FREQUENTLY ASKED QUESTIONS ABOUT SUSPENDING/TERMINATING REPORTING OBLIGATIONS

What are the ways in which an issuer can enter the registration and reporting system under the Securities Exchange Act of 1934 (the "Exchange Act")?

There are several ways in which an issuer can become obligated to file periodic and current reports under the Exchange Act, including through registration of a class of securities with the U.S. Securities and Exchange Commission (the "SEC"), or as a result of the effectiveness of a registration statement for the offer and sale of securities under the Securities Act of 1933 (the "Securities Act"):[1]

- A company that files a registration statement pursuant to the Securities Act which becomes effective incurs reporting obligations pursuant to Section 15(d) of the Exchange Act;
- An issuer must register a class of equity securities under Section 12(g) of the Exchange Act if, on the last day of its fiscal year, the issuer's total assets exceed $10 million and a class of its equity securities (other than exempted securities) is held of record by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors;
- An issuer that is a bank or bank holding company must register a class of equity securities under Section 12(g) of the Exchange Act if, on the last day of its fiscal year, the issuer's total assets exceed $10 million and a class of its equity securities (other than exempted securities) is held of record by 2,000 or more persons;
- An issuer may register a class of equity securities under Section 12(g) of the Exchange Act on a voluntary basis;
- An issuer must register its securities pursuant to Section 12(b) when listing on a national securities exchange, such as the New York Stock Exchange ("NYSE") or NASDAQ; and

[1] We discuss the ways in which an issuer can enter the Exchange Act reporting system in Frequently Asked Questions About Periodic Reporting Requirements for U.S. Issuers – Overview http://www.mofo.com/files/Uploads/Images/FAQ-Periodic-Reporting-Requirements-for-US-Issuers-Overview.pdf. These Frequently Asked Questions focus on issues for domestic issuers. Please also refer to our Frequently Asked Questions About Foreign Private Issuers, available on our website at http://www.mofo.com/files/Uploads/Images/100521FAQForeignPrivate.pdf.

- An issuer can succeed automatically to reporting obligations under Sections 12(b), 12(g) or 15(d) if the issuer meets the conditions for succession of another reporting issuer's registration and/or reporting obligations pursuant to a merger or acquisition.

How does an issuer terminate and/or suspend its registration and reporting obligations under the Exchange Act?

There are several steps that an issuer must take to terminate and/or suspend its Exchange Act reporting obligations. If the issuer has a class of securities registered under Section 12(b), then either the issuer or the natural securities exchange must file a Form 25 to initiate the delisting/deregistration process. If an issuer has a class of securities registered under Section 12(g), then it must file a Form 15 to terminate the registration and reporting obligations under Section 12(g). If an issuer has a reporting obligation under Section 15(d), then it must file a Form 15 to suspend its Section 15(d) reporting obligation. In each case, the issuer must satisfy specific conditions that are described in more detail in these Frequently Asked Questions.

How does an issuer with a class of securities registered pursuant to Section 12(b) initiate the delisting/ deregistration process?

When an issuer has a class of securities registered under Rule 12(b) and listed on a national securities exchange, Rule 12d2-2 and Form 25 govern the delisting and deregistration process. Form 25 is a one-page form that is used by issuers or the natural securities exchange to file a notice of delisting/deregistration. The filer checks the applicable box to indicate the subparagraph of Rule 12d2-2 that is relied on for the delisting/deregistration.

If an issuer wishes to delist/deregister a class of securities from more than one exchange, must a Form 25 be filed with respect to each exchange?

A separate Form 25 must be filed for each exchange on which an issuer's securities are listed. An issuer may seek to delist/deregister more than one class of securities of the same issuer on one Form 25.

What are the filing deadlines for notifying an exchange of delisting?

If the issuer is initiating the delisting, the issuer must notify the exchange at least 10 days prior to filing the Form 25. The delisting process itself is conducted by the exchange as the security is struck from the securities exchange's listing and is no longer traded on that exchange.

How long does it take for delisting and deregistration under Section 12(b) to occur once a Form 25 is filed?

In general, once a Form 25 is filed, delisting occurs automatically within 10 days. However, deregistration under Section 12(b) does not occur for another 80 days. According to General Instruction 5 to Form 25 and Rule 12d2-2(d)(2), delisting/deregistration occurs 90 days after filing the Form 25. If the filer needs to amend the Form 25 before the ten-day delisting period runs, then delisting/deregistration occurs 90 days from the filing of the amended Form 25.

When may an issuer stop filing reports after a Form 25 is filed for delisting/deregistration under Section 12(b)?

If an issuer does not have any reporting obligations with respect to any other class of securities, and is not required to continue reporting based on an obligation under Section 12(g) or Section 15(d) with respect to the class of securities that is delisted, then the issuer will not

be required to file any current or periodic reports that are due on or after the date the class of securities is delisted. Until the termination of the Section 12(b) reporting obligation is effective 90 days after the Form 25 is filed (or such shorter period as the SEC may determine), any other obligations, such as those under the proxy rules, Section 16(b) and certain beneficial ownership reporting requirements will continue to apply. Once the termination of the Section 12(b) reporting obligation is effective 90 days after the Form 25 is filed, all reporting obligations arising from the Section 12(b) registration are terminated. This entire delisting/deregistration process is designed to operate by the passage of time, with a "safety valve" allowing the SEC to intervene in limited circumstances if necessary. The SEC does not usually provide for any shorter period of time for delisting/deregistration under Section 12(b).

If an issuer registered a class of securities under both Sections 12(b) and 12(g), is the Section 12(g) registration terminated at the same time as the Section 12(b) registration?

When an issuer delists/deregisters a class of securities under Section 12(b), it must determine whether it has a reporting obligation under Section 12(g). In the event that an issuer had registered a class of securities under Section 12(g) prior to the time that it registered that class of securities under Section 12(b), then the Section 12(g) registration (which had been suspended by the Section 12(b) registration) would revive. This situation is common for issuers that were quoted on NASDAQ prior to its registration as a national securities exchange, because they had originally registered under Section 12(g) in connection with their initial NASDAQ listing, and then were deemed to be registered under Section 12(b) upon the effectiveness of NASDAQ's registration as a national securities exchange in 2006.

If an issuer registered a class of securities only under Section 12(b), could a class of securities be deemed registered under Section 12(g) once the Section 12(b) registration is terminated?

If an issuer had not previously registered a class of securities under Section 12(g) prior to registering the class of securities under Section 12(g), then the issuer would need to determine whether Rule 12g-2 would deem the deregistered class of securities as registered under Section 12(g).

Rule 12g-2 provides that any class of securities which would have been required to be registered except for the fact that it was exempt from such registration because it was listed and registered on a national securities exchange or because it was issued by a registered investment company, shall upon the termination of the listing and registration of such class or the termination of the registration of such issuer and without the filing of an additional registration statement be deemed to be registered, if at the time of such termination: (i) the issuer of such class of securities has elected to be regulated as a business development company and such election has not been withdrawn; or (ii) securities of the class are not exempt from such registration pursuant to Section 12 or applicable rules and all securities of such class are held of record by 300 or more persons.

What does an issuer need to file to terminate its reporting obligation arising because the issuer has a class of securities registered under Section 12(g)?

An issuer seeking to terminate its registration under Section 12(g) must file a Form 15. Form 15 provides a

certification and notice of termination of registration under Rule 12(g), which becomes effective 90 days after the Form 15 is filed.

An issuer that has a class of equity securities registered under Section 12(g) may terminate that registration pursuant to Section 12(g)(4) if: (i) the number of record holders of that class falls below 300; or (ii) the number of record holders of that class falls below 500 and the issuer's assets have been no more than $10 million at the end of each of its last three fiscal years. For issuers that are banks or bank holding companies, Title VI of the Jumpstart Our Business Startups Act recently increased the 300 persons held-of-record test in Section 12(g)(4) to 1,200 persons.

If an issuer files a Form 15 to terminate registration under Section 12(g), it does not have to file any current or periodic reports that are due on or after the date the Form 15 is filed. Until the termination of the Section 12(g) registration is effective 90 days after the Form 15 is filed (or such shorter period as the SEC may determine), any other obligations, such as those under the proxy rules, Section 16(b), and certain beneficial ownership reporting requirements, will continue to apply. Once the termination of the Section 12(g) registration is effective 90 days after the Form 15 is filed, all reporting obligations arising from the Section 12(g) registration are terminated. This deregistration process is designed to operate by the passage of time, with a "safety valve" allowing the SEC to intervene in limited circumstances, if necessary. The SEC does not usually provide for any shorter period of time for deregistration under Section 12(g).

If an issuer has terminated its registration under Sections 12(b) and/or 12(g), may it still have a reporting obligation under Section 15(d)?

In those situations where an issuer has terminated its registration under Section 12(b) and/or Section 12(g), the issuer may still have ongoing reporting obligations as a result of Section 15(d).

An issuer filing any Securities Act registration statement that becomes effective incurs a reporting obligation under Section 15(d), which subjects the issuer to the same periodic and current reporting regime applicable to issuers with a class of securities registered under Section 12; however, the proxy rules, the third-party tender offer rules and Sections 16, 13(d) and 13(f) reporting do not apply. The Section 15(d) reporting obligation typically first arises at the time of the issuer's initial public offering registration and is incurred again with each subsequent Securities Act registration statement that goes effective, or with each annual update of a registration statement pursuant to Section 10(a)(3) of the Securities Act.

An issuer can never "terminate" its reporting obligations under Section 15(d); rather the reporting obligation arising under Section 15(d) can only be suspended. In 1964, when the SEC adopted amendments to the Securities Act, Section 15(d) was added to reflect a policy concern that the SEC had with respect to investors who purchase securities in an offering registered under the Securities Act. The SEC's view was that such investors need the benefit of continued disclosure, even if the issuer is not registered under the Exchange Act. If an issuer no longer satisfies the requirements under which it was able to cease reporting under Section 15(d), then the suspension ends

and the reporting obligation returns without any further action of the issuer.

Under what circumstances can an issuer suspend its reporting obligation under Section 15(d)?

An issuer's reporting obligations under Section 15(d) are suspended: (i) while an issuer has a class of securities registered under Section 12; or (ii) if, on the first day of any fiscal year other than the year in which the Securities Act registration statement became effective, there are fewer than 300 record holders of the class of securities offered under the Securities Act registration statement.

In addition to the automatic suspension specified in Section 15(d), Rule 12h-3 permits an issuer to suspend its Section 15(d) reporting obligation if, at any time, the issuer:

- is current in its Exchange Act reporting obligations;
- has (1) fewer than 300 record holders of the class of securities offered under the Securities Act registration statement; or (2) fewer than 500 record holders and its assets must not have exceeded $10 million on the last day of each of the issuer's three most recent fiscal years; and
- has not had a Securities Act registration statement relating to that class of securities become effective in the fiscal year for which the issuer seeks to suspend reporting, or has not had a registration statement that was required to be updated by Section 10(a)(3) of the Securities Act during the fiscal year for which the issuer seeks to suspend reporting, and, if the issuer is relying on the fewer than 500 record holder and $10 million in assets threshold noted above, during the two preceding fiscal years.

What form must an issuer file to suspend its reporting obligation under Section 15(d)?

An issuer files a Form 15 to suspend its reporting obligation under Section 15(d). If the reporting obligation is suspended under Section 15(d) by operation of the statutory provision, the filing of a Form 15 is not a condition to the statutory suspension, but rather is required to serve as a notice of the suspension pursuant to Rule 15d-6. If the issuer suspends its reporting obligation under Rule 12h-3, then Rule 12h-3(a) requires the filing of the Form 15 as a condition to the suspension. If the certification of termination on Form 15 is subsequently withdrawn or denied, the company must file all reports that would have been required if the Form 15 had not been filed.

Does the SEC Staff provide relief with respect to the Section 15(d) reporting obligation?

The SEC Staff issued Staff Legal Bulletin No. 18 to provide "blanket" relief for issuers seeking to rely on Rule 12h-3 to avoid filing periodic reports that otherwise would be due after an issuer is acquired, or where an initial public offering is abandoned.[2] The relief is necessary where any Securities Act registration statement (*e.g.*, a Form S-1, Form S-3 or Form S-8) became effective or had been updated (automatically by incorporation by reference of a Form 10-K, or otherwise) or was required to be updated prior to the suspension under Section 15(d).

[2] Staff Legal Bulletin No. 18 (March 15, 2010) is available at: http://www.sec.gov/interps/legal/cfslb18.htm.

The relief is necessary because Rule 12h-3(c) disallows suspension of the Section 15(d) obligation for the remainder of a fiscal year in which any Securities Act registration statement of the issuer went effective or was required to be updated under Section 10(a)(3) of the Securities Act. As a result, outstanding registration statements can be particularly problematic when an issuer seeks to suspend its Section 15(d) reporting obligation. For example, an acquirer seeking to immediately stop filing periodic and current reports of an acquired issuer following an acquisition of that issuer would find that Rule 12h-3(c) prevents the acquirer from doing so if any acquiree registration statement became effective or was required to be updated in the last fiscal year (even though the acquirer has become the sole shareholder of the acquired issuer through the acquisition); thus, without relief, there would be no suspension of the reporting obligation until the fiscal year following the acquisition (when presumably there will no longer be any effective registration statements because any offerings would have been terminated as a result of the acquisition). Similar problems arise for an issuer when it fails to successfully execute an IPO, because the Form S-1 registration statement became effective and triggered a Section 15(d) reporting obligation, even though no securities were sold to the public. In no-action letters preceding the issuance of Staff Legal Bulletin No. 18, the Staff effectively read subparagraph (c) out of Rule 12h-3, but only to allow suspension for issuers that were acquired or that had a Securities Act registration go effective for an abandoned IPO (and, more recently, when an issuer that meets the assets/number of record holders tests and simply wishes to "go dark" and stop reporting).

The Staff will continue to consider no-action letters, however, outside of the merger and abandoned IPO context, such as when an issuer is "going dark" because the number of record holders of the class of securities has fallen below the Section 15(d)/Rule 12h-3 thresholds.

What conditions must be satisfied in order to rely on the Staff's positions in Staff Legal Bulletin No. 18?

In order to rely on the Staff's positions in Staff Legal Bulletin No. 18 and file a Form 15 in reliance on Rule 12h-3, the issuer:

- must no longer have a class of securities registered under Section 12;
- must comply with all of the other requirements of Rule 12h-3 (*i.e.*, must have filed all reports required by Section 13(a) for the shorter of its most recent three fiscal years and the portion of its current year, or since the Section 15(d) obligation was incurred, and as of the time of filing the Form 15 (to terminate Section 12(g) registration, if any, and suspend Section 15(d) reporting) must have fewer than 300 record holders of the class of securities, or fewer than 500 record holders and assets that did not exceed $10 million on the last day of each of the issuer's three most recent fiscal years);
- must have deregistered any unsold securities from Securities Act registration statements, and/or withdrawn any registration statements if there were no sales; and
- must not otherwise file Exchange Act reports during the time period in which the issuer wants to rely on Rule 12h-3 to suspend the Section 15(d) reporting obligation (*i.e.*, no

"voluntary" SEC filings under the terms of an indenture or otherwise).

When are filings related to the delisting/deregistration and suspension of the Section 15(d) reporting obligation made in the context of an acquisition of a reporting issuer?

In order to satisfy the third condition in Staff Legal Bulletin No. 18 stated above, the process of deregistration or withdrawal must be completed *prior* to filing the Form 15. For situations where there is an outstanding Securities Act registration statement (pursuant to which sales were made), the issuer must file a post-effective amendment to the outstanding registration statement, which amendment, unless automatically effective pursuant to Rule 464 (*e.g.*, a post-effective amendment to an automatic shelf, a Form S-8 or a Form S-3 registering a dividend reinvestment plan), must be declared effective by the Staff prior to filing the Form 15. This post-effective amendment contains simply an explanatory note about deregistration, and Part II information.

Alternatively, if no sales were made pursuant to a registration statement that went effective during the year, then the issuer would merely need to submit a withdrawal request under Securities Act Rule 477. In Securities Act Rules Compliance and Disclosure Interpretation No. 249.01, the Staff indicates that a registration statement may be withdrawn using Rule 477 (i) before effectiveness or (ii) after effectiveness if no securities were sold. While a Rule 477 withdrawal request is not declared "effective" by the Staff, as with a post-effective amendment, the Staff does need to consent to the withdrawal before the registration statement and any pre-effective amendments are considered withdrawn.

In a situation where an acquisition closes early in the year prior to the automatic annual updating of outstanding registration statements through the filing of the Form 10-K, an acquiree can deregister prior to filing the Form 10-K, and thereby avoid the updating considerations which create the concerns in relying on Rule 12h-3(c) that are addressed by Staff Legal Bulletin No. 18.

Is there any basis under which an issuer is able to avoid Exchange Act registration and reporting obligations that apply?

The Exchange Act provides the SEC with broad authority to grant exemptions from the registration and reporting requirements. These exemptions could be granted by rule, regulation or order. Section 36 of the Exchange Act provides the SEC with the authority to exempt any person, security, or transaction from any provision of the Exchange Act and any rule or regulation under the Exchange Act. Section 12(h) provides the Commission the authority to exempt persons, or classes of persons, from Sections 12(g), 13, 14, 15(d) and 16.

Can an issuer have its Exchange Act registration revoked?

In some cases, the SEC may revoke an issuer's registration pursuant to Section 12 of the Exchange Act because of a long track record of delinquent filings. The SEC has the authority to revoke such registration under Section 12(j) of the Exchange Act. In many instances, a revocation proceeding under Section 12(j) will be preceded by a 10-day suspension in trading. This suspension will most likely continue for a longer period

of time because brokers cannot resume quotations until they determine that the issuer has satisfied the information requirements of Rule 15c2-11, which usually is not possible because of the missing periodic reports.

The SEC's Division of Corporation Finance and Division of Enforcement have been working jointly on a delinquent filer program for several years. Delinquent filers are identified and provided notice and an opportunity to become current. If delinquent filers do not become current even after an opportunity has been provided, the SEC institutes a revocation proceeding. Most revocation proceedings are decided against issuers and the issuer's registration is revoked

Does an issuer have reporting obligations even after its 1934 Act registration is revoked?

Even if an issuer's registration is revoked, an issuer may continue to have a reporting obligation under Section 15(d). The potential penalty for not filing reports under Section 15(d) is a fine of $100 for every day the delinquency continues. The SEC, however, has rarely invoked this penalty.

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