

Dated: October 18, 2002.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02-27224 Filed 10-24-02; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release Number IC-25774; 812-12598]

### Corvis Corporation; Notice of Application

October 21, 2002.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of application under section 3(b)(2) of the Investment Company Act of 1940 (the "Act").

**SUMMARY OF APPLICATION:** Applicant Corvis Corporation ("Corvis") seeks an order under section 3(b)(2) of the Act declaring it to be primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities. Corvis is a telecommunications company that designs, manufactures, and sells high performance optical networking products.

**FILING DATES:** The application was filed on August 7, 2001 and amended on October 18, 2002.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 15, 2002, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicant, 7015 Albert Einstein Drive, Columbia, MD, 21046-9400.

**FOR FURTHER INFORMATION CONTACT:** Julia Kim Gilmer, Senior Counsel, at (202) 942-0528, or Janet M. Grossnickle, Branch Chief, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (tel. 202-942-8090).

### Applicant's Representations

1. Corvis, a Delaware corporation, is in the business of designing, manufacturing and selling high performance optical networking products through its direct and indirect interests in wholly-owned subsidiaries and Acme Grating, LLC ("Acme Grating"), a company it controls within the meaning of section 2(a)(9) of the Act.<sup>1</sup> As a development stage company, Corvis' operations consisted primarily of research and development, product design, manufacturing and testing of optical communications systems. As an operating company, Corvis has conducted field trials for customers, deployed transmission and switching equipment, built up finished goods inventory to support customer service orders, and sold products to its customers.

2. Corvis states that it needs to maintain a large amount of capital in order to cover expenses related to the research and development of new technology, products, product enhancements, and other operational expenses such as marketing. Corvis desires to use a portion of its working capital to invest in short-term, investment grade securities, as outlined in its investment policies which are attached to the application ("Capital Preservation Investments"), pending the use of such capital for its current and future operations. Corvis also states that it must preserve capital for carrying out future mergers and acquisitions and for entering into strategic partnerships and joint ventures.

3. Corvis also makes and expects to continue making investments in long-term, non-controlling, strategic investments in the debt or equity securities of other entities ("Strategic Investments"). Corvis states that its current Strategic Investments are invested in developing-stage privately held companies that are engaged in businesses that Corvis believes complement its technology. Corvis further states that it views its Strategic Investments as a means to facilitate the

development of next-generation technology and foster positive relations with companies that Corvis believes will add value to its products.

4. In October 2000, Corvis created Corvis US Capital, Inc. ("US Capital"), a Delaware corporation, for tax and business reasons unrelated to the Act, to hold Corvis' cash, Capital Preservation Investments, Strategic Investments and other marketable investment securities. Corvis indirectly owns all of the outstanding securities (other than short-term paper and directors' qualifying shares) of US Capital. Corvis states that it has not, does not currently, and does not intend in the future to engage in short-term trading of any securities, including Capital Preservation Investments and Strategic Investments.

### Applicant's Legal Analysis

1. Corvis seeks an order under section 3(b)(2) of the Act declaring that it is primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities, and therefore not an investment company as defined in the Act.

2. Under section 3(a)(1)(C) of the Act, an issuer is an investment company if it is engaged or proposes to engage in the business of investing, reinvesting, owning, holding or trading in securities, and owns or proposes to acquire investment securities having a value in excess of 40% of the value of the issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis. Section 3(a)(2) of the Act provides that "investment securities" include all securities except government securities, securities issued by employees' securities companies, and securities issued by majority-owned subsidiaries of the owner which (i) are not investment companies, and (ii) are not relying on the exclusions from the definition of investment company in section 3(c)(1) or 3(c)(7) of the Act.

3. Corvis states that as of June 29, 2002, 82% of its total assets (exclusive of government securities and cash items), on an unconsolidated basis, consist of investment securities as defined in section 3(a)(2) of the Act. Corvis believes that this percentage may rise as it acquires additional Capital Preservation Investments, writes down the value of certain assets (such as goodwill), takes restructuring charges, and disposes of other assets (such as excess or obsolete inventory and surplus equipment).

4. Rule 3a-1 provides an exemption from the definition of investment company if no more than 45% of a company's total assets consist of, and

<sup>1</sup> Corvis owns 49% of the voting shares and 99% of the economic interest in Acme Grating. Acme Grating owns certain licensed intellectual property that it uses to manufacture gratings that Corvis purchases and uses in its operations. Corvis states that, as of June 29, 2002, Acme Grating had total assets of \$0.

not more than 45% of its net income over the last four quarters is derived from, securities other than government securities and securities of majority-owned subsidiaries and companies primarily controlled by it. Corvis states that it cannot rely upon rule 3a-1 under the Act because it has suffered operating losses for the twelve months ended June 29, 2002, while earning some investment income during the same period.

5. Section 3(b)(2) of the Act provides that, notwithstanding section 3(a)(1)(C) of the Act, the Commission may issue an order declaring an issuer to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly, through majority-owned subsidiaries, or controlled companies conducting similar types of business. Corvis requests an order under section 3(b)(2) of the Act declaring that it is primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities, and therefore not an investment company as defined in the Act.

6. In determining whether a company is primarily engaged in a non-investment company business under section 3(b)(2), the Commission considers: (a) The issuer's historical development; (b) its public representations of policy; (c) the activities of its officers and directors; (d) the nature of its present assets; and (e) the sources of its present income.<sup>2</sup>

a. *Historical Development.* Corvis has been a development stage company from the time of its inception until July 2000 and an operating company from that time to the present. As a development stage company, Corvis' operations consisted primarily of research and development, product design, manufacturing, and testing of optical communications systems. As an operating company, Corvis has conducted field trials for customers, deployed transmission and switching equipment and built up finished goods inventory to support customer service orders and sold products to its customers. Corvis states that all of its activities since its formation have been devoted solely to designing, manufacturing and marketing high performance optical communications systems. Corvis has not disposed of any of its Strategic Investments and does not plan to dispose of any Strategic Investments in the foreseeable future.

b. *Public Representations of Policy.*

Corvis states that it has never represented that it is involved in any business other than designing, manufacturing and selling high performance optical networking products. Corvis asserts that it has consistently stated in its reports to stockholders, press releases and filings with the Commission that it is a telecommunications company. Corvis states that it has emphasized operating results and has never emphasized either its investment income or the possibility of significant appreciation from its Capital Preservation Investments or Strategic Investments as a material factor in its business or future growth.

c. *Activities of Officers and Directors.* Corvis states that its senior officers and directors are actively engaged in the management of telecommunications business and that their educational and business backgrounds are predominantly in the fields of engineering, physics, telecommunications, accounting, mathematics, marketing, software development, computer science, general management and law. Only two of the twenty-six directors, executive officers and key employees have a securities investment background or private equity experience. Three Corvis officers and a director from Corvis' Board of Directors ("Board"), who is not an officer or employee of Corvis, serve on a committee (the "Investment Committee") that manages the investment portfolio. The officers and director devote, on average, less than 1% of their time to matters relating to Capital Preservation Investments and Strategic Investments. The involvement of Corvis' Board in capital preservation efforts has been limited to establishing investment objectives for the Capital Preservation Investments. Further, Corvis states that its approximately 900 employees collectively spend approximately 58% of their time on research and development, 24% of their time designing and manufacturing products, 18% of their time on accounting, recruiting, marketing products, and other administrative matters, and less than 1% of their time on Capital Preservation Investments and Strategic Investments.

d. *Nature of Assets.* Corvis states that as of June 29, 2002, its total assets (exclusive of Government securities and cash items, as such terms have been interpreted by the Commission or its staff), consolidated with US Capital, was \$581.50 million, approximately 14.9% of which represented investment securities as defined in section 3(a)(2) of

the Act.<sup>3</sup> Corvis further represents that as of June 29, 2002, less than 1% of these investment securities were Strategic Investments, and the rest were Capital Preservation Investments. Corvis states that Capital Preservation Investments consist of short-term investment grade securities held by Corvis not for investment purposes, but to preserve its capital pending its use in operations. Corvis further states that Strategic Investments are not contemplated to comprise as much as 4% of Corvis' total assets.

e. *Sources of Income and Revenue.* Corvis states that its subsidiaries (other than US Capital) and Acme Grating, a controlled company, are emerging telecommunications businesses that typically generate little or no income for Corvis in the form of dividends or capital appreciation and have produced significant losses for Corvis to date. Corvis asserts that its activities as an operating company are more appropriately analyzed by evaluating Corvis' proportionate share of the revenues from directly-owned assets, wholly-owned subsidiaries and Acme Grating in light of Corvis' total revenues. Corvis states that, for the four quarters ending June 29, 2002, revenues from its directly-owned assets, wholly-owned subsidiaries and Acme Grating represented approximately 84.1% of Corvis' total revenues.<sup>4</sup> Corvis expects that in the future, the percentage of its total revenues derived from operating activities will ordinarily be over 80% and the percentage derived from investments will ordinarily be under

<sup>3</sup> Corvis states that the value of its interests in controlled conducting similar types of business is \$0 million. Additionally, for the purposes of this analysis, US Capital's holdings of money market fund shares have been treated as "cash items." Corvis states that these money market funds comply with rule 2a-7 of the Act and seek to maintain a stable net asset value of \$1.00 per share. Corvis states that consolidating its assets with those of US Capital provides a more accurate picture of its telecommunications business because the assets held by US Capital will only consist of money market fund shares, other Capital Preservation Investments, some or all of the Strategic Investments and other marketable debt and equity securities. Moreover, since US Capital is a wholly-owned subsidiary, consolidation will not result in the type of distortions that could result from consolidating other types of subsidiaries.

<sup>4</sup> For purposes of this analysis, revenues of the wholly-owned subsidiaries were consolidated and revenues of Acme Grating, a controlled company, were attributed to Corvis in proportion to Corvis' interests in Acme Grating. Corvis uses the equity method of accounting for Acme Grating, which under Generally Accepted Accounting Principles ("GAAP") means that Acme Gratings' income or losses, but not revenues, are attributed to Corvis based on its ownership of Acme Grating. Acme Grating provided less than .1% of Corvis' total revenues. Corvis consolidates its wholly-owned subsidiaries, including US Capital, when preparing its financial statements in accordance with GAAP.

<sup>2</sup> Tonopah Mining Company of Nevada, 26 SEC 426, 427 (1947).

20%. Corvis represents that it does not intend to derive a significant percentage of its revenues from income derived from the sale of interest in non-controlled companies.

7. Corvis thus asserts that it satisfies the standards for an order under section 3(b)(2) of the Act.

#### **Applicant's Conditions**

Applicant agrees that any order granting the requested relief will be subject to the following conditions:

1. Corvis will continue to allocate and utilize its accumulated cash and Capital Preservation Investments, whether held directly or through US Capital, for bona fide business purposes.

2. Corvis will not engage in trading in securities, either directly or through any of its subsidiaries, for short-term speculative purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**  
Deputy Secretary.

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## **SECURITIES AND EXCHANGE COMMISSION**

### **Sunshine Act Meetings**

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of October 28, 2002:

A Closed Meeting will be held on Monday, October 28, 2002, at 10 a.m., and Open Meetings will be held on Wednesday, October 30, 2002 at 10 a.m., and Thursday, October 31, 2002 at 10 a.m.

Commissioner Campos, as duty officer, determined that no earlier notice thereof was possible.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), (9)(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

*The subject matter of the Closed Meeting scheduled for Monday, October 28, 2002 will be:*

Formal order of investigation;

Institution and settlement of administrative proceedings of an enforcement nature;

Institution and settlement of injunctive actions; and  
Adjudicatory matter.

*The subject matter of the Open Meeting scheduled for Wednesday, October 30, 2002 will be:*

1. The Commission will consider proposing new rules and amendments regarding the use of pro forma financial information in order to implement section 401(b) of the Sarbanes-Oxley Act of 2002. In addition, the Commission will consider an amendment to Form 8-K requiring the filing of earnings announcements and releases.

2. The Commission will consider whether to propose rules relating to section 401(a) of the Sarbanes-Oxley Act of 2002. The proposed rules would require companies to provide in their "Management's Discussion and Analysis" section of the Commission filings: (a) A discussion of off-balance sheet arrangements; (b) a table of aggregate contractual obligations due in short and long-term time horizons; and (c) either a table or textual disclosure of aggregate contingent liabilities and commitments in the short and long-term.

3. The Commission will consider whether to propose new rules that would prohibit an issuer's directors and executive officers from purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants or beneficiaries from engaging in equity securities transactions, if the equity security was acquired in connection with the director or executive officer's service or employment as a director or executive officer. These rules would implement section 306(a) of the Sarbanes-Oxley Act of 2002. In addition, the proposed rules would require issuers to provide advance notice to their directors and executive officers and the Commission of the imposition of a pension plan blackout period.

*The subject matter of the Open Meeting scheduled for Thursday, October 31, 2002 will be:*

1. The Commission will consider whether to propose amendments to the definition of terms used in the exception from the definition of dealer for banks under section 3(a)(5) of the Securities Exchange Act of 1934. The Commission will consider whether to propose amendments to the related exemption for banks, savings associations, and savings banks as well as propose a new exemption concerning securities lending. These proposals relate to the implementation of the

specific exceptions for banks from the definitions of "broker" and "dealer" that were amended by the Gramm-Leach-Bliley Act.

2. The Commission will consider proposed rules establishing standards of professional conduct for attorneys who appear and practice before the Commission in any way in the representation of issuers, as required by section 307 of the Sarbanes-Oxley Act of 2002. These standards would include a rule requiring an attorney to report "evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the company or any agent thereof" to the chief legal counsel or the chief executive officer of the company (or the equivalent); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 942-7070.

Dated: October 23, 2002.

**Margaret H. McFarland,**  
Deputy Secretary.

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-46620A; File No. SR-NYSE-2002-46]

### **Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Shareholder Approval of Equity Compensation Plans and the Voting of Proxies**

October 21, 2002.

#### **Correction**

In FR Document No. 02-26037, beginning on page 63486 in the issue for Friday, October 11, 2002, the word "less" in footnote 10 should be changed to "greater." Footnote 10 should read as follows:

<sup>10</sup> For these purposes, a "repricing" means any of the following (or any other action that has the same effect as any of the following): (1) Amending the terms of an option after it is granted to lower its strike price; (2) any other action that is treated as a repricing under generally accepted accounting principles; and (3) canceling an option at a