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Internal Market and Services DG

Director-General

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Ms Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9303
The United States of America

Subject: Proposed Rules on 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 Number: S7-12-05

Dear Ms Morris,

This letter constitutes the response of the European Commission to the call for comments made by the U.S. Securities and Exchange Commission ('the SEC') in relation to its re-proposed rules on 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 ('the Exchange Act').

The observations in this letter reflect extensive consultations with governments and securities regulators of the 27 Member States of the European Union, associations representing European issuers, individual companies and other stakeholders. Accordingly, this response is supported by the European Securities Committee, representing the governments of all 27 Member States of the European Union and the Committee of European Securities Regulators (CESR), representing 29 securities regulators in the European Economic Area (EEA).

General comments

In March 2006 the European Commission services submitted comments on the draft rules on deregistration presented by the SEC to the public in December 2005. The European Commission services were encouraged by the SEC's commitment to improve the situation of European companies listed on the U.S. capital markets that were seeking to terminate their listings. However, the specific means of modernising the 40-year old deregistration rules and, in particular, of increasing the availability of deregistration for

foreign private issuers that were then proposed did not satisfy the expectations of the EU stakeholders (noted in the European Commission services' letter to the SEC of 1 March 2006).

Therefore, the European Commission services welcome the SEC's announcement in December 2006 of a new, revised proposal aiming to offer a more balanced, open and simple solution to the 'deregistration issue'.

We believe that the new proposal has the potential to largely resolve the deregistration issue, and if adjusted and adopted along the lines set out below, would offer clear benefits to all interested parties. Without any weakening of the regulatory protections currently afforded, the proposed rules would give foreign private issuers contemplating whether to enter the U.S. capital markets or to maintain their presence there, sufficient reassurance that the 'captive' character of the relevant securities regulation and reporting requirements no longer applies. U.S. holders of their securities, irrespective of their size, would able to take advantage of overseas investment opportunities without having to access foreign markets. Finally, those foreign companies that no longer have a reason to remain on U.S. capital markets would be able to leave once U.S. investors have had an adequate opportunity to dispose of their holdings.

The new proposal takes proper account of all stakeholders' interests and sets domestic concerns in the wider, global picture. A successful resolution to the 'deregistration issue' will bring the U.S. and European capital markets closer and would demonstrate in clear and practical terms the value of the Financial Markets Regulatory Dialogue for addressing trans-Atlantic financial issues.

Technical comments

The European Commission services welcome the announcement by the SEC of the new proposal to modify the rules on termination by a foreign private issuer of its registration of a class of securities under Exchange Act Section 12(g) (and its resulting Section 13(a) reporting obligations), and of the reporting obligations of such an issuer under Section 15(d) of that Act.

We are pleased that those elements of the original proposal that were most positively received by European issuers (such as permanent nature of deregistration or improved counting method for U.S. shareholder interest) have been retained in the new text. What is more, the SEC has sought to improve the relevant provisions to meet concerns expressed by many issuers, by increasing their practicability or eliminating unintended restrictions to eligibility for deregistration. In this context, we welcome the fact that the new proposal extends permanent deregistration to those foreign issuers that have already terminated SEC registration under the 'old' rules; limits the dormancy condition to one year; allows unintended registrants, such as successor foreign issuers, to terminate SEC registration sooner; and offers the same conditions for deregistration to smaller foreign issuers.

Trading volume threshold

Above all however, we are grateful to the SEC for having reconsidered the eligibility criteria originally proposed in December 2005. Those criteria would have left an overwhelming majority of EU issuers unable to deregister. In our comments on the December 2005 proposal, we argued that greater openness would benefit trans-Atlantic

financial markets and an eligibility rate of 26%[1] was insufficiently ambitious. We insisted that restrictive exit rules were not needed for EU issuers, on the grounds that such issuers are subject in their domestic markets to stringent reporting requirements that are as rigorous, and confer equivalent levels of investor protection, as those imposed in the U.S. We are pleased to note that this view is shared by the SEC. We believe that the application of a single quantitative benchmark, based on average daily trading volume ('ADTV') to determine foreign issuers' eligibility, would ensure that significantly more European issuers are freed from the current restrictions on terminating their U.S. listing.

The choice of an ADTV ratio as a principal benchmark to determine eligibility for deregistration is a good one: both simple and clearly measurable. This is a good reflection of the amount of U.S. resident trading activity in the foreign issuer's securities and excludes those trades that take place in markets outside the U.S., where U.S. investors rely on the issuer's home country reporting. Irrespective of our strong support for the proposed benchmark, however, we would still like to make a few suggestions regarding the structure of the ADTV ratio and its possible implications.

a) Increasing the threshold

First, we note that a threshold level set at 5% would still bar a substantial number of EU issuers from using the new rule[2]. As the SEC rightly notes, the ability to exit without restriction can be a strong incentive for overseas issuers considering first time entry to the U.S. market. For these reasons, and in view of recent reports about the competitiveness of U.S. capital markets, the higher the threshold the better. We would therefore ask the SEC to consider whether it would be possible to raise the ADTV parameter further.

b) Primary market(s) vs. worldwide trading volume

The European Commission services consider that, in order to reflect properly the importance of U.S. resident trading activity in the overall trading in the foreign issuer's securities, the primary trading market ADTV should be replaced with a worldwide ADTV: a measure which would take into account all markets where the security is traded, also including the U.S. ADTV in the denominator. This option should be open to all issuers that can provide the SEC with reliable data on trading volumes in the other markets.

This element is particularly important for EU issuers owing to the forthcoming application of the Market in Financial Instruments Directive ('MiFID') in November 2007. MiFID will radically change the conditions under which securities are traded in Europe. The concept of the primary market for an issuer's securities will still remain relevant. However, we expect that increasing portions of the public float of public companies traded in Europe will move from traditional stock exchanges towards alternative execution venues (that is, multilateral trading facilities and the systematic execution of trades internally by investment firms) that will compete for the trading volume both within the home market and outside it. There is a concern, therefore, that

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[1] In other words, barely one in four foreign issuers worldwide with a U.S. market presence could potentially use the rules as originally proposed. European estimates indicated that the figure for EU-based issuers would be still lower.

[2] The European Commission services' estimates suggest that some 40% of EU issuers would still be ineligible.

the current ADTV test may fail in the future to capture the full volume of trading in a security admitted to trading in Europe. We also note that regulators will be required, from 2009, to publish average daily turnover figures giving a whole-of-market value across trading venues and every market in the EEA[3]. We would therefore support the use of a more general, worldwide ADTV reference value as denominator in the deregistration rule. As an alternative approach that better reflects the specific situation in Europe, the SEC might also wish to consider treating the EEA as a single jurisdiction for the purpose of determining the primary trading market ADTV.

c) The asymmetry of the over-the-counter (OTC) trading

We would expect the volume of OTC trading either to be included in both the U.S. ADTV and that of the primary market(s) or worldwide trading volume for the purposes of the comparison that is to be made, or to be excluded from both the numerator and the denominator. Issuers should be allowed to use data on OTC trading outside the U.S. as long as that data comes from reliable sources and its quality may be verified by the SEC. Should the SEC consider that the availability of data on overseas OTC trading of SEC-registered foreign private issuers is too limited, the asymmetry in the current proposal should be eliminated by excluding U.S. OTC trading from the U.S. ADTV. As noted above, OTC trading figures will be available for trading within the EEA from 2009.

Treatment of debt securities

Unlike equities, the treatment of debt securities remains substantially unchanged. As we understand it, in order to deregister foreign debt issuers would still have to demonstrate that their securities were held by fewer than 300 investors, either worldwide or resident in the U.S. The new rules thus offer no improvement for foreign issuers that wish to deregister their debt securities. We appreciate that the threshold of 300 shareholders is a general standard that applies equally to domestic registrants. Nevertheless, we are concerned that the importance attached to historical standards may not be entirely justified in this case, particularly in view of the impressive growth of U.S. financial markets over the past 40 years. We should note, in addition, that if the deregistration rule is adopted along the lines proposed, the most restrictive test would be maintained in the case of debt markets that, due to their predominantly wholesale nature, do not require the same retail investor protection standards as in the equity markets. In our view, the exponential growth in the number of institutional investors active on the debt markets should be reflected in a significant increase of the applicable threshold in the deregistration rule. We therefore support other commentators in their call for a substantial increase of the threshold applicable to foreign debt issuers. In our view, this should be at least 1000 U.S. holders.

'Equity-linked' securities

The proposed rule envisages that in determining whether the 5% trading volume test is met, an issuer is expected to take into account trading in its equity as well as in other 'linked' securities (such as convertible bonds, warrants or other less commonly held derivatives). In our experience, the availability of data on the size of trading in such instruments related to a specific equity security (in the strict sense) tends to be limited and foreign issuers may find it difficult to establish appropriate amounts. Therefore, we

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[3] See Articles 33 (in particular 33(6)) and 34 of Regulation 1287/2006 http://tinyurl.com/n5db7

would recommend that the SEC reconsider the scope of the definition of 'equity security' used in the new deregistration rule.

Permanent deregistration

We are grateful to the SEC for having included in its re-proposal new provisions which would assist issuers that have already deregistered in making their status permanent. However, it appears that the benefits of the new deregistration regime would only be extended to prior Form 15 filers if they continue to meet the 'old' quantitative deregistration threshold of the 300 shareholders. This would impose on such issuers unnecessary additional burdens equivalent to those they were required to discharge when deregistering for the first time, such as precise counting of existing U.S. holders of securities using the old, onerous counting rules. As a result, those foreign issuers would in practice be subject twice to the more restrictive and less practicable deregistration tests before they can finally deregister permanently. In the case of all other registrants, by contrast, permanent deregistration would be available after they have met the updated, less onerous tests. This imbalance also highlights a more general problem of mismatch between the registration and deregistration conditions for foreign private issuers, which in our view might be addressed by the SEC at some later stage.

Timing

We would strongly encourage the SEC to take all possible measures to ensure swift adoption of the revised proposal in order to ensure that it is available to all registrants before 30 June 2007: that is prior to the 20-F filing deadline for issuers with December 31 fiscal year end.

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In summary, the services of the European Commission, with the support of the European Securities Committee and the Committee of European Securities Regulators (CESR), very much welcome the far-reaching modifications that the SEC has made. The suggestions made in this letter are intended to address a few residual points of concern. In our view, the more open the final outcome decided by the SEC, the more this will enhance the prosperity of trans-Atlantic and U.S. financial markets.

We would, of course, be happy to discuss or explain further the views expressed in this letter, and to support the SEC's initiative in any other way. We also would urge the SEC to take a final decision on this rule as soon as possible.

Yours sincerely,

Jörgen Holmquist

Copies to: Christopher Cox, the SEC Chairman

Paul S. Atkins, the SEC Commissioner

Roel C. Campos, the SEC Commissioner

Kathleen L. Casey, the SEC Commissioner

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Members of the European Securities Committee

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