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Find Your Way Through the Delisting and Deregistration Door — Steps for Acquired Public Companies to Terminate and Suspend Exchange Act Reporting Requirements

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Introduction

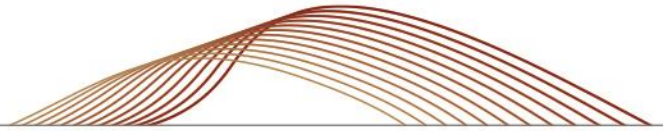
Now that the ink has dried on the signing set and the initial excitement of announcing a public company merger has passed, the deal lawyer's second shift has just begun. While the focus is often on the drafting and filing of tender offer documents or the definitive merger proxy, as closing approaches, lawyers also need to navigate the muddy waters of delisting and deregistering the acquired company's classes of securities—a complex task, especially when the target has multiple classes of publicly listed securities. This article explores some of the pertinent issues surrounding the delisting and deregistration of classes of a public company's securities under Sections 12 and 15(d) of the Securities and Exchange Act of 1934, as amended (the "Exchange Act") in the wake of an M&A transaction. Unless otherwise noted, section and rule references herein refer to the applicable sections of the Exchange Act and the rules promulgated thereunder.

Reporting Company Status

Prior to discussing the delisting and deregistration process, it is essential to explore a company's path to Exchange Act registration. Companies become subject to Exchange Act reporting requirements if they are registered pursuant to Section 12 or Section 15(d) of the Exchange Act, which occurs under three different scenarios: (i) the company publicly lists a class of securities on a national exchange;[1] (ii) the company falls within certain statutorily prescribed size thresholds;[2] or (iii) the company has an effective registration statement under the Securities Act of 1933, as amended (the "Securities Act"), which was filed with the Securities and Exchange Commission (the "Commission").[3]

Registration Pursuant to Section 12(b)

By virtue of listing one or more classes of securities on one of the Nasdaq Stock Markets ("NASDAQ"), the New York Stock Exchange ("NYSE") or another national securities exchange, an issuer becomes registered pursuant to Section 12(b) and thereby subject to Section 13 reporting requirements. For each class of securities that is listed on a national securities exchange, an issuer must have an effective registration statement on Form 8-A or Form 10 on file with the Commission.



Registration Pursuant to Section 12(g)

Issuers with (i) total assets exceeding $10 million and (ii) a class of equity securities (other than exempted securities) that have either 2,000 record holders or 500 record holders who are not accredited investors[4] must register such securities by filing a registration statement with the Commission and are thereby subject to Section 13(a) reporting requirements. As discussed more fully below, the provisions of Section 12(g) do not apply to companies that are registered pursuant to Section 12(b).

Registration Pursuant to Section 15(d)

Pursuant to Section 15(d)(1), companies that have an effective Securities Act registration statement on file with the Commission must file all reports required by Section 13. Unlike registration pursuant to Section 12, once a company is registered pursuant to Section 15(d), the company's reporting requirement can never be terminated. Rather, such reporting obligations can merely be suspended for eligible classes of securities.[5] If a company's Section 15(d) reporting obligations are suspended but the company later does not meet the record holder and asset eligibility thresholds for suspension on the first day of a subsequent fiscal year, the company's reporting obligations under Section 15(d) will be revived.[6]

Independent Reporting Obligations

A company is not subject to Exchange Act reporting requirements under more than one of the aforementioned sections at a time. Rather, if a company has a class of securities registered pursuant to Section 12(b), its reporting obligations under Sections 12(g) and 15(d) are suspended. Similarly, if a company has securities registered pursuant to Section 12(g), then its reporting obligations under Section 15(d) are suspended. Finally, even if a company does not have a class of securities registered under Section 12, it can still have reporting obligations by default under Section 15(d) if it has an effective registration statement under the Securities Act.

We're in the Reporting Company Club, But Maybe We Want Out...

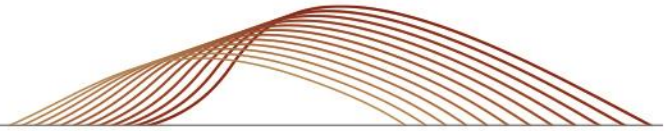
Once in the reporting company club, a company might find that membership is not all that it is cracked up to be. Between the burdensome annual reporting requirements, the stressful ongoing reporting requirements and the invasive management salary and other disclosure requirements, staying in the reporting company club can be time consuming and costly. For many companies, particularly those that have been acquired, such costs do not outweigh the benefits that access to public capital provides.

There are several common scenarios where a reporting company may elect to delist and deregister, including when a company elects to "go dark" or "go private" as well as after a private company abandons an initial public offering.

One of the most common scenarios, and the focus of this article, is when a public company is acquired in a forward or reverse triangular merger and the acquired company survives as a wholly-owned subsidiary of the acquiror.

Do We Have the Key to the Deregistration Door?

Before running for the exit, an acquired public company must first meet several requirements to successfully deregister from its reporting obligations. First, the company must ensure that it is eligible for relief from all of its reporting obligations. Often, an acquired public company will have reporting obligations under each of Sections 12(b), 12(g) and 15(d). Consequently, the company must ensure



eligibility for deregistration under each section. Further complicating matters, the registration regimes are not wholly independent.

An acquired public company listed on NASDAQ or NYSE should analyze its delisting and deregistration eligibility in statutory order—by first determining the company's eligibility to terminate registration under Section 12(b), then under Section 12(g), and finally, by determining the company's eligibility to suspend reporting under Section 15(d). The individual eligibility requirements can be complicated. However, an acquired public company can generally assess its delisting and deregistration eligibility by testing whether it is able to meet the requirements of suspending its Section 15(d) reporting obligations. In order to suspend a company's reporting obligations under Section 15(d) with respect to a class of securities, the company must be up to date on all of its required reporting obligations and such class of securities must have either:

1. less than 300 record holders;[7] or
2. less than 500 record holders, but only if the Company's total assets did not exceed $10 million on the last day of each of the company's three most recent fiscal years.[8,9]

Once eligible, a company may deregister at any time with board, but normally not stockholder, approval.

Delisting vs. Deregistration

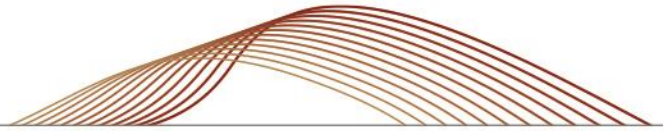
Even if a company holds the key to deregistration, the deal attorney must be mindful to guide his or her client through the process of both deregistering with the Commission and delisting from any exchange on which the company's securities are traded. Delisting and deregistration are related conceptually and in practice. Nevertheless, it is important to distinguish between what each accomplishes. At a high level, delisting involves removal from the exchange in which the acquired company's stock was traded and deregistration involves terminating or suspending the company's reporting requirements under the Exchange Act. The process for delisting and deregistration are linked, but delisting must occur before deregistration.

Delisting and Deregistering Multiple Classes of Securities

If an acquired company has multiple classes of securities that it needs to delist and deregister, the deal lawyer must complete the delisting and deregistration process independently for each class. In the context of an acquired company, the acquiror will generally want to address those classes of securities that were exchanged for cash merger consideration ("Merger Consideration Securities") first. Then, the company can start the process for its other exchange-traded classes of securities that were not exchanged for cash merger consideration ("Other Exchange Traded Classes of Securities").[10] The filing process for the Merger Consideration Securities is different from the filing process for the Other Exchange Traded Classes of Securities, as discussed below.

Step 1: Delisting from the Exchange and Deregistering under Section 12(b)

Delisting from a national securities exchange is integrated with deregistering a class of securities under Section 12(b). In an M&A transaction, delisting an acquired company's Merger Consideration Securities, often just the acquired company's common stock, happens as a matter of law. An exchange is required to delist a class of securities by filing a Form 25 in EDGAR if it is informed of certain events with respect to such class of securities, including that the securities representing such class represent only the right to receive cash consideration.[11] Delisting Other Exchange Traded Classes of Securities requires the acquired company to voluntarily delist each such class of securities by filing a Form 25.[12] Ten days after



filing a Form 25, the respective classes of securities for that filing will be delisted; however, such classes of securities will not be deregistered under Section 12(b) until 90 days following the filing date.[13]

Form 25

The requirements for filing a Form 25 are governed by Rule 12d2-2. The requirements differ based upon whether the securities to be deregistered are Merger Consideration Securities or Other Exchanged Traded Classes of Securities. For both types, however, the Form 25 to deregister the securities, with attachments, must be filed electronically in EDGAR.

Merger Consideration Securities

Under Rule 12d2-2(a), an exchange must file a Form 25 to deregister a class of securities if it is reliably informed of certain conditions with respect to such class of securities, including that "the instruments representing the securities comprising the entire class have come to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right, except, if such be the fact, the right to receive an immediate cash payment." In the context of a merger, once the certificate of merger has been accepted by the applicable secretary of state, any class of securities that represents only the right to receive cash merger consideration will, by operation of law, no longer qualify to be listed, and upon notice, the exchange upon which such class of securities is listed must strike the class of securities from the exchange by filing a Form 25 with the Commission. The deal lawyer or the company should be in communication with the relevant exchange in advance of filing the certificate of merger to coordinate the delisting of the Merger Consideration Securities.

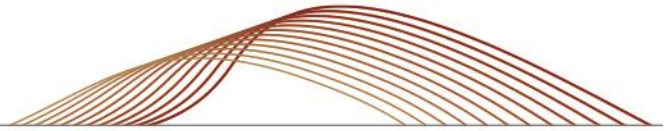
Other Exchange Traded Classes of Securities

If the acquired company has Other Exchange Traded Classes of Securities, such as debt, the company will need to voluntarily initiate the delisting and deregistration for each such class of such securities. Under Rule 12d2-2(c), a company with a class of securities listed and registered pursuant to Section 12(b) can terminate the listing and registration of such class of securities by voluntarily filing a Form 25 to alert the Commission of its withdrawal of such class of securities from listing on a national securities exchange and its intention to withdraw such class of securities from registration under Section 12(b) of the Exchange Act.[14]

There is nothing to stop an acquired company from jumpstarting the voluntary delisting process prior to the effective date of a merger, but given the uncertainty surrounding the actual effective date of a merger and the signals such advance notification could give the market, it is advisable to wait until the merger is effective prior to initiating the voluntary delisting process.

Upon filing Form 25, an issuer must represent that:

1. it complied with applicable state law and exchange rules governing delisting and deregistration;
2. it provided 10 days' prior written notice to the exchange of its determination to withdraw a class of securities from listing and registration;[15] and
3. contemporaneous with providing written notice to the exchange, it published notice of its intention to withdraw the class of securities via a press release and on its Web site, and that such notice will remain publicly available until delisting has been completed (i.e., 10 days after the filing of the Form 25).



Voluntary submission of a Form 25 still requires the company to work with the relevant exchange. Under Rule 12d2-2(c)(3), an exchange receiving notice of a company's intent to delist pursuant to Rule 12d2-2(c)(2)(ii) must publish written notice of such intent on its Web site until the delisting has been completed.

Timing for Delisting Pursuant to Section 12(b)		
Days	**Merger Consideration Securities**	**Other Exchange Traded Classes of Securities**
Before Closing	Company notifies exchange of pending transaction and need to delist Merger Consideration Securities.	-
Closing	Exchange files Form 25 after receiving evidence that the certificate of merger has been filed. *Rule 12d2-2(a)(3).* Company files Form 8-K announcing delisting. *Item 3.01(d) of Form 8-K.*	Company provides written notice to exchange of intent to voluntarily delist Other Exchange Traded Classes of Securities. *Rule 12d-2(c)(2)(ii).* Company issues press release, posts notice on its Web site. *Rule 12d2-2(c)(2)(iii)*. Company files Form 8-K announcing voluntary delisting. *Item 3.01(d) of Form 8-K.*
+10	Barring intervention from the Commission, delisting of Merger Consideration Securities effective. *Rule 12d2-2(d)(1).*	Company files Form 25 with Commission to voluntarily delist Other Exchange Traded Classes of Securities. *Rule 12d2-2(c)(2).*
+20	-	Barring intervention from the Commission, delisting of Other Exchange Traded Classes of Securities effective. *Rule 12d2-2(d)(1).*

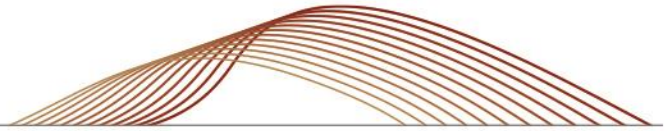
Step 2: Deregistering under Section 12(g) and Section 15(d)

In order to successfully deregister, an acquired public company must terminate each layer of its registration under the Exchange Act.[16] As previously indicated, deregistration pursuant to Section 12(b) registration occurs in conjunction with delisting. To terminate Section 12(g) registration or suspend Section 15(d) registration, the company must file a Form 15 for each class of securities to be deregistered.

Form 15

The filing of a Form 25 alone will not get the company through the deregistration door. Completing deregistration typically requires an appropriately filed Form 15.

Upon deregistration under Section 12(b), many public companies will have their registration under Sections 12(g) or 15(d) revived. Revival under Section 12(g) will occur if either (i) the class of securities to be deregistered was listed on NASDAQ prior to August 2006, when NASDAQ required listed companies to be registered pursuant to Section 12(g), or (ii) there are 300 or more record holders of the class of



securities to be deregistered.[17] Revival under Section 15(d) occurs if the company has filed an effective registration statement under the Securities Act.

Rule 12g-4 provides for termination of revived Section 12(g) reporting obligations. Rules 12h-3 and 15d-6 provide for suspension of revived Section 15(d) reporting obligations.[18] To terminate or suspend registration under these rules, as applicable, the company must file a corresponding Form 15 with the Commission. But a Form 15 cannot be filed for a class of securities until on or after the Form 25 striking such class of securities from the relevant exchange has become effective. Accordingly, the company should generally not *file a Form 15 until ten days after filing the corresponding Form 25* for a class of securities to be deregistered.

Those Pesky Shelf-Registration Statements

A nuance in Rule 12h-3(c) creates issues for companies trying to deregister while they have outstanding registration statements "on-the-shelf." Rule 12h-3(c) disallows suspension of Section 15(d) reporting obligations for the remainder of any fiscal year in which an issuer had a registration statement that became effective or was required to be updated under Section 10(a)(3) of the Securities Act. Accordingly, absent relief from Rule 12h-3(c), an acquired company with outstanding registration statements will be unable to suspend its reporting obligations under Section 15(d).

The Commission provided such relief in Staff Legal Bulletin No. 18. This bulletin lifts the requirements of subparagraph (c) of Rule 12h-3 in the context of an abandoned initial public offering and an acquisition. To avail itself of such relief, the acquired company must:

1. no longer have a class of securities registered under Section 12 at the time of filing a Form 15;
2. comply with all other requirements of Rule 12h-3, specifically, the company may not exceed the record holder and asset thresholds set forth in Rule 12h-3(b)(1) and it must be current with its Exchange Act reporting obligations as of the date of the Form 15 filing;[19]
3. deregister any unsold securities from effective Securities Act registration statements and withdraw any effective registration statements if there were no sales; and
4. not otherwise file any Exchange Act reports during the time period in which it seeks to avail itself of the suspension provided by Rule 12h-3.

To comply with the third requirement under Staff Legal Bulletin No. 18, the company must deregister all unsold securities and take-down any effective registration statements, including, for example, shelf-registration statements on Form S-3 and S-8, *before* filing Form 15.[20] If sales were made under a registration statement, then a full post-effective amendment to such registration statement will need to be filed and *declared effective* by the Commission before the Form 15 filing. Post-effective amendments to registration statements on Form S-8 and automatic shelf registration statements on Form S-3 are immediately effective upon filing. However, many other types of registration statements must be declared effective by the Commission, which can take time.[21] Because proper timing of the effectiveness of any post-effective amendments is critical, the deal lawyer will want to work with the Commission confidentially before filing to ensure that the post-effective amendments will be declared effective in time to file the Form 15 on the tenth day after submission of the Form 25. If no sales were made pursuant to a registration statement, a request to withdraw such registration statement under Rule 477 of the Securities Act can instead be submitted. As a practical matter, the withdrawal of a registration statement under Rule 477 is generally effective at the time of filing, so long as the Commission does not object within 15 days.

When Will This End? Timing for Deregistration

Barring amendment by the filer or comment by the Commission, the process for deregistration operates by the passage of time for each class of securities being deregistered. Ten days after filing a Form 25, delisting for the applicable class of securities will be effective—stopping any remaining trading of the securities on the exchange and suspending the company's reporting obligations under Section 13(a) (but not other Sections of the Exchange Act, as discussed below). Ninety days after filing Form 25, deregistration under Section 12(b) will be effective and the company's reporting obligations under Section 13(a) will be terminated.[22] Ninety days after filing Form 15, deregistration under Section 12(g) will be effective and registration under Section 15(d) will be suspended—suspending the company's remaining reporting obligations under the Exchange Act.

Timing for Deregistration		
Days	**Merger Consideration Securities**	**Other Exchange Traded Classes of Securities**
Closing	Exchange files Form 25 after receiving evidence that certificate of merger has been filed. *Rule 12d2-2(a)(3).*	Company provides written notice to exchange of intent to voluntarily delist Other Exchange Traded Classes of Securities. *Rule 12d2-2(c)(2)(ii).* Company issues press release and posts notice on its Web site announcing voluntary delisting. *Rule 12d2-2(c)(2)(iii).*
+10	Barring intervention from the Commission, delisting of Merger Consideration Securities effective. *Rule 12d2-2(d)(1).* Company files Form 15 to deregister Merger Consideration Securities under Sections 12(g) and 15(d). *Rules 12g-4; 15d-6.*	Company files Form 25 with Commission to delist and deregister Other Exchange Traded Classes of Securities under Section 12(b). *Rule 12d2-2(c)(2)(i).*
+20	-	Company files Form 15 to deregister Other Exchange Traded Classes of Securities under Sections 12(g) and 15(d). *Rules 12g-4; 15d-6.*
+90	Section 12(b) registration is terminated. *Rule 12d2-2(d)(2)*	-

Timing for Deregistration		
Days	**Merger Consideration Securities**	**Other Exchange Traded Classes of Securities**
+100	Form 15 for Merger Consideration Securities deemed effective. Section 12(g) registration is terminated. *Rule 12-g-4(a).* Section 15(d) registration is suspended. *Rule 15d-6.*	Section 12(b) registration is terminated. *Rule 12d2-2(d)(2)*
+110	-	Form 15 for Other Exchange Traded Classes of Securities deemed effective. Section 12(g) registration is terminated. *Rule 12-g-4(a).* Section 15(d) registration is suspended. *Rule 15d-6.*

BUT WAIT! There May Still Be Required Filings Even Post Filing Forms 25 and 15

Post-filing Forms 25 and 15, the deal lawyer can begin to see the light outside the deregistration door. But before tossing those EDGAR access codes, the deal lawyer needs to be aware of several potential ongoing reporting obligations. These obligations can arise under the requirements of the Exchange Act or the company's prior contractual obligations.

Post-Filing Exchange Act Reporting Obligations

The filing of Forms 25 or 15 does not immediately terminate or suspend the company's reporting obligations under the Exchange Act. Indeed, an acquired company can still have ongoing reporting obligations for quite some time post-filing. Throughout the process of delisting and deregistration, the company will have ongoing reporting requirements as follows:

Timeframe	Required Filings
Before Filing Form 25 and Upon Filing Form 25	Company and beneficial owners of the company's registered securities must continue to file all reports required under any applicable provisions of the Exchange Act and rules of the exchange(s) in which the company's securities are traded.
10 days after Filing Form 25 and Upon Filing Form 15	Company is relieved of reporting requirements imposed by registration pursuant to Section 12(b),[23] Section 15(d) (i.e. periodic reporting requirements) and the exchange rules, but the company and beneficial owners of the company's registered securities must continue filing other reports required by the Exchange Act, including those required by Sections 14(a), 16 and 13(d).
90 days after Filing Form 15	Company is relieved of all reporting requirements under the Exchange Act for securities that were deregistered.

Timeframe	Required Filings
Ongoing	Company must review its Section 15(d) suspension eligibility annually and continue its reporting obligations under Section 15(d) if the company does not meet the registered holder and asset thresholds for suspension on the first day of a fiscal year.[24]

Prior Contractual Obligations

The deal lawyer brought into help with an M&A transaction may not have been involved with the acquired company's myriad of other dealings. Often, the company may have entered into other agreements requiring the company to continue its reporting obligations under the Exchange Act. For example, a note indenture may contain a condition requiring the company to submit, provide, furnish or file reports under the Exchange Act. The Commission made clear in Staff Legal Bulletin No. 18 that compliance with the suspension of reporting requirements under the Exchange Act rules does not relieve issuers of their outside contractual obligations.[25] Therefore, as part of the diligence process, the deal lawyer should review the company's material contracts for provisions that could make formal delisting and deregistration with the Commission moot.

Conclusion

Though many roads lead to reporting company status, the deal lawyer must be careful to properly navigate the tricky path to delisting and deregistering an acquired company's outstanding classes of securities.

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[1] Section 12(b).

[2] Section 12(g).

[3] Section 15(d)(1).

[4] As such term is defined in Rule 501 of Regulation D of the Securities Act.

[5] Rule 12h-3(a).

[6] Rule 12h-3(e).

[7] Or, in the case of a bank, a savings and loan holding company (as such term is defined in Section 10 of the Home Owners' Loan Act (12 U.S.C. 1461)), or a bank holding company (as such term is defined in Section 2 of the Band Holding Company Act of 1956 (12 U.S.C. 1841)), 1,200 record holders.

[8] Rule 12h-3. Companies that are wholly acquired will almost certainly meet these requirements post-acquisition. But generally, even acquired companies with minority shareholders will meet these requirements as the record holders of the companies are often in the street name of a broker.

[9] The suspension of reporting obligations for classes of asset-backed securities is addressed in Rule 15d-22.

[10] Such secondary classes of securities include other classes of common stock or preferred stock that are registered under the Exchange Act or traded on a national securities exchange. Rights that trade with the common stock, such as rights to purchase preferred shares issued under a poison pill, are not considered independently registered securities requiring separate delisting and deregistration.

[11] Rule 12d2-2(a).

[12] Rule 12d2-2(c).

[13] Rule 12d2-2(d)(2).

[14] Rule 12d2-2(c)(1).

[15] Such notice should include the information required by Rule 12d2-2(c)(2), including a description of the security involved, together with a statement of all material facts relating to the reasons for withdrawal from listing and/or registration.

[16] Rule 12d2-2(d)(2).

[17] Alternatively, Section 12(g) registration could be revived if there are 500 or more record holders of the securities to be deregistered and the company's total assets have not exceeded $10 million on the last day of each of the company's three most recent fiscal years. *See also* notes 7 and 9 regarding the reporting thresholds for securities issued by certain types of issuers and for asset-backed securities.

[18] Once an effective registration statement has been filed under the Securities Act, an issuer's reporting obligations under Section 15(d) can only be suspended, never terminated.

[19] If a company relied on Part G(3) of the Instructions to Form 10-K to fulfill its obligation to file Part III information, but has yet to file its proxy statement prior to delisting and deregistration, the company must file a Form 10-K/A with the required Part III information prior to filing the Form 15. (Question 104.10 C&DI—Exchange Act Forms last updated December 8, 2016).

[20] Staff Legal Bulletin No. 18 at Section IV *citing* Item 512(a)(3) of Regulation S-K.

[21] Rules 462(e) and 464 of the Securities Act.

[22] Unless registration is revived under Section 12(g), in which case, Section 13(a) reporting obligations will be terminated 10 days later upon the effectiveness of the Form 15 and termination of registration under Section 12(g).

[23] This includes all reports required under Section 13(a), unless the company is also registered under Section 12(g).

[24] 12h-3(e).

[25] Staff Legal Bulletin No. 18 at Section IV.