地鐵公司
MTR Corporation

February 27, 2006

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

Re: Comments on Proposed Rule 12h-6 Relating to Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) and Duty to File Reports under Section 15(d) of the Securities Exchange Act of 1934 – File No. S7-12-05

Dear Mr. Katz,

We are submitting this letter in response to the Securities and Exchange Commission's request for comment on Release No. 34-53020.

The ordinary shares of MTR Corporation Limited ("MTR") are listed on the Hong Kong stock exchange, with the government of the Hong Kong Special Administrative Region owning approximately 76 % of MTR's ordinary shares. MTR is currently subject to the reporting obligations under the Exchange Act by virtue of Section 15(d) due to SEC-registered debt securities, and MTR's shelf registration statement filed with the SEC in 2001. Accordingly, MTR has been filing Form 20-Fs and Form 6-Ks pursuant to the SEC rules.

We fully welcome and support the Commission's efforts to make it easier for foreign private issuers like ourselves to exit, and to be granted exemption, from the registration and reporting obligations under the Exchange Act. However, we believe that the proposed rules require further amendments and clarifications to provide adequate relief in particular for foreign private issuers, such as ourselves, that are reporting under Section 15(d) of the Exchange Act in respect of debt securities and whose securities are subject to relatively low interest in the United States market.

Comments

1. "Entrance threshold" under Rule 12g-3-2(a) under the Exchange Act to be increased so that "entrance threshold" is higher than "exit thresholds" under proposed Rule 12h-6

We note and welcome that the proposed rules would facilitate the exit by foreign private issuers from reporting obligations under Section 12(g) of the Exchange Act by the addition of two new "exit tests", i.e., the "5% or fewer U.S. shareholders" – test and the "10% or fewer U.S. shareholders and 5% or less U.S. trading volume" –

地鐵有限公司
MTR Corporation Limited

香港九龍灣偉業街33號
地鐵灣塘地鐵大廈
香港郵政總局信箱 9916號
電話 (852) 2993 2111
傳真 (852) 2798 8822
網址 www.mtr.com.hk

MTR Tower, Telford Plaza,
33 Wai Yip Street,
Kowloon Bay, Hong Kong.
GPO Box 9916, Hong Kong.
Telephone (852) 2993 2111
Facsimile (852) 2798 8822
Website www.mtr.com.hk

test. However, it appears that the new rules would not amend the "entrance test" in Rule 12g-3-2(a) under the Exchange Act, pursuant to which a foreign private issuer would be required to register its equity securities under Section 12(g) of the Exchange Act and become subject to the Exchange Act reporting obligations if its equity securities are held by more than 500 holders of record worldwide and 300 or more beneficial owners resident in the United States. We believe that the lower threshold for the "entrance test" as compared to the new "exit tests" could subject a foreign private issuer to a requirement to register its equity securities under Section 12(g) under the Exchange Act (for example, if such foreign private issuer would have 300, or have slightly more than 300, shareholders residing in the United States) even though such foreign private issuer would simultaneously meet the new "exit test" (for example, because such foreign private issuer has been subject to Section 15(d) reporting obligations in respect of debt securities and meets the general exit conditions and either the "5% or fewer U.S. shareholders" test or the "10% or fewer U.S. shareholders and 5% or less U.S. trading volume" test). Under the current "entrance test", foreign private issuers could become subject to the Section 12(g) registration and reporting requirements even if only a minuscule percentage of their total shareholder base was comprised of shareholders resident in the United States. In our view, such a low shareholder threshold level is not significant enough on a relative basis to warrant the imposition of registration and reporting obligations, and thereby obligations under the Sarbanes-Oxley Act of 2002, on a foreign private issuer. We believe that the SEC by proposing the new "exit tests" has recognized that the "300 or more U.S. resident shareholder" test is outdated. We therefore respectfully submit that the "entrance test" be amended by adding new entrance tests similar to the new "exit tests" so that the "entrance test" requires a higher threshold than the "exit test". Alternatively, we respectfully submit that the current "entrance test" threshold of the "300 or more U.S. resident shareholders" be significantly increased in order to more adequately balance the interests of U.S. resident shareholders and the burdens on foreign private issuers imposed by Exchange Act reporting and Sarbanes-Oxley Act obligations.

2. <u>New counting method to be applicable to "entrance test" under Rule 12g-3-2(a) under the Exchange Act</u>

We welcome and support the Commission's proposed streamlined counting method for determining the number of U.S. resident holders of a foreign private issuer's debt and equity securities.

However, it appears that under the proposed rules the new counting method will only apply to the "exit tests" but not to the "entrance test" under Section 12(g) and Rule 12g-3-2(a) of the Exchange Act. We believe that the proposed new counting method should apply equally in connection with the "entrance test" and suggest that Rule 12g-3-2(a) be amended accordingly.

3. <u>Immediate availability of Rule 12g-3-2(b) exemption to be extended to foreign private issuers that terminate their reporting obligation under Section 15(d) in</u>

香港九龍觀塘業街33號
偉業廣場地鐵大廈
郵政總局信箱 9916 號
電話 :(852) 2993 2111
傳真 :(852) 2798 8822
網址 :www.mtr.com.hk

MTR Tower, Telford Plaza,
33 Wai Yip Street,
Kowloon Bay, Hong Kong.
GPO Box 9916, Hong Kong.
Telephone : (852) 2993 2111
Facsimile : (852) 2798 8822
Website : www.mtr.com.hk

respect of debt securities and that do not meet the "entrance test" under Section 12(g)

We welcome and support the Commission's proposal pursuant to which the Rule 12g-3-2(b) exemption from the Section 12(g) registration and reporting requirements will be available immediately upon the effectiveness of a termination of the reporting obligations pursuant to the filing of proposed Form 15F under proposed Rule 12h-6 (i.e., without the 18 months waiting period required under the current rules). However, the proposed new rule 12g-3-2(e) appears to apply only if a reporting obligation under Section 12(g) or 15(d) in respect of *equity* securities has been terminated pursuant to proposed Rule 12h-6. Thus, it appears that a foreign private issuer that is not subject to the Section 12(g) registration and reporting requirements (i.e., that does not meet the "entrance test"-thresholds) and is only subject to Section 15(d) reporting obligations in respect of *debt* securities would be subject to an 18 months waiting period upon termination of its "debt securities" reporting obligation under Section 15(d) of the Exchange Act prior to being able to avail itself of the Rule 12g-3-2(b) exemption.

Accordingly, we respectfully submit that proposed Rule 12g-3-2(e) be amended to clarify that the Rule 12g-3-2(b) exemption will also be immediately available to a foreign private issuer that was only subject to a "debt securities" reporting obligation under Section 15(d) and meets the following conditions:

(i) such issuer has terminated its reporting obligations under Section 15(d) of the Exchange Act in respect of *debt* securities; and

(ii) such issuer at such time is not required to register its equity securities under Section 12(g) (i.e., such issuer does not meet the "entrance test" thresholds).

We believe that tbe above suggested clarification is necessary in order to address the following three issues and inconsistencies in particular:

(i) The 18 months waiting period that would otherwise be applicable to a foreign private issuer that has terminated its Section 15(d) reporting obligation in respect of debt securities would particularly create problems for foreign private issuers that maintain a Level 1 ADR facility. The maintenance of a Level 1 ADR facility generally requires that an issuer is either (i) subject to Exchange Act reporting obligations or (ii) has obtained the Rule 12g-3-2(b) exemption. Thus, such foreign private issuer would be forced either to continue to be subject to the Exchange Act reporting obligations or to terminate its Level 1 ADR facility to the detriment of the ADR holders.

(ii) During the 18 months waiting period, such issuers would have to monitor the number of U.S. resident holders continuously and could become subject to Section 12(g) registration and reporting obligations, while an issuer that terminated a Section 12(g) reporting obligation or that does not otherwise have

香港九龍灣宏照道33號
港鐵灣地鐵大廈
香港鐵路總局信箱 9916號
電話 :(852) 2993 2111
傳真 :(852) 2798 8822
網址 :www.mtr.com.hk

MTR Tower, Telford Plaza,
33 Wai Yip Street,
Kowloon Bay, Hong Kong.
GPO Box 9916, Hong Kong.
Telephone : (852) 2993 2111
Facsimile : (852) 2798 8822
Website : www.mtr.com.hk

any Section 12(g) reporting obligation could immediately avail itself of the Section 12g3-2(b) exemption.

(iii) Under the Commission's proposed Rule 12g-3-2(e), a foreign private issuer that is subject to Section 12(g) reporting obligations in respect of its equity securities and is also subject to Section 15(d) reporting obligations in respect of its SEC-registered debt securities and meets the "exit test" in respect of both its Section 12(g) and Section 15(d) reporting obligation could avail itself of the Rule 12g-3-2(b) exemption immediately upon termination of the Section 12(g) "equity securities"-reporting obligations. In contrast, a foreign private issuer that is only subject to Section 15(d) reporting obligations in respect of debt securities and that is well below the Section 12(g) thresholds, would be subject to an 18 months waiting period upon termination of its Section 15(d) "debt securities" reporting obligation. We believe that there is no justification for such unequal treatment and therefore urge the Commission to amend Rule 12g-3-2(e) as suggested above.

4. Definition of brokers, dealers, banks and other nominees to exclude individual shareholders

Rule 12h-6 requires foreign private issuers to "look-through" brokers, dealers, banks and other nominees. However, it is generally not possible for a foreign private issuer to determine from a review of its shareholder register whether a registered shareholder is a broker, dealer, or other nominee. The proposed new counting method is therefore of little value to foreign private issuers if they were required to conduct their "look-through" inquiries with every registered shareholder.

Accordingly, we suggest limiting the look-through test for brokers, dealers, banks and other nominees to non-individual shareholders as discernible from the entry in the register of shareholders. Alternatively, we suggest the addition of a new rule to allow issuers to make the assumption that all individual shareholders (i.e., shareholders who are, or from their corresponding entry in a foreign private issuer's shareholder register appear to be, natural persons) are holding the shares for their own behalf and not as nominees for other beneficial owners.

5. Calculations under proposed Rule 12h-6 to exclude Qualified Institutional Buyers

Under the calculations underlying proposed Rule 12h-6, no differentiation is made with respect to different types of U.S. investors. Given the difference between sophisticated institutional investors and other types of investors, we believe that it would be appropriate to treat sophisticated institutional investors differently from other investors in this context.

It appears to us that this distinction already exists in other contexts, as for example under Rule 144A under the Securities Act. We believe that Qualified

香港九龍灣海濱道33號
世福廣場地鐵大廈
香港郵政總局信箱9916號
電話 :(852) 2993 2111
傳真 :(852) 2798 8822
網址 :www.mtr.com.hk

MTR Tower, Telford Plaza,
33 Wai Yip Street,
Kowloon Bay, Hong Kong.
GPO Box 9916, Hong Kong
Telephone :(852) 2993 2111
Facsimile :(852) 2798 8822
Website :www.mtr.com.hk

Institutional Buyers, as defined in Rule 144A, would not require the same degree of protection as non-institutional investors, as they are by their nature sophisticated investors capable of making investment decisions on the basis of otherwise available materials, for example, under foreign private issuer's home market disclosures, and are sufficiently protected by the regulatory requirements of such foreign private issuers' home jurisdictions.

Accordingly, we suggest that Qualified Institutional Buyers, as defined in Rule 144A, be excluded when calculating the number of US residents for all purposes under proposed Rule 12h-6.

6. Trading volume benchmark under proposed Rule 12h-6 to be increased to 10%

Since shares of large foreign private issuers that qualify as well-known seasoned issuers ("WKSI") are often constituent stocks of a number of stock market indexes, institutional investors may likely make purchases of such securities in bulk for portfolio rebalancing or index tracking purposes. As a result, the U.S. trading volume for such foreign private issuers could easily exceed the "5% or less U.S. average daily trading volume" test available to WKSIs under proposed Rule 12h-6 even though the number of U.S. holders resident in the United States may actually be very small.

We would therefore propose an increase of the benchmark of U.S. trading volume to 10% of the average daily trading volume of the relevant class of equity securities.

Conclusion

For the reasons discussed above, we submit that the proposed Rule 12h-6 and Rule 12g3-2 be revised to:

(i) increase the thresholds under the "entrance test" under Section 12(g) and Rule 12g-3-2(a) so that such "entrance test" requires a higher threshold than the new "exit tests" under Rule 12h-6;

(ii) ensure that the proposed new counting method applies equally in connection with the "entrance test" under Section 12(g) and Rule 12g-3-2(a);

(iii) clarify that a foreign private issuer that is not subject to Section 12(g) registration and reporting requirements (i.e., that does not meet the "entrance test" thresholds) and is only subject to Section 15(d) reporting obligations in respect of *debt* securities, would be able to avail itself of the Rule 12g-3-2(b) exemption immediately upon termination of its "debt securities" reporting obligation under Section 15(d) of the Exchange Act;

(iv) limit the look-through test for brokers, dealers, banks and other nominees to non-individual shareholders as discernible from the entry in the register of

香港九龍觀塘偉業街33號
地鐵觀塘地鐵大廈
香港郵政總局信箱 9916 號
電話：(852) 2993 2111
傳真：(852) 2798 8822
網址：www.mtr.com.hk

MTR Tower, Telford Plaza,
33 Wai Yip Street,
Kowloon Bay, Hong Kong.
GPO Box 9916, Hong Kong.
Telephone : (852) 2993 2111
Facsimile : (852) 2798 8822
Website : www.mtr.com.hk

shareholders; or alternatively, to add a new rule to allow issuers to make the assumption that all individual shareholders (i.e., shareholders who are, or from their corresponding entry in a foreign private issuer's shareholder register appear to be, natural persons) hold shares for their own behalf and not as nominees for other beneficial owners;

(v) exclude Qualified Institutional Buyers, as defined in Rule 144A, when calculating the number of US residents for all purposes under proposed Rule 12h-6; and

(vi) increase the U.S. trading volume benchmark for well-known seasoned issuers to 10%.

We would be pleased to discuss with the staff of the Commission the various issues raised and the suggestions we have made. If you have any enquiries, please feel free to contact Mr. Jimmy Lau, General Manager – Financial Control & Treasury, at (852) 2993-2403.

Very truly yours,

Lincoln Leong
Finance Director

香港力寶道鐵路大廈33號
健福鐵路地鐵大廈
香港郵政總局信箱 9916 號
電話：(852) 2993 2111
傳真：(852) 2798 8822
網址：www.mtr.com.hk

MTR Tower, Telford Plaza,
33 Wai Yip Street,
Kowloon Bay, Hong Kong.
GPO Box 9916, Hong Kong
Telephone : (852) 2993 2111
Facsimile : (852) 2798 8822
Website : www.mtr.com.hk