MAKINSON COWELL

By e-mail to: rule-comments@sec.gov

Mr. Jonathan G. Katz
Secretary,
Securities and Exchange Commission,
100 F Street, NE,
Washington, DC 20549-9303

February 28, 2006

**Re: Proposed Rule 12h-6 Permitting Foreign Private Issuers to Deregister and Terminate Their Reporting Obligations under the Securities Exchange Act of 1934**

**File Number S7-12-05**

Dear Mr Katz,

We strongly support a change to the current deregistration rules for foreign issuers and the general thrust of the Commission's new proposals. However we believe that the proposals could better meet the Commission's objectives by expanding the benchmarks for the number of U.S. shareholders and percentage of U.S. shareownership, clarification of the route by which previously deregistered companies should transition to the new rules, parallel amendment to the rules on registration and small though important changes to the counting rules.

Makinson Cowell is a capital markets advisory firm that provides independent research and advice to large publicly traded companies based primarily in Europe, including about one-third of the UK's FTSE 100 and companies with their home listings on the other major European exchanges. We have already worked on U.S. deregistration projects with some clients and have ongoing projects with others. Our role has included looking through the nominees to determine the number of U.S. resident record holders. We therefore have some practical perspective, in particular regarding the benchmarks for measuring investor interest and the rules governing the counting process.

## ENABLE A REASONABLE NUMBER OF COMPANIES TO DEREGISTER

Based on our experience, the proposed investor interest benchmarks would not meet the Commission's objectives regarding a reasonable increase in the number of foreign issuers eligible for deregistration.

In part, the proposed benchmarks are based on current levels of U.S. ownership that are reported by foreign issuers under Item 7.A.2 of form 20-F. In the webcast that announced the proposals, the Commission and staff noted that differences in methodology may raise questions as to how comparable the 20-F data are to

the counts required for deregistration. We have observed that because the look-through process is not specifically required for form 20-F and it is time-consuming and expensive to apply, many companies do not use it in answering Item 7.A.2. The 20-F data therefore is likely to exclude U.S. residents holding through banks or brokers. Our experience in counting shows that this can be a sizeable category, resulting in significant differences in the figures reported in the 20-F and those required for deregistration counting purposes. Therefore a significantly smaller number of registrants would be able to deregister under the proposed rules than is suggested by the 20-F data.

Research that we have conducted shows that the average U.S. ownership of a UK FTSE 100 company today is 20%. Another measure is the latest survey published by the Department of the Treasury dated December 2005, which shows that the market value of U.S. holdings of foreign equities stood at $2,560bn in December 2004. This equates to about 15% of total US equity investment. This is about a ten-fold increase since 1980, when U.S. foreign equity investment stood at $250bn or around 1.5%.

EXPAND THE 300 SHAREHOLDER BENCHMARK, EXCLUDE QIBs

The proposed rules would keep the current 300 U.S. shareholder benchmark as one of several available to foreign issuers. In applying the current look-through rules in the context of the scale of today's market, we have found that even foreign issuers at the bottom end of U.S. ownership typically exceed the 300 holder benchmark. The 300 U.S. resident shareholder benchmark was introduced almost 40 years ago, when the scale of U.S. foreign investment was less than a tenth of what it is today.

We have found that many investing institutions today represent dozens of beneficial holders each and that a few of the largest institutions can represent 100s each. In most cases the beneficial holders to which we refer are themselves sophisticated institutional investors, mainly government and corporate pension funds, trust and endowment funds and other financial institutions such as insurance companies and money managers. U.S. resident owner counts therefore typically far exceed the 300 benchmark based solely on Qualified Institutional Buyers (QIBs) rather than on the non-QIBs, who are the primary group meant to be protected.

This experience suggests two changes that should be considered to the proposed rules. First, that the benchmark for the number of resident U.S. shareholders should be increased, and secondly, that QIBs should be excluded when calculating this benchmark. Based on the ten-fold increase in U.S. foreign ownership since 1980, the suggestion made in some recent submissions to the Commission to increase the benchmark to 3,000 owners seems to be a reasonable order of magnitude. The suggestion to exempt QIBs would also seems a reasonable extension of the Commission's philosophy of affording the greatest protection to smaller and individual investors as embodied in Rule 144A, provided that the information set out in Rule 12g3-2(b) is supplied. Our experience suggests that these changes to the benchmark would be consistent with a company's having a relatively small U.S. shareownership given the scale of today's market.

EXPAND THE % SHAREOWNERSHIP BENCHMARK

The Commission should also consider expanding at least one of the benchmarks relating to the percent of a foreign issuer's shares held by U.S. residents to scale it up to reflect the size of international investing today.

Of the total $2560bn that U.S. residents invest in foreign equities, the latest U.S. Treasury survey shows that only 15% is invested in the form of depository receipts. In general we have found that the percentage of shares held as depository receipts is a reasonable proxy for the maximum percentage of shares held by non-QIBs, due to the prohibitive expense and administrative complexity of investing directly overseas. The percentage of the $2560bn being invested by non-QIBs therefore can be assumed to be significantly less than 15%, since a significant portion of the depository receipts are owned by QIBs.

Arithmetically, if we use the 15% of U.S. investment in foreign securities held in depository receipts as a proxy for non-QIBs interest, a maximum of 3% of the typical 20% U.S. holding in a major UK company relates to non-QIBs and 17% or more relates to QIBs. Thus 17+% compares to the 10% benchmark now proposed for a "well-known seasoned issuer". The suggestions made in recent submissions to the Commission to raise the proposed 10% benchmark to 15% therefore seems to be a reasonable range.

## ENSURE AN EQUITABLE TRANSITION TO THE NEW RULES

We are concerned that the treatment of all previously registered companies should be the same. A number of companies have deregistered recently or plan to deregister very soon, possibly in advance of the finalization of the new rules. Such companies should not be disadvantaged particularly as they have properly deregistered under the current more stringent rules.

The proposed rules do not specifically address this situation, but we have heard it argued that the requirement to file or furnish reports for the two years immediately prior to deregistration would preclude already deregistered companies (whose reporting requirements are therefore already suspended) from re-filing under the new rules. Such companies would presumably continue to have reporting suspended rather than terminated and be required to continue to monitor U.S. residents' shareholdings.

We have also heard it argued that companies that have already deregistered will be able to establish immediate Rule 12g3-2(b) exemption. This does not seem to be specifically covered in the proposed rules although it may be intended.

The new rules should clarify the position of companies that have already deregistered. We would recommend that they specifically allow previously deregistered companies to take immediate advantage of the new rules.

## CONFORM REGISTRATION RULES WITH THE NEW DEREGISTRATION RULES

The requirement to register securities under section 12(g) when there are more than 300 U.S. resident shareholders should be revised to match the deregistration benchmarks. It seems unreasonable to expect a foreign private issuer with the characteristics required for deregistration to have to register in the first place and then presumably as soon as possible thereafter go through the process of deregistration.

## MAKE ADDITIONAL MODIFICATIONS TO THE COUNTING METHOD

Based on our counting experience under the old rules, we welcome the limitation of the look-through process to the U.S., country of incorporation/legal establishment and country of primary listing. This change would greatly ease the research burden without materially impacting the quality of the results. We have found that it can be very time-consuming to delve down through layers of nominees in other jurisdictions to find only a few if any U.S. residents.

The proposal that inquiries may stop after a reasonable effort is also welcome. However, it may be difficult to assess reasonableness without further guidance at least until best practice has developed. For example, how should a U.S. nominee account whose name includes "retail" or a U.S. broker's account whose name includes "clients" be treated if there has been no response to repeated inquiry? Such accounts may contain zero or thousands of U.S. resident investors, make no difference to benchmark calculations based on shareholdings or volumes but be critical to calculations based on the number of holders. As the lack of response indicates no hunger for the protection provided by registration, the rules should specifically state that such accounts may, after repeated inquiry, be regarded as one holder only.

The Commission's proposal says that where there are publicly filed reports or other information has been provided to the issuer that indicate U.S. securities holdings that they should be taken into the count. This is likely to be difficult to implement as 13-F data, for example, is reported by fund and does not provide the name or names of the nominees/custodians or sub-custodians. The most likely other source of information may be portfolio managers who often communicate their position to an issuer to ensure access to management. Here again the issuer is very unlikely to have the nominee information necessary for a full reconciliation to the registered accounts. Additionally there is unlikely to be a second source of information for the type of individual investor accounts mentioned above. It is reasonable to state that the total holding by U.S. residents should not be less than the total shown in any public filing or other information but a more detailed comparison would be impracticable.

We note that we have successfully used s212 of the UK Companies Act to carry out identification projects leading to the deregistration of UK based foreign private issuers.

We would be pleased to assist the SEC with further background on our views and on our experience regarding the deregistration process.

Yours sincerely

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