SHEARMAN & STERLING LLP

BROADGATE WEST | 9 APPOLD STREET
LONDON EC2A 2AP
WWW.SHEARMAN.COM | T +44.20.7655.5000 | F +44.20.7655.5500

28 February 2006

BY EMAIL

Mr. Jonathan G. Katz, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

File No. S7-12-05

Dear Mr. Katz:

We are pleased to submit this letter in response to the request of the U.S. Securities and Exchange Commission ("Commission") for comments regarding its proposals on the termination of a foreign private issuer's registration and reporting obligations under the Securities Exchange Act of 1934 ("Exchange Act"), published in Release No. 34-53020, International Series Release No. 1295 (23 December 2005) (the "Release").

We strongly support the Commission's proposals to consider factors in addition to the number of U.S. resident security holders of a foreign private issuer ("FPI"), such as an FPI's U.S. public float and its recent history of accessing the U.S. public markets, in determining FPIs' eligibility for termination of registration. We believe the Commission's broadening of the criteria for termination of registration more closely reflects the variety of situations in which continued U.S. registration would present a disproportionate regulatory obligation relative to the benefits it may provide to an FPI and its U.S. investors. Moreover, we believe the Commission's proposals will help to assuage recent concerns of many non-U.S. companies about subjecting themselves to increased regulation through U.S. registration, a perception that has been fed to some extent by the notion that non-U.S. companies cannot exit the U.S. regulatory framework once they have entered it.

We believe, nonetheless, that there are a number of areas that have not and should be addressed in the Release, which we discuss below. We also comment on selected areas where we suggest modifications to the Commission's proposals. In summary, our suggestions are:

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- that the benefit of immediate and indefinite exemption from registration under Rule 12g3-2(b), as provided in Rule 12g3-2(e)(1), be extended to FPIs that terminate or have terminated registration under the existing Exchange Act Rules, namely, Rules 12g-4, 12h-3 and 15d-6;

- that FPIs that terminate or have terminated registration under the existing Exchange Act Rules, as well as FPIs that have never registered in the U.S. but provide information pursuant to existing Rule 12g3-2(b), be allowed to provide company information on their web sites or through their primary trading market's electronic medium instead of furnishing this information to the Commission, as set out in Rule 12g3-2(e)(2) and (3) for deregistering FPIs under the new rules;

- that the Commission make explicit that FPIs that issue shares underlying options and other equity-based compensation awards they have granted to U.S. employees prior to termination of registration may rely on Rule 701 under the Securities Act of 1933 (the "Securities Act") to exempt the issuance of such shares, so long as the aggregate sales price of such shares did not exceed the three-pronged aggregate sales threshold set out in Rule 701 in any of the relevant prior 12-month periods (the "three-pronged aggregate sales threshold");[1]

- that following termination of registration, FPIs be allowed to rely on Rule 701 to issue as many shares as required to satisfy options and other equity-based compensation awards granted to U.S. employees without complying with Rule 701's enhanced disclosure requirements (primarily in the form of U.S. GAAP-reconciled financial information), as long as:

    - the options or other awards were granted prior to termination of registration;

    - the three-pronged aggregate sales threshold set out in Rule 701 was not exceeded in any of the relevant prior 12-month periods; and

    - such FPIs would still qualify for termination of registration under the tests set out in proposed Rule 12h-6 if the shares underlying options and other awards were treated as issued and included in the calculation of the FPI's U.S. shareholding or shareholders, as the case may be;

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[1] The three-pronged aggregate sales threshold is the greatest of: (i) U.S.$1 million, (ii) 15% of the total assets of the company, and (iii) 15% of the outstanding amount of the class of shares being offered and sold (in the case of (ii) and (iii), as of the company's most recent balance sheet date if not older than its last fiscal year-end).

- that, in respect of the tests to calculate the percentage of U.S. resident equity security holdings relative to worldwide equity security holdings:

    - the Commission make clear that securities of U.S. resident security holders that are excluded from the worldwide float are also excluded from the aggregate U.S. resident security holding figure;

    - the Commission replace the securities of "affiliates", as the category of securities excluded from the calculation, with the securities held by persons who hold more than 10 percent of the FPI's equity securities worldwide;

    - additionally, the Commission exclude from the calculation securities held by qualified institutional buyers under Securities Act Rule 144A; and

    - as an alternative to the exclusion of securities held by qualified institutional buyers, the Commission exclude the securities held by the five U.S. residents who hold the largest number of the FPI's equity securities at or below 10 percent worldwide, provided the aggregate of the securities held by such five U.S. residents is more than 10 percent of the FPI's equity securities worldwide;

- that the Commission exclude from offerings that trigger the 12-month dormancy period unregistered offerings of securities other than the securities whose registration or reporting obligations the FPI intends to terminate;

- that the Commission exclude transactions under Securities Act Section 3(a)(10) from transactions that trigger the 12-month dormancy period;

- that, in respect of calculation of the U.S. average daily trading volume ("ADTV") of the securities of a well-known seasoned issuer ("WKSI"), the Commission make clear that such ADTV would be zero for any part of the relevant 12-month period during which the WKSI has delisted the subject security from every U.S. national securities exchange and inter-dealer quotation system of a U.S. national securities association;

- that, in respect of a WKSI, the percentage of U.S. security holdings be allowed to be determined at any date within 120 days before the filing date of the Form 15F;

- that, in the case of FPIs deregistering debt securities or FPIs deregistering equity securities that do not qualify for termination of registration based on the

percentage tests (and that therefore must determine the actual number of U.S. residents holding the relevant security), the Commission provide for a fall-back presumption of one U.S. resident account per U.S. nominee if, after reasonable inquiry, an FPI is unable without unreasonable effort to obtain information about the number of U.S. resident accounts held by a U.S. nominee; and

- that the Commission not condition eligibility for deregistration as a general matter on an FPI's tendering for all the securities held by U.S. residents.

We discuss these points in detail below.

Continued maintenance of the Rule 12g3-2(b) exemption

The new rules should provide the benefit of immediate and indefinite exemption from registration under Rule 12g3-2(b) not only to FPIs that terminate their registration or reporting obligations under the proposed rules, but also to FPIs that terminate or have terminated registration or suspended reporting obligations under the existing rules. Under existing Rule 12g3-2(d), an FPI may not avail itself of the Rule 12g3-2(b) exemption until 18 months after it has terminated its registration under Section 12(g) or its active or suspended reporting obligations under Section 15(d). This means such an FPI must monitor (and continue to meet) the criteria for termination of registration at fiscal year-end for 18 months after termination in order to avoid a re-registration obligation. Moreover, for FPIs who have conducted an offering under the Securities Act, including to employees on Form S-8, the obligation to monitor and meet these criteria continues indefinitely because their reporting obligations can only be suspended, not terminated. Hence, the 18 month-period never lapses for these FPIs.

Proposed Rule 12g3-2(e) provides for an immediate exemption from Rule 12g3-2(b) for FPIs that terminate registration or reporting obligations under the new rules, and this exemption would remain effective until an FPI registers a class of securities under Section 12 or incurs reporting obligations under Section 15(d) in respect of securities other than the securities with respect to which a reporting obligation was terminated. So effectively, the Release would relieve FPIs that terminate registration or reporting obligations under the new rules of any requirement to monitor their continued eligibility for remaining deregistered and remaining exempt from reporting obligations.

We cannot see any reason to impose a burdensome post-termination monitoring obligation (and a risk of re-registration or revived reporting obligations in respect of the class of securities whose registration or reporting is terminated) on one group of deregistering FPIs and not another in this manner. In our view, the fairer alternative would be to provide for the benefit of new Rule 12g3-2(e) to all deregistering FPIs, past and future.

Proposed Rule 12g3-2(e)(1), therefore, should refer not only to FPIs that file a Form 15F pursuant to Rule 12h-6 but also FPIs that have filed or a file a Form 15 pursuant to Rule 12g-4, 12h-3 or 15d-6.

We recognise the benefit of new Rule 12g3-2(e)(1) would be conditioned on an FPI's making certain information available in English on its Internet web site or through an electronic information delivery system in its primary trading market, and that the new Form 15F provides a mechanism of making the U.S. public aware of where this information would be found (all as set out in proposed Rule 12g3-2(e)(2) and (3)). These requirements can easily be extended to FPIs that have deregistered under the existing rules. For instance, the Commission can require previously deregistered FPIs to file with it a variation of Form 15F, in order to provide the U.S. public with the location of where information on the relevant company may be found in the future.

Moreover, there is no reason not to additionally allow non-U.S. companies that have never registered in the U.S. to deliver information to their U.S. investors—i.e., to comply with Rule 12g3-2(b)--through web site postings and postings on their primary trading market's electronic medium. That, as stated in the Release, these electronic media are more accessible to the public than paper filings made with the Commission would be equally true for Rule 12g3-2(b) filers that have never registered. As with previously deregistered FPIs, the Commission can require existing and future Rule 12g3-2(b) filers that have never registered to file with it a variation of Form 15F, in order to provide the U.S. public with the location of where information on such filers may be found.

Issuance of shares underlying employee options and other equity-based compensation awards post-termination

The Release does not address a situation in which FPIs commonly find themselves—their existing and foreseeable U.S. public shareholding, including shares held by their U.S. employees, is sufficiently small as to justify termination of U.S. registration, but their obligation to issue shares to their U.S. employee option and other equity-based compensation award holders may require continued U.S. registration. We believe this topic should be addressed as part of the Commission's efforts to revamp the FPI deregistration scheme.

Availability of Securities Act Rule 701 to FPIs that deregister

We believe an FPI's ability to rely on Securities Act Rule 701 to issue shares underlying options and other equity-based compensation awards it has granted prior to

termination of registration should be explicitly provided for in the new rules.[2] Presently, an Exchange Act registrant that issues shares underlying options granted to its U.S. employees must register the share issuance under the Securities Act on a Form S-8 before the options become exercisable in order to permit the shares to be freely tradable. A company not subject to Exchange Act reporting requirements may issue shares underlying options and other equity-based compensation awards without Securities Act registration in reliance on Rule 701 provided that, among other requirements, the aggregate sales price of the issued shares does not exceed the three-pronged aggregate sales threshold within any 12-month period.

To date, the Commission has not affirmatively addressed whether an FPI that terminates its registration may thereafter rely on Rule 701 to cover the issuance of shares underlying U.S. options and other equity-based compensation awards it has granted prior to termination, provided the aggregate sales price of such shares did not exceed the three-pronged aggregate sales threshold in any of the relevant prior 12-month periods.[3] We see no logical basis to distinguish between FPIs that terminate their registration and companies that have never registered in this regard. To treat these categories of issuers differently would have the effect of penalising FPIs for their prior U.S. registration, which would contravene the Release's objective of facilitating FPIs' entry into and exit from U.S. registration.

Exemption from Rule 701's enhanced disclosure requirements for shares underlying options and other equity-based compensation awards granted prior to termination

In addition to the comment above, it is our view that deregistering FPIs should be exempt from Rule 701's enhanced disclosure requirements applicable to sales in excess of U.S.$5 million in a 12-month period regardless of the amount of shares they issue to satisfy options and other equity-based compensation awards, as long as all of the following criteria are met:

- the options and other awards were granted prior to termination of registration;

[2] All references in this letter to "other equity-based compensation awards" or "other awards" refer to those equity-based compensation awards for which registration or an exemption from registration is required under the Securities Act (e.g., employee stock purchase plans).

[3] The Commission staff in three No-Action Letters, however, has indicated that an issuer whose reporting requirements are suspended upon the filing a Form 15 is eligible to use Rule 701 to exempt from registration both equity awards outstanding at the time of the deregistration and any future equity. See *DOCdata N.V.* (SEC No-Action Ltr., Jan. 18, 2001); *New City Communications* (SEC No-Action Ltr., Sept. 9, 1988); and *Peoria Journal Star, Incorporated* (SEC No-Action Ltr., Oct. 6, 1988).

- the three-pronged aggregate sales threshold set out in Rule 701 was not exceeded in any of the relevant prior 12-month periods; and

- such FPIs would still qualify for termination of registration under the tests set out in proposed Rule 12h-6 if the shares underlying the options and other awards were treated as issued and included in the calculation of the FPI's U.S. shareholding or shareholders, as the case may be.

Under Rule 701, shares underlying options and other equity-based compensation awards are deemed sold at the date the options or awards are granted. While Rule 701 does not require any specific disclosure in connection with share sales of less than U.S.$5 million in any 12-month period, the Rule does require enhanced disclosure, primarily in the form of risk factors and financial statements reconciled to U.S. generally accepted accounting principles ("GAAP"), in the case of sales in excess of U.S.$5 million. Such disclosure must be provided a reasonable period of time prior to the sale of the shares or, in the case of options, a reasonable period of time prior to their exercise. Thus, under the present wording of the Release, an FPI terminating its U.S. registration and reporting obligations nonetheless might have to comply with U.S. financial reporting requirements in order to satisfy the issuance of shares underlying its outstanding options or other equity-based compensation awards, notwithstanding that: (i) the issuance of the option and other award related shares did not exceed the three-pronged aggregate sales threshold in any of the relevant prior 12-month periods, and (ii) the FPI would have been eligible under Rule 12h-6 to avoid such U.S. reporting even if shares underlying its options and other awards were included in the calculation of the FPI's U.S. shareholding or shareholders, as the case may be.

We believe it is consistent with the Release's objectives to allow such an FPI to meet its pre-existing option and other award related share issuance obligations and still avoid U.S. reporting obligations. As illustrated above, to insist on compliance with Rule 701's enhanced disclosure requirements in this context would effectively negate relief from U.S. reporting obligations for an otherwise eligible FPI, which is one of the key objectives for any FPI that terminates its registration. Alternatively, the spectre of Rule 701's enhanced disclosure requirements might cause an FPI to delay its termination of registration until after the options and other equity-based compensation awards vest and/or are exercised. As vesting periods are typically three to four years and options generally have a life of seven to 10 years, this could cause a substantial delay in the time of an FPI's deregistration without any meaningful basis for the termination to occur later rather than earlier.

In including the enhanced disclosure requirements to Rule 701, the Commission was concerned about non-registered U.S. companies issuing substantial amounts of shares to their employees without providing adequate company disclosure to them. In this regard deregistering FPIs may be distinguished from companies that have never registered, as

deregistering FPIs would have published reports that included U.S. GAAP-reconciled financial information at the time they granted options and other equity-based compensation awards to their employees (which, as previously mentioned, is the time the shares underlying such options or other awards are deemed sold to employees under Rule 701). That U.S. GAAP reports would no longer be available at the time of vesting and/or exercise should not make a difference to most option holders. As a factual matter, for most option holders options represent a tangible economic benefit (or not) once vested, rather than an investment decision at that date for which U.S. GAAP information would be relevant. Typically, option holders make a simple determination as to whether their options are "in the money" at the time they vest. If they are, the option holders exercise the options and most often immediately sell the underlying shares into the market.

As for the minority of option holders and other award holders who do not dispose of the underlying shares upon vesting in order to hold them for investment, the Commission has determined as a policy matter that if an FPI's U.S. shareholdings are sufficiently small, U.S. reporting may fall away notwithstanding that certain U.S. residents continue to make investment decisions about the FPI. Thus, for example, U.S. reporting similarly would not be available to U.S. residents trading in the secondary market of an FPI's shares after the FPI has deregistered. Because we propose limiting this Rule 701 exemption to FPIs whose U.S. shareholding or shareholders, as the case may be, remain below the thresholds set out in Rule 12h-6 after taking into account the shares issued to satisfy their outstanding options and other awards, we believe our suggestions are consistent with the objectives of the Release.

We believe that, as a practical matter, the Commission's proposals on deregistration will be of much less utility for FPIs otherwise eligible to deregister unless the issuance of shares underlying their existing options and other equity-based compensation awards is addressed.

Percentage of U.S. resident security holdings as a criterion for termination of registration

We welcome the Commission's proposed Rules 12h-6(a)(4) and (5), which introduce the percentage of an FPI's U.S. security holdings relative to its worldwide security holdings as an alternative criterion for deregistration to the number of the FPI's U.S. resident security holders. As we mentioned initially, we believe this addition more closely reflects the circumstances in which continued U.S. registration can impose regulatory obligations on an FPI disproportionate to the level of U.S. investor interest in the FPI or a particular class of its securities. Nonetheless, there are a number of areas where we believe the language of Rule 12h-6 may be improved, both as clarification measures and to reflect additional

circumstances regarding an FPI's U.S. security holdings that should be taken into account in determining eligibility for deregistration.

Clarification of exclusion of affiliates from calculation of U.S. security holdings

In each of clauses 12h-6(a)(4)(i)(B), (a)(4)(ii) and (a)(5), the percentage of U.S. residents holding the voting and non-voting equity securities of an FPI is measured against the outstanding voting and non-voting equity securities held by non-affiliates on a worldwide basis. This language suggests that equity securities held by U.S. resident affiliates would be excluded altogether from the percentage of U.S. resident holdings, i.e., from both the numerator and denominator in calculating the percentage held by U.S. residents. This comports with the manner in which the percentage of U.S. security holdings is calculated for the Tier I and II, so-called "cross-border" exemptions for FPIs from the Commission's tender offer, exchange offer and going-private rules.[4]

Nonetheless, the exclusion of U.S. resident affiliates is not clear on the face of the Rule. An alternate (but probably unintended) reading of the existing language is that securities held by U.S. affiliates would be included in the aggregate number of U.S.-held securities but excluded from the securities held worldwide by non-affiliates. We believe the language should be made clearer to exclude from the U.S. resident security holding figure (the numerator) any securities excluded from the worldwide float (the denominator), and have suggested language in this regard under the next section.

Replacing the "affiliate" concept with more specific categories of large-volume security holders

In light of the Commission's desire to streamline the methods of counting the number of U.S. resident security holders, we believe the "affiliate" concept is too nebulous and fact-specific to effectively serve as the category of excluded holders and should be replaced with more black-and-white categories representing an FPI's large-volume security holders. "Affiliates" are defined in the Release by reference to the definition in Rule 12b-2 as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with," another person. Although many companies consider persons who hold in excess of 10 percent of their shares to be "affiliates", in the end the notion of control requires an analysis of all the relevant facts and circumstances and may leave an FPI with questions as to which security holders it can properly exclude from the calculation.

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4 See Securities Act Rule 800(h), Exchange Act Rule 13e-3(g)(6) and the instructions to Exchange Act Rules 13e-4(h)(8) and (i) and 14d-1(c) and (d).

Consistent with previous Commission rulemaking in the context of the Tier I and II exemptions, we propose that "affiliates" be replaced by persons who hold more than 10 percent of an FPI's voting or non-voting equity securities. In the Tier I and II context, the Commission determined that U.S. persons who hold in excess of 10 percent of an FPI's equity securities are likely to have the sophistication to "go overseas" and access information available about an FPI through non-U.S. information channels. Hence, the Commission decided to exclude them from the percentage of an FPI's U.S. public float in determining whether the FPI must comply with U.S. reporting obligations in conducting a business combination, exchange offer or a going-private transaction. We believe the same rationale holds true in the deregistration context—U.S. residents who hold more than 10 percent of an FPI's equity securities are likely to be able to, and do, make their investment decisions about the FPI through information channels other than U.S. reporting.

In addition, there are circumstances where an FPI may have U.S. equity security holders that do not hold in excess of 10 percent of the relevant securities but nonetheless clearly fall in the category of sophisticated investors. In this regard, we support the various other commentors who have suggested the additional exclusion of securities held by qualified institutional buyers under Securities Act Rule 144A from the U.S. security holding figure. It is well established that qualified institutional buyers rely on information provided outside U.S. registered reporting to make their investment decisions.

Alternatively, we propose that the Commission additionally exclude from the calculation of U.S. public float securities held by an FPI's top five largest-volume U.S. resident equity security holders—each of which holds 10 percent or less of the FPI's equity securities on a worldwide basis--if their holdings aggregate to more than 10 percent of the FPI's equity securities on a worldwide basis. Inclusion of such a small number of large-volume U.S. security holders in the aggregate volume of an FPI's U.S. security holdings would similarly distort the true picture of such an FPI's U.S. public float, including the institutional float, for which the threshold tests were designed.

Putting these concepts together, we propose the following changes to the language of clause 12h-6(a)(4)(i)(B), with corresponding changes to the language of clauses (a)(4)(ii) and (a)(5) (additions in bold; deletions stricken). Alternatively this proposed exclusion language may be included as an instruction to Rule 12h-6 or in clause (e) thereof under "Counting method".

> United States residents held no more than 10 percent of the outstanding voting and non-voting equity securities **of the issuer,** regarding which there is a reporting obligation under section 13(a) or 15(d) of the Act (15 U.S.C. 78m(a) or 78o(d)), ~~held by the issuer's non-affiliates~~ on a worldwide basis at a date

within 60 days before the end of the same 12 month period, **excluding from the calculation:**

> **(x) securities held by persons who held more than 10 percent of the outstanding voting and non-voting equity securities of the issuer on a worldwide basis at such date; and**
>
> **Option A: (y) securities held by qualified institutional buyers within the meaning of Rule 144A of the Securities Act of 1933 at such date.**
>
> **Option B: (y) securities held by the five United States residents who held the largest number of the outstanding voting and non-voting equity securities of the issuer at or below 10 percent of such securities worldwide at such date, provided the aggregate of the securities held by such five United States residents was more than 10 percent of such securities worldwide.**

Other comments

Unregistered offerings of unrelated securities triggering the dormancy period

As the Release is presently drafted, an FPI's offering not subject to Securities Act registration, of securities other than the securities whose registration the FPI intends to terminate, would trigger a 12-month dormancy period prohibiting the FPI from proceeding with the intended termination. We do not believe this should be the case. A private U.S. offering of one class of securities would not constitute accessing the U.S. investor market in a manner that contravenes the spirit of deregistering a wholly separate class of securities. For example, an FPI's issuance of debt securities to qualified institutional buyers under Securities Act Rule 144A should have no bearing on an FPI's desire to deregister a class of its equity securities based on the proportionally small U.S. public float of the equity securities. We therefore propose that the 12-month dormancy period be triggered only in the case of an FPI's unregistered offering of the class of securities whose registration the FPI intends to terminate.

Section 3(a)(10) transactions triggering the dormancy period

Under the Release an FPI would also trigger the 12-month dormancy period by conducting a transaction under Securities Act Section 3(a)(10), which we do not believe should be the case. In Section 3(a)(10) transactions, the sale of an FPI's securities to U.S.

residents is ancillary to the completion of a business combination among companies or corporation reorganisations. U.S. security holders are not so much targets of such a transaction, but rather participants in a corporate transaction affecting an FPI's worldwide security holders. As such, Section 3(a)(10) transactions do not involve access to the U.S. investor market in a manner similar or analogous to an offering for fund-raising purposes where the issuer is making a choice among investor markets.

Moreover, in a Section 3(a)(10) business combination where the surviving company is an FPI, the volume of securities distributed into the U.S. by the FPI could cause its U.S. security holdings to exceed the Release's thresholds of U.S. public float or number of U.S. resident security holders, and thereby independently prevent an FPI from qualifying for termination of registration. Consequently, by its own terms a Section 3(a)(10) transaction can prevent an FPI's termination of registration or impose a latency period in respect of it. For these reasons, we do not believe Section 3(a)(10) transactions should automatically trigger any dormancy period.

Calculation of average daily trading volume for well-known seasoned issuers

For FPIs that are WKSIs, one of the criteria for deregistering a class of securities would be that the U.S. ADTV of such class, during a recent 12-month period, be no greater than five percent of the ADTV of the same class in the FPI's primary trading market during the same period. FPIs whose securities are listed on a U.S. national securities exchange or quoted on a quotation system of a U.S. national securities association must (and do) delist such securities before terminating their registration. In this context, we request the Commission to make explicit that the U.S. ADTV would be zero for any part of a recent 12-month period during which a WKSI FPI has delisted the subject security from every U.S. national securities exchange and inter-dealer quotation system of a U.S. national securities association.

Time of calculating U.S. public float of a WKSI

Under proposed Rule 12h-6(a)(4)(i)(B), a WKSI's U.S. public float must be calculated at a date within 60 days before the end of the "recent 12-month period" during which the WKSI's U.S. ADTV is calculated, which itself must end within 60 days before the date the Form 15F is filed. We propose instead that the Commission allow for the public float calculation to be made at any date within 120 days before the filing date of the Form 15F. This would be consistent with how U.S. public float would be calculated under clauses (a)(4)(ii) and (a)(5) of the same Rule. Moreover, it would provide greater flexibility as to the time period over which the calculation is performed, as the calculation could then be made within 60 days *after* the end of the recent 12-month period. This would be a welcome

accommodation to WKSIs that undertake an often lengthy and cumbersome process of counting their U.S. shareholders among a wide worldwide shareholder pool.

Presumptions about U.S. nominee accounts in the absence of information

Under the Release, FPIs intending to deregister debt securities, as well as FPIs intending to deregister equity securities that do not qualify for termination of registration based on the percentage tests, must determine the actual number of U.S. residents that hold the relevant security, whether such U.S. residents hold directly or through nominee accounts. Nominees in the U.S. often fail or refuse to reply to inquiries about persons on whose behalf they hold securities, even if the information solicited is limited to the number of U.S. resident accounts rather than the identities of the account holders. The Release's proposed facilitation in counting method—namely, that after a reasonable but unsuccessful inquiry an FPI may assume that customers holding through nominees are resident in the jurisdiction in which the nominee has its principal place of business—does not assist those FPIs that need to determine the actual number of U.S. resident accounts behind U.S. nominees.

To address this situation, we propose that the Commission provide for a fall-back presumption of one U.S. resident account per U.S. nominee if, after reasonable inquiry, an FPI is unable without unreasonable effort to obtain information about the number of U.S. resident accounts held by a U.S. nominee. Alternatively, we propose that the Commission instruct the Depository Trust Company to condition a nominee's participation in the clearance system upon the nominee making information available about the number of U.S. residents on whose behalf it holds securities.

Conditioning termination of registration on an FPI's self-tender for securities held by U.S. residents

The Commission has queried whether to condition availability of deregistration as a general matter on an FPI's tendering for all the securities held by U.S. residents. We do not think this is a plausible approach. First, such a change would require an FPI that qualifies for termination based on its existing circumstances—i.e., minimal U.S. public float or number of U.S. resident security holders—to actively undertake a transaction to take out its remaining U.S. security holders. This would be even stricter than the existing criteria for deregistration under Rule 12g-4 and would thereby contravene the Release's objective of facilitating deregistration. Moreover, as the "all-holders rule" under the Commission's tender offer rules would not allow an FPI to make a tender offer selectively to certain of its equity security holders, the Commission would have to promulgate an exception to the "all-holders rule" in order to condition deregistration in this manner.

General concepts that we welcome

In closing, we wish to reiterate that we welcome the principal general concepts that the Commission has advanced in the Release, notably:

- that FPIs may deregister only after a period of time has elapsed from their U.S. registration;

- that a dormancy period is imposed on FPIs that conduct a U.S. registered offering of any securities or that conduct an unregistered offering of the securities that are the subject matter of deregistration (subject—except as otherwise noted above—to the exceptions enumerated by the Commission);

- that FPIs may deregister only after a period of having established a non-U.S. exchange listing that constitutes their primary trading market (although we believe such primary trading market should be allowed to be located anywhere outside the U.S. and not be restricted to the FPI's home country);

- that the criteria for deregistration take into account U.S. public float as an alternative to the number of U.S. resident security holders;

- that the criteria for deregistration are relaxed for WKSIs;

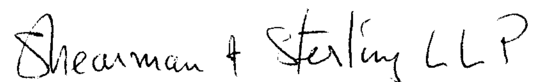
- that the method of counting U.S. resident security holders is relaxed to more closely resemble that under the Tier I and II, cross-border rules, and that U.S. public float is measured by excluding U.S. security holders with larger amounts of securities; and

- that FPIs that deregister may establish the Rule 12g3-2(b) exemption immediately and for so long as they do not register a class of securities under the Exchange Act or conduct an offering pursuant to the Securities Act.

* * *

We appreciate the opportunity to comment on the Release and would be pleased to discuss any questions the Commission or its staff may have in respect of our comments. Please do not hesitate to contact Jim Bartos, Pamela Gibson or Mehran Massih at 011 44 20 7655 5000.

Very truly yours,



SHEARMAN & STERLING LLP