CLEARY GOTTLIEB STEEN & HAMILTON LLP

ONE LIBERTY PLAZA
NEW YORK, NY 10006-1470

2000 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20006-1801

RUE DE LA LOI 57
1040 BRUSSELS

CITY PLACE HOUSE
55 BASINGHALL STREET
LONDON EC2V 5EH

PAVELETSKAYA SQUARE 2/3
115054 MOSCOW

MAIN TOWER
NEUE MAINZER STRASSE 52
60311 FRANKFURT AM MAIN

THEODOR-HEUSS-RING 9
50668 COLOGNE

PIAZZA DI SPAGNA 15
00187 ROME

VIA SAN PAOLO 7
20121 MILAN

BANK OF CHINA TOWER
ONE GARDEN ROAD
HONG KONG

SHIN KASUMIGASEKI BUILDING
3-2, KASUMIGASEKI 3-CHOME
CHIYODA-KU, TOKYO 100-0013

AVOCATS AU BARREAU DE PARIS
41, AVENUE DE FRIEDLAND
75008 PARIS
01 40 74 68 00
FAX
01 45 63 66 37
WWW.CLEARYGOTTLIEB.COM

ROGER J. BENRUBI
JEAN-MARCEL CHEYRON
SENIOR COUNSEL

JEAN-MICHEL TRON
MEMBRE DU CONSEIL DE L'ORDRE

JEAN-PIERRE VIGNAUD
GILLES ENTRAYGUES
ROBERT BORDEAUX-GROULT
FRANÇOIS JONEMANN
RUSSELL H. POLLACK
ARNAUD DE BROSSES
JEAN-MARIE AMBROSI
ANDREW A. BERNSTEIN
PIERRE-YVES CHABERT
PASCAL COUDIN
JEAN-YVES GARAUD
JOHN D. BRINITZER
FRANÇOIS BRUNET
FABRICE BAUMGARTNER
MARIE-LAURENCE TIBI
VALÉRIE LEMAITRE

CATHERINE PEULVÉ
SOPHIE DE BEER
CLAUDIA ANNACKER
COUNSEL

March 18, 2005

The Honorable William H. Donaldson
Chairman
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington D.C. 20549-0609

Re: U.S. Reporting Obligations of Foreign Issuers

Dear Chairman Donaldson:

We are writing in support of the efforts of several European organizations to assist the Commission in determining how the United States rules relating to deregistration can be made more flexible while maintaining the protection of U.S. investors. We agree with the organizations that the Commission's efforts to date have been quite positive, and we are pleased to participate in a continuing dialogue that we hope will translate the goodwill of all the parties into a concrete initiative.

We agree with the European organizations that the Commission should place great emphasis on the protection of U.S. investors following a company's deregistration. There is a profound and essential difference between the deregistration of a company whose principal trading market is a liquid foreign market that is subject to recognized regulatory oversight, and the deregistration of a company for which this is not the case. Crucially, the price of the first issuer's securities is determined primarily on its home market both before and after deregistration. In contrast, the deregistration of a U.S. issuer or a foreign issuer that does not have a liquid home market would fundamentally disrupt the price determination mechanism for the issuer's securities. This difference should permit the Commission to be more flexible in determining the level of U.S. investor interest in the securities of the first issuer compared to the second.

It is also crucial that the standards adopted by the Commission for all foreign private issuers be practical and usable without undue burden. Otherwise, the deregistration problem will continue to affect adversely the perception of the U.S. market by foreign issuers, making it unlikely that companies will seek to register their securities except when required to do so to make acquisitions. This would be at odds with the Commission's announced efforts to encourage registration to maintain the vibrancy of the U.S. capital markets.

To assist the European organizations and the Commission, we have attached in Annex A to this letter the text of proposed rule changes that could be used to implement the modified European proposal. In the remainder of this letter, we analyze the draft proposal and provide our views on some of the reservations that have been expressed by the Commission staff in discussions relating to the February 2004 proposal.

1. Summary of the Modified Proposal

The proposal would provide two, alternative criteria for determining when a company would be allowed to terminate its registration.[1] The first would be available in cases where U.S. investors would benefit from post-deregistration protection of the type provided in the most liquid European markets. The second would be based on three alternative thresholds that we believe would appropriately determine the level of U.S. interest in a company's securities in the context of the modern, international securities market.

In each case, a company could not deregister until it has filed two annual reports on Form 20-F following its most recent registration of securities (whether in connection with a listing or a non-employee public offering), so that there would be adequate time to attenuate the impact of a voluntary step taken by the company to access the U.S. public market.

Under the first alternative, issuers would be required to meet a number of requirements that would ensure the protection of U.S. investors following deregistration:

- Publication of financial statements in accordance with IFRS;
- Reporting under standards meeting IOSCO recommendations;
- A principal trading market on a Designated Offshore Securities Market (as defined in Regulation S under the Securities Act);
- A principal trading market with an average daily trading volume for the market of at least $1 billion;

1 Technically, the proposal would allow an issuer to terminate registration under Section 12(g) of the Exchange Act or a reporting obligation under Section 15(d) of the Exchange Act. For the sake of simplicity, we refer in this letter only to termination of registration.

- Less than 5% of its worldwide trading volume on markets in the United States, and at least 55% on a single non-U.S. market;

- A mechanism to allow U.S. retail investors to sell their securities cost-free for six months following deregistration where legally permitted; and

- Transition reporting on corporate governance, accounting standards and tax treatment of U.S. investors.

The second alternative would incorporate three main components designed to measure U.S. investor interest in a practical manner:

- Deregistration would be available if 10% or less of the company's share capital were held in the United States, if 10% or less of the company's shareholders were in the United States or if the company had fewer than 3,000 shareholders in the United States. The use of alternative criteria would be intended to make the system workable for companies from many jurisdictions with different securities registration and ownership reporting systems.

- The U.S. investor thresholds would exclude qualified institutional buyers, employees and directors.

- The rules for counting U.S. investors and the percentage of share capital held in the United States would include workable timing and calculation mechanisms, as well as assumptions where reasonable inquiries do not produce conclusive results.

Under both alternatives, a company that terminates its registration would be immediately eligible for the exemption from reporting provided by Rule 12g3-2(b). As a result, a company would not need to re-establish its exemption from the reporting requirements of the Exchange Act following deregistration, so long as it furnishes its home country documents to the Commission pursuant to Rule 12g3-2(b). To further ensure the protection of U.S. investors, the proposal would call for deregistering issuers to furnish, as a condition to continuing eligibility for Rule 12g3-2(b), English language annual reports containing a brief business description and audited financial statements.

2. Responses to Issues Raised by Commission Staff

During the course of the discussions that have taken place over the past year, we understand that the Commission staff has raised a number of issues that currently lead at least some staff members to be uneasy with the February 2004 proposal. We hope that the reinforced proposal will address the concerns of these staff members. In addition, we believe it would be useful to comment directly on some of the issues raised by the staff.

A. Deregistration of Companies with Large Numbers of U.S. Shareholders

Some members of the staff have expressed unease about the notion that a company with thousands of U.S. shareholders, or with a large percentage of its capital held in the United States, might be permitted to deregister. This is understandable -- for more than

40 years, the test for deregistration has been based on shareholder numbers, and the February 2004 proposal (as well as the current reinforced proposal) would represent a major change.

As understandable as the unease of the staff might be, we believe that it should be overcome in the context of the staff's analysis of the first alternative, for a number of reasons. Most importantly, the proposal provides substantial post-deregistration protection, while the existing rules provide none. In our opinion, it is more important to ensure the protection of U.S. investors following deregistration than it is to ensure that only a small number of investors would be affected by deregistration (particularly where the small number of investors would have no protection at all).

In addition, if investors do not wish to hold the securities of a company whose securities are not registered with the Commission, they are free to sell those securities. Deregistration effectively amounts to a change in the nature of the investment of a security holder. It is hardly the only circumstance in which a significant change can occur. A company can change the nature of its business, make a substantial acquisition or merge with another company, without the consent of at least a significant minority of its shareholders. Deregistration is in our view a less radical change if it is effected in circumstances that provide the protections of the current proposal. In addition, by providing U.S. retail investors with a cost-free sales mechanism for six months on a highly liquid, transparent market whenever legally possible, and a transition report requirement for two years, the proposal gives U.S. retail investors the practical ability to withdraw from their investment on an informed basis within generous time periods.

Finally, all reasonably practicable structures carry the risk that a company with a large U.S. shareholder base might deregister. As discussed below, a rule based on the number of U.S. shareholders or the percentage of share capital held in the United States must be accompanied by practical counting rules and assumptions to be workable in practice. When these rules and assumptions are applied, by definition a certain number of U.S. shareholders will not be counted (because, for example, the rules will need to provide workable assumptions for a case where a broker or bank is unable or unwilling to provide information). As a result, a workable rule based on the level of a company's U.S. shareholder base suffers potentially from the same "defect" that the Commission staff has cited as an obstacle to the European proposal.

B. Use of the Proposed Rule by Companies Outside Europe

We understand that some members of the Commission staff have viewed the February 2004 proposal as potentially inequitable, because it could be used most easily by European issuers but not by issuers from many other countries.

We believe that the current proposal overcomes this difficulty, as it provides detailed criteria (under the second alternative) that can be used by companies from any jurisdiction. The second alternative also presents the advantage of incorporating multiple thresholds so that companies with a variety of home country securities registration and ownership reporting systems can use it on a practical basis.

At the same time, we believe that it is appropriate for the Commission to recognize features of specific foreign regulatory regimes that provide substantial post-deregistration protection to U.S. investors. The European organizations are proposing a structure that emphasizes the protections available in Europe, because that is the system that they know best and that is directly applicable to their members. We encourage the Commission to determine whether the regulatory systems of other jurisdictions might appropriately form the basis for one or more additional alternative systems. In any event, we do not see any particular value in a "one size fits all" approach to the deregistration problem.

3. Analysis of the Proposal

A. The First Alternative

The most significant feature of the current proposal by the European organizations is the conception and reinforcement of standards designed to ensure that U.S. investors will receive substantial protection following deregistration, in the form of quality reporting, liquidity, market regulation, price determination, exit possibilities and transition reporting. While by definition these protections are not identical to those provided by Exchange Act registration and reporting, we believe that they are nonetheless substantial, and that they are an appropriate test to use to determine whether a foreign company can deregister its securities.

(i) Reporting under IOSCO Standards and IFRS Accounting Principles

As was the case in the February 2004 proposal, deregistration under this alternative would be contingent upon a company being required by its home country rules and regulations to publish reports and financial information under quality, internationally recognized standards. We believe it would be appropriate for the Commission to recognize these standards as providing substantial protection. Form 20-F itself is based on IOSCO principles (except with respect to financial statements), so this requirement would not represent a substantive change for deregistering companies. The Commission staff has on many occasions announced the objective of achieving convergence with IFRS so that in the future mutual recognition might be possible. This is an implicit recognition of the quality of IFRS as a body of accounting principles. As a result, we believe it is appropriate to rely on IFRS reporting as an indicator of quality financial reporting, in a deregistration context that is well short of mutual recognition.

We have proposed that this alternative be available only to companies that are required by their home country rules to publish IOSCO reports and IFRS financial statements. Voluntary compliance with these standards would not be sufficient, particularly because the absence of a home country regulator to review the reports and financial statements might call into question the degree of a company's compliance. In addition, it would be difficult to pursue remedies against a company that voluntarily complies initially, and that stops complying after a period of time.

In the proposed definition of "IFRS," we have used the definition proposed by the Commission in its proposal to facilitate first time reporting under IFRS,[2] with one important exception. The Commission's proposal defined IFRS as the accounting standards adopted by the International Accounting Standards Board (IASB). European companies are not, however, required to comply with the IASB's standards until they are endorsed by the European Commission.[3] Because the proposal is based on a company being "required" by home country rules to report under IFRS, rather than voluntary compliance, the definition must be consistent with the legal requirement imposed on companies.

(ii) Liquid, Designated Offshore Securities Market

To reinforce the protection of U.S. investors, the current proposal would allow deregistration under the first alternative only when a company's principal trading market provides sufficient liquidity to ensure that U.S. investors will have a meaningful opportunity to sell their securities after deregistration and is governed by an effective body of regulation so as to ensure transparency.

To measure the effectiveness of regulation, we have proposed that the Commission limit deregistration under the first alternative to companies whose principal trading market is a "Designated Offshore Securities Market" as defined in Regulation S under the Securities Act. To meet this definition, a market must meet criteria that include, among other things, association with a generally recognized community of financial institutions with an established operating history, oversight by a governmental or self-regulatory body, oversight by an existing body of law and systems to ensure transaction reporting, public communication of quotations and organized clearance and settlement. Markets must apply to the Commission on a case-by-case basis to be considered "Designated Offshore Securities Markets." See Securities Act Rule 902(b).

In addition, deregistration under the first alternative would only be available if the average daily trading volume of the principal trading market for the company's securities is at least $1 billion. This will ensure that the market provides substantial liquidity for U.S. investors who wish to sell their securities.

(iii) Trading Volume Threshold

The trading volume proposal made by the European organizations in February 2004 has been at the center of the debate over deregistration during the past year. We believe this is unfortunate, as we believe it has obscured the importance of the significant proposals

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2 See Release Nos. 33-8397 (and 8397A); 34-49403 (and 49403A); International Series Release No. 1274 (and 1274A); File No. S7-15-04.

3 The endorsement process involves consideration by the European Commission of whether the international accounting standards are contrary to certain EU Directives and are conducive to the European public good as well as whether they meet the criteria of understandability, relevance, reliability and comparability required of the financial information needed for making economic decisions and assessing the stewardship of management. Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, Official Journal L. 243, 11/09/2002 P. 0001-0004 ("Regulation (EC) No. 1606/2002").

designed to ensure protection of U.S. investors following deregistration, which have been reinforced in the current proposal.

We believe that the trading volume test should be regarded as an important component of post-deregistration protection, and not just as a measure of U.S. interest in a company's securities (clearly there can be reasonable debate as to what the best measure of U.S. interest is, but in our view that is not the essential question).[4] When a company's U.S. trading volume is very low, it means that after deregistration the price determination mechanism for the company's securities will remain essentially undisturbed. If its U.S. trading volume is high, then deregistration would disrupt the pricing mechanism, and U.S. investors would be significantly affected by deregistration. We believe it is important for the Commission to take this crucial difference into account.[5]

In the proposal, we have incorporated the definition of "substantial U.S. market interest" from Regulation S, substituting a threshold of 5% of U.S. trading volume for the 20% level in Regulation S. To ensure that trading volume is tested over a substantial time period (and to ensure that companies do not precipitously delist securities to bring themselves below the threshold), we have proposed that trading volume be measured over a period of two fiscal years.

There has been some discussion of whether the 5% threshold should be reduced to 3% or even lower. We believe this is neither necessary nor appropriate. A 5% level is sufficient to ensure that deregistration will not disrupt the price determination mechanism for a company's shares, and a 3% threshold would provide minimal additional protection, if any. The only practical impact of the change would be to limit the number of companies that would be eligible for deregistration. We believe that the number of eligible companies should not be used as a factor to determine the appropriate threshold (or any other standard in the modified rules), because it bears no relation to the degree of protection of U.S. investors.[6]

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4 While we believe that U.S. investor interest should not be the primary issue, we note that Congress appears to consider trading volume to be a relevant criterion in the determination of U.S. interest, and one that may be used by the Commission as an alternative to the number of investors. In Section 12(h) of the Exchange Act, the Commission is granted the authority to grant exemptions from, among other things, the registration requirements of Section 12(g), if it finds that such action is not inconsistent with the public interest or the protection of investors, determined on the basis of "the number of public investors, amount of trading interest in the securities … or otherwise."

5 We note as well that the current proposal would require a company to provide in the United States all material information that it publishes in its home country pursuant to Rule 12g3-2(b). As a result, the information on which the company's home country market price is based would be made available in the United States even after deregistration.

6 Some commentators have suggested that the 5% trading volume threshold would effectively allow the large majority of European companies to terminate their SEC registration. While we believe that, even if true, this would not be relevant to the analysis, we note that the Citigroup study that accompanies the letter from the European organizations shows that many of the largest companies in France, Germany and the United Kingdom would not be eligible to deregister on the basis of this test, and that in fact the average U.S. trading volume levels among the largest companies in the United Kingdom and Germany are above the 5% level.

(v) Cost-free Sales Facility

The current proposal would require that the company offer to repurchase the securities held by U.S. retail investors (in which case the repurchase transaction would have to comply with U.S. tender offer regulations), or that they make available to U.S. retail investors a brokerage facility for at least six months, with the company paying brokerage commissions. The company would also be required to pay all costs of conversion of American Depositary Receipts to ordinary shares, as well as currency conversion commissions. The only exception would be in cases where making a repurchase offer or providing a brokerage facility exclusively to U.S. retail investors would violate a company's home country law (for example, a law that requires companies to treat all shareholders equally).[7] In such a case, the company would be required to implement an alternative arrangement providing a similar economic benefit if that is possible under local law.

The key purpose of this provision is to provide U.S. retail investors with a choice as to whether they wish to maintain their investments following deregistration. This provides them with important protection, as it eases the transition for them and ensures that shareholders (and particularly ADR holders) will not be discouraged from selling in an unfamiliar market. The proposal would not extend the cost-free sales facility to qualified institutional buyers, as they are typically able to access foreign markets easily and, as a result, do not need this type of protection.

(v) Transition Reporting

To enable U.S. investors to make an informed decision as to whether they wish to retain their investments following deregistration, companies using the first alternative would be required to submit to the Commission, at the time of deregistration and in each of the first two years following deregistration, a report indicating how the company's home country corporate governance requirements differ from key provisions of the Sarbanes-Oxley Act of 2002 (such as the requirement to maintain an independent audit committee or a code of ethics, or to evaluate internal controls), what the material differences are between the company's accounting principles and U.S. generally accepted accounting principles (on a qualitative basis) and what the material tax consequences of a U.S. investor's investment would be.

We believe that the requirement to provide a transition report substantially reinforces the post-deregistration protection of the current proposal. It allows investors to understand to what extent their investment is different after deregistration compared to the investment that they made prior to deregistration.

B. The Second Alternative

The second alternative provides criteria of general applicability to all foreign private issuers. While we believe that post-deregistration protection is the most important

7 We believe that making such a facility available and paying the commissions would be possible under the laws of many of the largest European jurisdictions, although companies would need to make an assessment on a case-by-case basis at the time they contemplate terminating their registration.

question for all issuers, we recognize that it is impossible to define criteria analogous to those of the first alternative that could be applied to all issuers worldwide. As a result, the general criteria necessarily emphasize the level of U.S. investor interest in an issuer's securities. Nonetheless, certain of the protective elements of the first alternative – implementing a cost-free sales facility for retail investors where legally permitted and providing a transition report – could be applied more generally to all issuers if the Commission determines that this would be appropriate.

The second alternative incorporates a test of U.S. investor interest with multiple, alternative thresholds designed to accommodate the wide variety of home country regimes that apply to the securities of foreign companies listed in the United States. It also focuses on the classes of U.S. investors that have the greatest need for the protections of the U.S. securities laws under the Commission's traditional standards. Finally, it incorporates counting rules and assumptions that would make it practicable to determine whether companies meet the designated thresholds.

(i) The Multiple Threshold Test

One of the greatest difficulties with the current system is that many issuers are unable to determine whether they have fewer than 300 shareholders resident in the United States. The current rules are drafted as if all companies maintained shareholder registers that could be consulted at any time. In reality, very few companies outside the United States maintain such systems. In some countries shares are issued in bearer form. In others they are evidenced only by book-entry in a centralized clearance system, the members of which hold securities in "street name" under strict banking secrecy laws. Some countries require intermediaries to provide information regarding the beneficial owners of securities, while others do not. Some countries require large shareholders to file beneficial ownership declarations (similar to Schedule 13G or 13D), while others do not.

As a result, the ability of a company to determine the level of U.S. interest in its securities is effectively based on a number of essentially random factors – namely the system of share registration, clearance and reporting that the company's home country has chosen to implement. In addition, some tests favor small companies over large companies or vice versa. For example, a small company might be more easily able to estimate the number of its U.S. shareholders with a higher degree of confidence than a large company with hundreds of thousands of shareholders worldwide, while the large company might more easily be able to determine the relative weight of U.S. investors in the overall composition of its shareholder base.

We believe that the ability of a company to benefit from the deregistration rules should depend on the Commission's U.S. investor protection mandate, and not on the random fact of its own home country securities holding system or its relative size. As a result, we do not believe that there can be any single option that depends on any method of shareholder calculation. Instead, the Commission should include several options. As a result, we propose that the Commission adopt three alternative thresholds that provide the flexibility to accommodate all types of issuers. Under this alternative, a company could terminate its registration if:

- 10% or less of its share capital were held by U.S. investors, or
- 10% or less of its shareholders were U.S. residents, or
- Fewer than 3,000 U.S. residents were holders of its shares.

(A) Percentage of Capital

We believe it would be appropriate for the Commission to allow companies to deregister based on the determination of the percentage of their share capital held in the United States. This is a test that has been used by the Commission to determine U.S. investor interest in a company's securities in the context of cross-border rights offerings and business combination transactions, and we believe it is also an appropriate measure in the context of deregistration. See Securities Act Rules 801 and 802; Exchange Act Rule 14d-1(c).

In addition, companies (particularly the largest ones) can relatively easily make assumptions regarding the last few percentage points of their share capital with a relatively high chance of those assumptions being accurate (see the discussion below with respect to counting rules and assumptions). Moreover, based on our experience in the context of rights offerings and business combinations, financial intermediaries and commercial information services are often more easily able to provide reliable figures about the overall number of shares held in a particular country than they are with respect to the number of accounts in a particular country. For companies from many countries, counting every last one of a company's shareholders is an impossible undertaking, and it is a substantial undertaking even for companies with direct share registration systems.

We have proposed a 10% threshold based on the use of a similar threshold in the context of business combinations and rights offerings. Unlike the rules applicable in those contexts, however, we have not proposed to eliminate large shareholders in determining whether the 10% threshold is met. The requirement to eliminate large shareholders has made it very difficult to implement the 10% threshold in business combinations and rights offerings, as it substantially reduces the margin of error in connection with the calculation. The transactions contemplated by the business combination and rights offering rules involve offers and sales of unregistered securities in the United States public market, or tender offers in which shareholders must determine whether the offered price represents a fair control premium. We believe that the stakes are not the same in the context of deregistration, and that accordingly the deregistration rules can be made more flexible.

(B) Percentage of Shareholders

We also believe that it would be appropriate for the Commission to allow companies to deregister based on the determination of the percentage of their shareholders that are resident in the United States. In a world where the largest companies have hundreds of thousands of shareholders, a threshold based on an absolute number of U.S. shareholders (even if it were substantially increased from the present level) could result in companies being unable to terminate their registration even where 1% or less of their shareholders are U.S. residents.

We recognize that a test based on the percentage of shareholders that are U.S. residents requires a company to determine the number of its shareholders in the United States and elsewhere in the world. With respect to the determination of United States shareholders, we believe that changing the current system to include more appropriate counting rules and assumptions could make the calculation feasible for a large number of companies. With respect to the determination of shareholders outside the United States, companies should be given considerable flexibility, because the failure to count non-U.S. shareholders would reduce the denominator and effectively overstate the U.S interest in a company's shares. Accordingly, there would be no risk that undercounting non-U.S. shareholders would result in companies deregistering when they should not properly be entitled to do so.

We have proposed that the threshold percentage be set at 10%. When a company's U.S. shareholders represent 10% or less of all of its shareholders worldwide, we believe that the United States has a minimal interest in requiring that company to continue reporting under U.S. standards.

(C) Number of Shareholders

We also believe it would be possible to maintain a test based on the absolute number of a company's U.S. shareholders so long as appropriate counting rules and assumptions are adopted. When the number of U.S. shareholders is below a certain level, the United States does not have a substantial interest in regulating the financial and business reporting of that company, as the impact of that company in the United States capital markets is minimal.

We believe that 3,000 shareholders would be an appropriate figure in the context of the current global capital market. The current threshold of 300 U.S. shareholders is decades old. Since 1964, when the rules were first adopted, substantial market changes have resulted in a significant increase in the number of investors owning shares in the United States. In a world with electronic markets, internet trading and widespread interest in the markets, the figure of 300 U.S. investors is out of date, and does not reflect a significant degree of U.S. interest in a company's securities.

(iii) Exclusion of QIBs and Employees

We believe that the number of investors and the percentage of share capital held in the United States should be counted without regard to any U.S. investor that a company reasonably believes to be a qualified institutional buyer,[8] and without regard to

8 The determination of whether an investor is a qualified institutional buyer would be made after the application of the counting rules and assumptions. As a result, the nature of each investor that holds its securities through a nominee would be evaluated separately, regardless of whether the nominee itself is a qualified institutional buyer. In addition, in applying the exclusion to the percentage of capital and percentage of shareholder tests, we would only exclude qualified institutional buyers resident in the United States, and only from the numerator of the calculation, because the relevant question in evaluating investor protection is what percentage of a company's overall shareholder base is made up of U.S. retail investors.

employees who acquired their securities in connection with an organized employee share purchase or stock option program.

As the Commission has made clear since the adoption of Rule 144A under the Securities Act in 1990, qualified institutional buyers do not need the same degree of protection as other investors. It would be inappropriate for the presence of a large number of qualified institutional buyers among a company's shareholders to trigger a registration requirement, when an unregistered company could sell an unlimited amount of its securities to an unlimited number of qualified institutional buyers in a Rule 144A transaction. While Rule 144A is a Securities Act exemption, the ability of companies to use Rule 12g3-2(b) following a Rule 144A offering effectively creates an Exchange Act exemption for companies with an unlimited number of qualified institutional buyers among its shareholders.

Similarly, employee stock ownership should be treated differently from ownership by the general public. If employees were not excluded from the determination of the number of U.S. shareholders for purposes of the deregistration rules, companies might have incentives not to make their securities widely available to employees. Moreover, employees have a special relationship with a company that is not present for the general public. The Commission has recognized this, as it permits a company to offer its securities to an unlimited number of employees pursuant to Rule 701 under the Securities Act or in a transaction not involving a public offering. As is the case for qualified institutional buyers, it would not make sense for the presence of a large number of employees among a company's shareholders to trigger a registration requirement, when an unregistered company could offer its shares to the same number of employees without registration.

(iv) Counting Rules and Assumptions

The current rules based on an absolute number of shareholders have proven difficult for many companies not only because of the low number, but also because of the structure of the look-through rules. To make the rules workable, it is essential that they provide a mechanism that permits companies to count their shareholder base in a reasonably practicable manner. Otherwise, companies may be eligible for deregistration but unable to prove their eligibility, and thus unable to use the deregistration right that should be available.

The issue of counting shareholders of a foreign private issuer is complex. As noted above, the securities registration systems and ownership reporting rules of many foreign countries differ from those of the United States, as well as from one another. The complexity involved has led to mixed results in the application of counting rules in the context of cross border rights offerings and business combinations, particularly for the "Tier 1" exemptions that involve low thresholds (and thus low margins for error).

In the draft rule proposal attached to this letter, we have provided an example of counting rules that are structured in the same general manner as Rule 800 under the Securities Act, with improvements designed to address the problems that have been encountered in the context of cross border rights offerings and business combinations. Whether the Commission chooses to retain this structure or to adopt a different structure, we believe it is essential for the counting rules to follow a number of important principles:

- Issuers should only be required to "look through" intermediaries in a limited number of jurisdictions. A significant defect of the current standard for deregistration in Rule 12g3-2(a) is the requirement that companies "look through" intermediaries worldwide. This makes counting shareholders extremely burdensome, without significantly improving the accuracy of the results. We believe that the standard found in Rule 800 – "looking through" intermediaries in the United States and the jurisdictions of incorporation and the principal trading market – strikes the appropriate balance by ensuring a reasonable level of accuracy without imposing undue burdens on issuers.[9]

- The rules should provide flexibility regarding the date as of which information is furnished. In our experience, intermediaries often are unable or unwilling to provide information as of a specific date. We propose that issuers be allowed to count responses from intermediaries giving positions as of a date 60 days before or after the end of a fiscal year.

- The rules must provide reasonable assumptions that can be used when financial intermediaries are unable or unwilling to provide the requested information. The appropriate assumptions will depend on which of the multiple thresholds is being applied. As an example (based on current Rule 800), the draft rule provides that, for purposes of counting the percentage of share capital held in the United States, a company would assume that the shares held through an intermediary that fails to provide information are beneficially owned by customers in the jurisdiction where the intermediary has its principal place of business. It provides similar assumptions to be used with respect to the other thresholds.

C. General Conditions

(i) Eligibility only after two annual reports on Form 20-F are filed

We believe it is fair that a company be required to comply fully with U.S. reporting obligations for a period of time after it voluntarily accesses the U.S. capital markets, whether through a listing or a non-employee public offering.

(ii) Immediate availability of Rule 12g3-2(b)

We believe that it is not appropriate to require companies to test their eligibility for deregistration more than once, as trading in the home markets of companies (including over the internet) can cause significant changes in the composition of their security holder bases.

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9 In addition, in determining the threshold based on the percentage of a company's shareholders resident in the United States, a company should properly be required to count U.S. shareholders determined by "looking through" intermediaries in jurisdictions in which a company's worldwide shareholder base is counted. A similar inquiry would not be necessary for the percentage of capital test, because the only relevant information is the percentage of the class held by U.S. residents, and a rule modeled after Securities Act Rule 800 would already require a company to take into account information as to U.S. holdings obtained from any source other than those that a company is required to consult.

(iii) Continuing English language annual report requirement

The purpose of this requirement is to ensure that U.S. investors who choose to retain their investments in the securities of a deregistering company continue to have access to essential information about the company, published in the English language. For companies deregistering under the first alternative (companies that provide substantial post-deregistration protection), this requirement will be largely redundant, as those companies will be required to report under IOSCO standards and IFRS accounting principles. However, this requirement ensures that the reports will be made available to U.S. investors in English. It also applies to companies deregistering under the second alternative, to ensure at a minimum that key information remains available to U.S. investors.

We have proposed that the English language annual report be made available to U.S. investors through submission to the Commission pursuant to Rule 12g3-2(b). The Commission could also consider requiring that the report be published on the company's web site. We have not included such a requirement in our proposal, because traditionally the Commission generally has not required web site publication of documents that are submitted to it (other than through publication by the Commission itself of documents submitted through the EDGAR system), although it might be appropriate for the Commission to reconsider this at the same time as it considers the proposal for new deregistration rules. We have also considered whether this document should be filed under the EDGAR system, but we believe this would be inappropriate, because it would be unduly burdensome for a company that is not registered under the Exchange Act to be required to maintain a system for making EDGAR filings of documents that ordinarily will contain significant numbers of graphics, or to keep abreast of evolving technical standards for EDGAR filings.

4. Conclusion

Since 1964, the standard for deregistration has revolved around a single question: what is the level of U.S. investor interest in a company's securities, as measured by the number of U.S. shareholders? At the time, this was appropriate, as companies ordinarily would not have exceeded the threshold without voluntarily taking steps to access the U.S. investor base. In addition, markets outside the United States did not provide disclosure, financial reporting or liquidity comparable to that of the United States.

More than 40 years later, the markets have evolved to the point where the Commission should be evaluating the protections afforded by foreign markets in determining how well-protected U.S. investors would be if a company were to deregister. The substantially different markets of today demand a new type of inquiry, based on substantially different standards. We strongly recommend that the Commission recognize the need to evaluate the protections afforded by markets outside the United States, and that it consider adopting the current, reinforced proposal.

We are pleased to be able to participate in the dialogue regarding the deregistration issue, and we hope that our contribution has been of assistance to the Commission. If members of the Commission staff have questions or would like to discuss any aspects of the present proposal, they can contact the undersigned or Russell H. Pollack at 011-33-1-40-74-68-00.

Sincerely yours,

Andrew A. Bernstein

cc: The Honorable Paul S. Atkins, *Commissioner*
The Honorable Roel C. Campos, *Commissioner*
The Honorable Cynthia A. Glassman, *Commissioner*
The Honorable Harvey J. Goldschmid, *Commissioner*

Alan L. Beller, Director, *Division of Corporation Finance*
Giovanni T. Prezioso, *General Counsel*
Ethiopis Tafara, *Director*, *Office of International Affairs*
Paul M. Dudek, *Office of International Corporate Finance*

Commissioner Charlie McCreevy, *European Commission*
David Wright, *Director, Financial Markets, DG Internal Market*
Arthur Docters van Leeuwun, *Commission of European Securities Regulators*

Edward F. Greene and Timothy Harvey-Samuel,
Citigroup

Annex A

Text of Proposed Rule Modifications

The proposed modification would be implemented primarily through the adoption of a new term, which we have called a "Foreign Issuer Eligible to Deregister" or "FIED." Because the current rules for foreign private issuers are drafted mainly as exemptions from the general rules applicable to domestic issuers, the precise modifications to be put into place will depend on whether the Commission decides to modify the standards applicable to domestic issuers at the same time as it modifies the standards applicable to foreign issuers. For purposes of the proposal set forth below, we have assumed that only foreign issuers will be affected by the modifications.

1) Modifications to Rule 12g3-2

a) Rule 12g3-2(a) would be replaced in its entirety to read as follows:[10]

(a) Securities of any class issued by any foreign private issuer shall be exempt from Section 12(g) of the Exchange Act if at the end of any fiscal year (i) the class has fewer than 3,000 holders resident in the United States, or (ii) 10% or less of the holders of the securities of the class are persons resident in the United States, or (iii) 10% or less of the class is held by persons resident in the United States. This exemption shall continue until the next fiscal year end at which none of these three conditions is satisfied. For the purpose of determining whether a security is exempt pursuant to this paragraph:[11]

(1) For purposes of determining the number of persons resident in the United States that hold securities of the relevant class, the determination shall be made as provided in Exchange Act Rule 12g5-1, except that securities held of record by a broker, dealer, bank or nominee for any of them shall be counted as held in the United States by the number of separate accounts for which the securities are held, determined on the following basis:

(A) inquiries as to the number of separate accounts for which the securities are held may be limited to brokers, dealers or banks located in (i) the United States, (ii) the subject company's jurisdiction of incorporation, (iii) the jurisdiction that is the primary trading market for the securities as to which the inquiries are being made, if different from the subject company's jurisdiction of incorporation, and (iv) for purposes of determining whether 5% or less of

10 Corresponding changes would be needed to rules, such as Securities Act Rule 800, that cross-reference Rule 12g3-2(a).

11 The counting rules represent an example based on the current structure of Rule 800. We recommend that, regardless of the structure used, the counting rules follow the principles set forth in the body of this letter.

the holders of the securities of the class are persons resident in the United States, any jurisdiction in which a similar inquiry is made for purposes of determining the number of holders of such securities that are not persons resident in the United States;

(B) responses to inquiries made to brokers, dealers or banks giving information as of a date within 60 days before or after the end of the subject company's fiscal year may be relied upon by the subject company as if such information were given on the date on which such fiscal year ends;

(C) if, after reasonable inquiry, the issuer is unable to obtain information regarding the number of separate accounts for which the securities are held by a broker, dealer or bank, the issuer may assume that such securities are held by such broker, dealer or bank for its own account and for any separate accounts as to which information is provided; and

(D) securities shall be counted as owned by U.S. residents when publicly filed reports of beneficial ownership or information that is otherwise provided to the subject company indicates that the securities are held by U.S. residents.

(2) For purposes of determining the percentage of a class of securities held by persons resident in the United States as of the end of any fiscal year, the determination shall be made as provided in Exchange Act Rule 12g5-1, except that securities held of record by a broker, dealer, bank or nominee for any of them shall be counted as held in the United States by the persons for which the securities are held, determined on the following basis:

(A) inquiries as to the residency of the persons for which the securities are held may be limited to brokers, dealers or banks located in (i) the United States, (ii) the subject company's jurisdiction of incorporation, and (iii) the jurisdiction that is the primary trading market for the securities as to which the inquiries are being made, if different from the subject company's jurisdiction of incorporation;

(B) responses to inquiries made to brokers, dealers or banks giving information as of a date within 60 days before or after the end of the subject company's fiscal year may be relied upon by the subject company as if such information were given on the date on which such fiscal year ends;

(C) if, after reasonable inquiry, the issuer is unable to obtain information regarding the residency of some or all of the persons for which the securities are held by a broker, dealer or bank, the issuer may assume that such securities are held by persons resident in the jurisdiction in which the broker, dealer or bank has its principal place of business; and

(D) securities shall be counted as owned by U.S. residents when publicly filed reports of beneficial ownership or information that is otherwise provided to the subject company indicates that the securities are held by U.S. residents.

(3) For purposes of this Rule 12g3-2(a), the number of persons resident in the United States shall be determined without taking into account any person resident in the United States that the issuer reasonably believes is a "qualified institutional buyer" (as defined in Rule 144A under the Securities Act), or who is a director of the relevant issuer or one of its affiliates, or who received his or her securities in connection with an offering made by the issuer pursuant to Rule 701 under the Securities Act, pursuant to an employee share purchase or stock option plan of the issuer or one of its affiliates in a transaction otherwise exempt from registration under the Securities Act, or pursuant to an offering by the issuer registered under the Securities Act on Form S-8. The determination pursuant to this paragraph (3) shall be made after the application of paragraph (1) or (2), as the case may be.

[current Rule 12g3-2(a)(2) would be renumbered Rule 12g3-2(a)(4)]

b) Rule 12g3-2(d) would be deleted and would be replaced by the following:

(d) The exemption provided by paragraph (b) of this rule shall not be available for the securities of a foreign private issuer that has had any securities registered under Section 12 of the Act, or a reporting obligation (suspended or active) under Section 15(d) of the Act (other than arising solely by virtue of the use of Form F-7, F-8, F-9, F-10 or F-80), in each case on a date subsequent to [effective date of this rule], unless such foreign private issuer has terminated its registration and reporting obligation pursuant to Rule 12g-4(c) in respect of all classes of securities to which such registration or such reporting obligation previously applied.

c) A new Rule 12g3-2(e) would be added, which would read as follows:

(e) A foreign private issuer that terminates its registration and reporting obligation pursuant to Rule 12g-4(c), and that claims an exemption from Section 12(g) of the Act pursuant to Rule 12g3-2(b), shall furnish to the Commission:

(i) on at least an annual basis, a report or similar document (in any such case an "annual report") in the English language, containing at a minimum the information specified in Rule 144A(d)(4) under the Securities Act (except that the annual financial statements must be audited); and

(ii) if the foreign private issuer files a certification on Form FIED on the basis of Rule 12g-4(f)(iii)(1), on the date of filing of such Form FIED, and concurrently with each of its first two annual reports furnished to the Commission subsequent to such termination, a supplemental report containing the information required by the Commission from time to time to be submitted on Schedule FIED.

2) Modifications to Rule 12g-4[12]

a) Rule 12g-4(a)(2) would be deleted.

b) A new Rule 12g-4(c), (d), (e) and (f) would be added, which would read as follows:

(c) Termination of registration of a class of securities of a Foreign Issuer Eligible to Deregister shall take effect 90 days, or such shorter period as the Commission may determine, after a foreign private issuer certifies to the Commission, on Form FIED,[13] that it is a Foreign Issuer Eligible to Deregister.

(d) The duty of the Foreign Issuer Eligible to Deregister to file reports pursuant to Section 13(a) shall be suspended immediately upon filing a certification on Form FIED; *provided, however*, that if the certification on Form FIED is subsequently withdrawn or denied, the issuer shall, within 60 days after the date of such withdrawal or denial, file with the Commission all reports which would have been required had the certification on Form FIED not been filed.

(e) If the issuer files a certification on Form FIED on the basis of Rule 12g-4(f)(iii)(1), then within 30 days after the filing of such certification, such issuer shall:

(i) arrange for all holders of American Depositary Receipts representing its shares to have the right, for a period of at least six months, at their option, to convert their American Depositary Receipts into the issuer's shares at no cost to such holders; and

(ii) either (A) make a cash tender offer for all outstanding shares and American Depositary Receipts of the issuer held by persons resident in the United States (other than persons that the issuer reasonably believes are qualified institutional buyers), or (B) make arrangements with a broker-dealer with a place of business in the United States to execute, on the issuer's principal trading market, sales of shares (including shares resulting from the conversion of American Depositary Receipts) at the prevailing market price in such market, for a period of at least six months, for the account of any person wishing to effect such a sale who is resident in the United States (other than persons that the issuer reasonably believes are qualified institutional buyers), to the extent that such shares or American Depositary Receipts were held by such person at the time the notice described below is first given, with all

12 It is important that the new exemption be placed in a Rule other than Rule 12g3-2, so as to ensure that the relevant issuer would not be required to register as a successor issuer (if the relevant conditions were met) pursuant to Rule 12g-3.

13 If the Commission chooses to adopt the proposed structure, Form FIED could be based on the structure of current Form 15, modified as appropriate. We have not included a draft of Form FIED with this letter.

brokerage commissions and other execution costs (including commissions for the conversion of sale proceeds to United States dollars) paid by the issuer. Notice of any such arrangement with a broker-dealer shall be provided by the issuer by publication in English in a United States newspaper or newspapers and, in the case of holders of American Depositary Receipts, by delivery to the depositary for transmittal to beneficial owners,[14] or (C) where the two foregoing options would be prohibited by the laws of the company's home country, to make such other arrangements, if any, as may be permitted under such laws to provide such persons the ability to sell such shares during such six-month period without incurring costs relating to execution or currency conversion (or with such costs minimized to the extent reasonably possible, if a cost-free arrangement cannot reasonably be provided under the laws of the company's home country).

(f) *Definitions*. The following terms shall have the meanings indicated when used in this Rule 12g-4:

Foreign Private Issuer Eligible to Deregister means a foreign private issuer that meets the following requirements:

(i) Since the effective date of the last registration statement of the foreign private issuer that became effective under the Securities Act or the Exchange Act (other than a registration statement on Form S-8), the issuer has filed with the Commission at least two annual reports on Form 20-F;

(ii) Such foreign private issuer has filed all annual reports on Form 20-F and Form 6-K required to have been filed pursuant to Section 13(a) of the Act with respect to the relevant class of securities, for the shorter of its most recent three fiscal years, or the period since the issuer became subject to such reporting obligation; and

(iii) Either of the following conditions applies with respect to such foreign private issuer:

(1) Such foreign private issuer is terminating its reporting requirement or registration with respect to a class of equity securities, and:

(A) is required, under the laws and regulations of its home country, to publish annual reports under standards meeting at a minimum the recommendations of the International

14 The Commission should either state its view in the proposing release that making a brokerage facility of this type available would not be a tender offer subject to Section 14(e) of the Exchange Act, or provide appropriate relief from the requirements of Regulation 14E relating to prompt payment and purchases of securities outside the offer.

Organization of Securities Commissions;

(B) is required, under the laws and regulations of its home country, to publish consolidated financial statements at least annually, prepared either in accordance with United States generally accepted accounting principles or in accordance with IFRS;

(C) has as the principal trading market for the class of securities as to which such termination is being made, a Designated Offshore Securities Market (as defined in Rule 902 under the Securities Act) with an average daily trading volume during the twelve months ending with the month most recently preceding such termination of at least $1 billion or the equivalent in any other currency; and

(D) has no "substantial U.S. market interest" (as defined in Rule 902 under the Securities Act) with respect to each class of securities as to which its registration or reporting requirement is being terminated, with 5% being substituted for 20% in the definition of "substantial U.S. market interest," and had no "substantial U.S. market interest," determined on the same basis, except with the calculation based on the issuer's second most recent fiscal year; or

(2) Such foreign private issuer is exempt from Section 12(g) of the Exchange Act, pursuant to the exemption provided by Rule 12g3-2(a) under the Exchange Act.

Home country has the meaning specified in Form 20-F.

IFRS means the International Financial Reporting Standards (i) published by the International Accounting Standards Board, or (ii) endorsed by the European Commission pursuant to Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, Official Journal L. 243, 11/09/2002 P. 0001-0004 (or any successor regulation thereto).

Qualified institutional buyer has the meaning specified in Securities Act Rule 144A. An issuer may determine its reasonable belief as to the status of a person as a qualified institutional buyer in the manner specified in Securities Act Rule 144A.

3) Modifications to Rule 12h-4

a) Rule 12h-4(b)(2) would be deleted and replaced by the following:

(2) Any class of securities of a foreign private issuer, to the extent such foreign private issuer has terminated its registration and reporting obligation pursuant to Rule 12g-4(c) in respect of all classes of securities to which such registration or such reporting obligation previously applied.

4) <u>New Schedule FIED</u>

Foreign private issuers required to submit information on Schedule FIED with an annual report or other similar document (an "annual report") pursuant to Rule 12g3-2(e) would be required to provide the following information:

a) A statement as to whether such issuer:

    i) Was required by its home country laws, rules or regulations to have maintained, at the end of the period covered by such annual report, disclosure controls and procedures (as defined in Rule 13a-15(e) or Rule 15d-15(e) under the Exchange Act);

    ii) Was required by its home country laws, rules or regulations to have published a report of management in the issuer's internal control over financial reporting for the period covered by such annual report, meeting the requirements of Item 15(b) of Form 20-F, stating separately whether such report was required to have been the subject of an attestation report of the issuer's registered public accounting firm, as contemplated in Item 15(c) of Form 20-F (if either of these conditions is not met, the issuer shall describe briefly any report that it was required to publish that covers the issuer's internal control over financial reporting and any related attestation of its registered public accounting firm, describing the material differences compared with the report contemplated in Item 15(b) of Form 20-F or the attestation contemplated in Item 15(c) of Form 20-F, as the case may be);

    iii) Has at least one audit committee financial expert (within the meaning of Item 16A of Form 20-F) serving on its audit committee;

    iv) Has adopted a code of ethics applicable to the persons specified in, and meeting the requirements of, Item 16B of Form 20-F;

    v) Has disclosed in its annual report the information regarding principal accountant fees and services contemplated in Item 16C of Form 20-F; and

    vi) Has an audit committee meeting the listing standards for audit committees contemplated in Exchange Act Rule 10A-3 (if such issuer was subject to such listing standards immediately prior to the termination of its registration or reporting obligation).

b) A narrative description of the principal differences between IFRS, as applied by the issuer, and United States generally accepted accounting principles.

c) The information regarding taxation required by Item 10.E of Form 20-F.