for a class of equity securities, if the average daily trading volume in the United States has been no greater than five percent of the average daily trading volume on a worldwide basis for a twelve month period (the trading volume standard).

In addition, Rule 12h-6 will require a foreign private issuer who

- delists in the United States, or
- terminates a sponsored American Depositary Receipts facility

and does not meet the trading volume standard at the date of delisting or termination, to wait an additional twelve months before deregistering.

For purposes of the trading volume standard, the definition of "equity securities" excludes convertible debt and other equity-linked securities.

Other Conditions

Rule 12h-6 will also require a foreign private issuer to:

- have been an Exchange Act reporting company for at least one year;
- have filed or submitted all Exchange Act reports required for one year;
- have filed at least one annual report;
- have maintained a listing on one or more exchanges for at least one year in the foreign private issuer's primary trading market in a foreign jurisdiction; and
- have not sold securities in a registered offering in the United States for one year (but will allow certain specified offerings and exempted offerings)

Examples of registered offerings that are allowable during the one year period are registered offerings:

- to the foreign private issuer's employees;
- by selling security holders in non-underwritten offerings;
- upon the exercise of outstanding rights granted by the foreign private issuer if the rights are granted pro rata to all existing security holders of the class of the foreign private issuer's securities to which the rights attach;
- pursuant to a dividend or interest reinvestment plan; or
- upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants issued by the foreign private issuer.

Rule 12h-6 will also be available to a foreign private issuer who:

- terminated or suspended its Exchange Act reporting obligations before the effective date of Rule 12h-6, subject to certain conditions[1]; or
- has succeeded to the Exchange Act reporting obligations of another company following a merger or acquisition.

Rule 12h-6 will permit a successor foreign private issuer to take into account the Exchange Act reporting history of its predecessor in meeting the conditions for deregistration.

Changes to the Rule 12g3-2(b) Exemption

Under the current rules, Rule 12g3-2(b) provides an exemption (the exemption) from registration under Section 12(g) of the Exchange Act to a foreign private issuer who submits to the SEC certain required home country materials. The adopted changes to Rule 12g3-2(b) will expand the exemption.

Currently, a foreign private issuer must wait eighteen months after it terminates its Exchange Act reporting before claiming the exemption.

Under the adopted changes, Rule 12g3-2(b) will permit a foreign private issuer to claim the exemption immediately upon terminating its Exchange Act reporting under Rule 12h-6 (rather than waiting eighteen months), so long as the foreign private issuer:

- publishes the required home country materials in English on its website; or
- through an electronic information delivery system in its primary trading market.

Currently, a non-reporting foreign private issuer receiving the exemption must submit to the SEC paper copies of the required home country documents.

Under the adopted changes, Rule 12g3-2(b) will permit a non-reporting foreign private issuer receiving the exemption, upon application to the SEC, to

- publish the required home country documents in English on its website; or
- through an electronic information delivery system in its primary trading market.

---

1 A former Section 15(d) reporting foreign private issuer would benefit from proceeding under Rule 12h-6 by obtaining termination, rather than mere suspension, of its reporting obligations with respect to a class of equity or debt securities. As discussed in more detail below, a former Section 12(g) foreign private issuer would benefit from proceeding under Rule 12h-6 by being able to claim the exemption from registration under 12g3-2(b), immediately upon effectiveness of its Rule 12h-6 termination.

NEW YORK • LOS ANGELES • WASHINGTON

BOSTON • BOCA RATON • NEWARK

NEW ORLEANS • PARIS

Client Alert

Proskauer Rose LLP's Capital Markets Group has extensive experience in all types of capital markets transactions, including both registered and exempt transactions. We represent domestic and foreign private issuers and underwriters in registered transactions and exempt Rule 144A, Regulation S and Regulation D transactions. We provide the full range of services required by our domestic and international clients to facilitate initial public offerings, follow-on offerings, investment-grade, convertible and high-yield debt offerings and real estate securities transactions.

For more information, please contact:

Julie M. Allen
212.969.3155 – jallen@proskauer.com

Allan R. Williams
212.969.3220 – awilliams@proskauer.com

Richard H. Rowe
202.416.6820 – rrowe@proskauer.com

Robyn Manos
202.416.6816 – rmanos@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.