

## SEC ADOPTS RULE REGARDING DELISTING AND WITHDRAWAL FROM REGISTRATION UNDER THE EXCHANGE ACT

The Securities and Exchange Commission (the “SEC”) recently issued a release<sup>1</sup> (the “Release”) adopting amendments to its rules and to Form 25 relating to the procedures for removing securities from listing and registration under Section 12(b) of the Securities Exchange Act of 1934 (the “Exchange Act”).<sup>2</sup> The final rules (a) require the amended Form 25 to be filed with the SEC on the EDGAR database, (b) provide that the filing of a Form 25 by a national securities exchange serves as notice to the SEC under Section 19(d) of the Exchange Act and (c) exempt, on a permanent basis, standardized options and security futures products traded on a national securities exchange from Section 12(d) of the Exchange Act.

### I. Background

Section 12(a) of the Exchange Act prohibits a member, broker or dealer from effecting a transaction in a security (other than an exempted security) on a national securities exchange unless the security is registered on that exchange in accordance with the Exchange Act and the rules thereunder. Section 12(d) of the Exchange Act states that a security may be delisted and/or withdrawn from registration on an exchange in accordance with the rules of the applicable exchange and upon such terms as the SEC deems necessary. Rule 12d2-2 and Form 25 under the Exchange Act set out the procedures and conditions for delisting a security from an exchange and/or withdrawing a security from registration under Section 12(b) of the Exchange Act.

### II. Exchange-Initiated Delisting and/or Withdrawal from Section 12(b) Registration

The SEC is amending Rule 12d2-2(b) to provide that a national securities exchange may strike a class of securities from listing and/or withdraw the registration of such securities under Section 12(b) of the Exchange Act by filing an application on Form 25. The delisting of the securities will be effective 10 days after the Form 25 is filed with the SEC, and the withdrawal from Section 12(b) registration will be effective 90 days after the filing of the Form 25 or such earlier time as the SEC may determine.<sup>3</sup> Previously, certain removals of securities from listing or registration occurred through the filing by an exchange of a written application and the subsequent issuance, by the SEC, of an order granting such application.

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<sup>1</sup> SEC Release No. 34-52029 (July 15, 2005).

<sup>2</sup> The amendments were initially proposed in SEC Release No. 34-49858 (June 15, 2004).

<sup>3</sup> During the time period between the effective dates of any such delisting and withdrawal from registration, the issuer’s duty to file reports under Section 13(a) of the Exchange Act and the rules and regulations thereunder would generally be suspended to the extent that such issuer’s duty to file such reports results solely from the relevant security’s registration under Section 12(b).

The Release also states that, except in the case of certain corporate actions described in Rule 12d2-2(a), an exchange will be permitted to delist or deregister securities by filing a Form 25 with respect to such securities only if the rules of the exchange provide for the following, at a minimum: (a) notice to the issuer of the exchange's decision to delist a security of such issuer; (b) an opportunity for the issuer to appeal to the exchange's board of directors or to a committee designated by the board; and (c) no fewer than 10 days prior to the effectiveness of the delisting, public notice, by means of a press release and posting on the exchange's website, of the exchange's final decision to delist the security. To the extent that a national securities exchange's rules do not comply with these requirements, such rules must be amended. Finally, the exchange must deliver a copy of the Form 25 application to the issuer.

The Release notes that the amendments described in the Release do not affect the requirement that an issuer file a Form 8-K if it receives notice from the exchange that maintains the principal listing for any class of its common equity that such exchange has submitted an application to delist a class of the issuer's securities.

### **III. Issuer-Initiated Withdrawal from Listing and/or Section 12(b) Registration**

The final amendments to Rule 12d2-2 allow an issuer to file a Form 25 to notify the SEC of its withdrawal of a class of securities from listing on a national securities exchange or of its intention to withdraw the securities from registration under Section 12(b) of the Exchange Act. The removal from listing will be effective 10 days after the filing of the Form 25, and the removal from registration under Section 12(b) will be effective 90 days after such filing or such shorter time as the SEC may determine. However, pursuant to new Rule 12d2-2(d)(3), if it provides written notice to the exchange and the issuer, the SEC may postpone the effectiveness of a delisting or deregistration beyond the standard 10-day and 90-day respective periods in order to determine both whether or not the applicable Form 25 filing was made in accordance with the rules of the exchange and what terms should be imposed on the effectiveness of the delisting and/or deregistration for the protection of investors.

Rule 12d2-2(c) also requires that an issuer filing Form 25 (a) comply with the applicable exchange's rules for delisting and with applicable state law, (b) at least 10 days prior to filing a Form 25, submit a written notification to the exchange of its intent to withdraw its security from listing and/or registration on such exchange, together with a description of the relevant security and a statement of all material facts relating to the reasons for such withdrawal from listing and/or registration, and (c) contemporaneously with submitting written notice to the exchange, notify the public, by means of a press release and, if the issuer has a publicly accessible website, by posting such notice on its website, of its intent to delist and/or withdraw its security from registration under Section 12(b). In addition, new Rule 12d2-2(c)(3) will require an exchange, upon notification by an issuer of such issuer's intent to withdraw a security from listing and/or registration on such exchange, to post on such exchange's website the intent of such issuer. The website postings by an issuer and an exchange must remain posted until the delisting becomes effective.

#### **IV. Reporting Obligations During Deregistration Process**

An issuer's duty to file reports under Section 13(a) of the Exchange Act will be suspended upon the effective date of a delisting to the extent that such requirements were applicable to such issuer solely due to the Section 12(b) registration of the security with respect to which a Form 25 was filed. However, the issuer will have to continue to comply with other Exchange Act requirements until the deregistration is effective.<sup>4</sup> Similarly, an issuer whose reporting obligations under Section 13(a) are suspended must, nonetheless, file reports required under Section 15(d) as if the class of securities with respect to which a Form 25 has been filed was no longer registered under Section 12(b) of the Exchange Act. In addition, if, following the effective date of a delisting, the SEC, an exchange, or an issuer delays the Form 25 effective date for deregistration of the relevant security, then the issuer will be required to file, within 60 days of such delay, any Section 13(a) reports that would have been required to be filed had the Form 25 not initially been filed. During any such delay, the issuer will also be required to file any subsequent reports required under Section 13(a).

#### **V. Elimination of Certain Existing Provisions in Rule 12d2-2**

Rule 12d2-2 is also being amended to delete the provisions that (a) permit an exchange to delist and deregister a security in the event that such security is admitted to trading on another exchange and trading in the security on such other exchange has become effective, and (b) allow an issuer to file, within 30 days of the publication of a rule or regulation that substantially changes the obligations and/or rights of an issuer, its officers, directors or security holders or persons soliciting or giving a proxy, consent or authorization with respect to such security, a request with the SEC for deregistration.

#### **VI. Changes to Form 25**

As stated above, the SEC is amending Form 25 so that it will be used for all delistings, whether initiated by the issuer or an exchange. The amended Form 25 will require the exchange or issuer to state (a) the name of the issuer of the security, (b) the name of the exchange on which such security is listed and registered, (c) the address of the issuer and (d) a description of the security. The issuer must also continue to check a box to designate the provision under Rule 12d2-2 relied upon to delist or deregister the security. Finally, the instructions to Form 25 will also now provide that the form must be filed on EDGAR.

#### **VII. Filing of Form 25 to Serve as Section 19(d) Notice**

Rule 19d-1 under the Exchange Act requires an exchange to file with the SEC a notice of, among other things, any final disciplinary actions, bars, prohibitions, conditions or limitations with respect to membership or participation in, or access to services of, such exchange. Because of

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<sup>4</sup> See new Rule 12d2-2(d)(5) in the Release.

the amendments described above in this memorandum, the delisting of a security will no longer be effected only after an order to such effect by the SEC. Instead, a delisting will be effective 10 days after the filing of a Form 25 regarding such delisting. Thus, the exchange is now replacing the SEC as the entity that will ordinarily take the final action with respect to a delisting and, as a result, the exchange will have to file with the SEC a notice under Rule 19d-1 with respect to a delisting. According to the Release, however, the filing of a Form 25 will suffice to fulfill the notice requirement. The exchange will have to attach a copy of its delisting determination to the Form 25 and include such determination in its filing of the Form 25 on EDGAR.

### **VIII. Exemption of Options and Security Futures Products**

The SEC is also exempting, on a permanent basis, standardized options and security futures products traded on a national securities exchange from the requirements of Section 12(d) of the Exchange Act and Rule 12d2-2 thereunder.<sup>5</sup>

### **IX. Compliance Date**

The amendments and new rules will become effective on August 22, 2005. However, in order to provide exchanges with sufficient time to propose amendments to their rules and for such amendments to be considered by the SEC, the compliance date of the amendments and new rules is April 24, 2006.

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If you have any questions concerning the foregoing or would like further information, please call John S. D'Alimonte at (212) 728-8212, David K. Boston at (212) 728-8625, Kenneth A. Sicklick at (212) 728-8155 or the attorney with whom you regularly work.

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<sup>5</sup> New Rule 12d2-2(e) in the Release.