S7-12-05 - 40

VIVENDI UNIVERSAL

February 28, 2006

VIA E-MAIL : rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary,
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: Solicitation of Public Views Regarding 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:

We are pleased to respond to the request of the Securities and Exchange Commission (the "Commission") for comments on the Commission's proposed rules regarding the 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").

We commend the Commission for its efforts to liberalize the procedures by which non-U.S. issuers may terminate their Exchange Act reporting obligations, and we appreciate the opportunity to comment on the proposed rules, given our own experience as an Exchange Act reporting company.

Rules Must Address Fundamental Concerns to Attract Non-U.S. Issuers

The Commission has indicated its belief that as a result of the proposed rules, foreign private issuers should be more willing initially to register their securities with the Commission. If the rules succeed in this regard they will provide a broader base of U.S. investors with increased investment opportunities while at the same time affording to these investors the statutory protections of U.S. securities laws.

We believe, based on our own experience as a non-U.S. issuer and our interactions with other European business leaders, that there are many companies that would register their equity securities with the Commission but have decided not to do so for two main reasons: first, the costs of Exchange Act reporting have increased significantly in recent years, and second, once a non-

New York Office
800 Third Avenue · New York, NY 10022 / USA
Tel.: (212) 572 7000

www.vivendiuniversal.com

Head Office
42, avenue de Friedland · 75380 Paris cedex 08 · France
Tel. 33 (0)1 71 71 10 00 · Fax: 33 (0)1 71 71 10 01

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U.S. issuer enters the U.S. public capital markets it must be prepared to remain there permanently. Both of these concerns have been highly publicized and are well known.[1]

Therefore, we believe that the Commission must fundamentally address both concerns if it is to succeed in achieving its goal of attracting new registrants. This is especially true given the fact that non-U.S. issues may increasingly attract U.S. capital without registering securities with the Commission.[2]

While the rule proposal does not address the first concern,[3] it can potentially address the second. As potential U.S. registrants weigh the costs and benefits of U.S. registration, the fact that any obligation they undertake may well become permanent significantly increases the potential costs of making a wrong decision and is a substantial deterrent to registration. However, we do not believe that the proposed rules and thresholds, as currently drafted, will alleviate this concern. For example, for many companies, a few large U.S. institutional investors could easily surpass the 5% and 10% shareholding thresholds contained in the proposed rules, and as the Commission itself has noted the 300 record holder threshold may too easily be exceeded. As a result, we believe the rules as proposed will continue to discourage issuers from initially registering their securities with the Commission.

Nevertheless, we believe that the rule proposal is a step in the right direction and that adjustments to the proposed rules can make registration with the Commission a more attractive option. In that regard, we respectfully offer the following comments:

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[1] Our own experience as a listed issuer and a reporting company in the U.S. has been positive. The transactions we have carried out in the U.S. have been historically important to us and form a significant part of who we are today as a company. However, due in part to increased costs and significant management time associated with incremental financial reporting obligations, we have publicly announced our intention to seek to terminate, when possible, our Exchange Act reporting obligations. Given this context, we hope you will find our viewpoint to be helpful.

[2] For example, non-U.S. issuers may resort to the U.S. institutional market through a Rule 144A offering. In addition, our experience has been that U.S. affiliated institutional funds are increasingly willing to invest directly in shares (rather than, for example, ADRs) in liquid European markets.

[3] While outside the scope of this specific rulemaking, we have two suggestions to reduce the costs that a non-U.S. dual listed issuer must face in connection with U.S. registration. First, we believe that the Commission should either seek to accelerate the convergence of U.S. GAAP with IFRS or, even in the absence of a convergence, permit non-U.S. issuers to satisfy their Exchange Act reporting obligations by reporting on the basis of IFRS without a U.S. GAAP reconciliation. Second, we believe the Commission should find ways to reduce the potential compliance costs associated with Section 404 of the Sarbanes-Oxley Act. We believe that where home country or other existing regulatory regimes are operating in well developed markets, the Commission should seek ways to exempt compliance or otherwise reduce the burdens thereof.

Threshold and Counting Method Comments

Exclude Qualified Institutional Buyers (QIBs)

You have also asked for comment as to whether the rule should allow an issuer to exclude institutional investors when determining the number of its U.S. resident shareholders. We believe that large institutional investors, such as QIBs, should be excluded for purposes of calculating both the number of record holders as well as the other shareholding thresholds.

As we indicated above, it is our experience that with the internationalization of securities markets, a few significant institutional investors can easily surpass the shareholding thresholds set forth in the proposed rule. As a result, without an adjustment, we believe the rule is likely to be arbitrary in its application and will not address the concerns of potential new registrants.

Further, U.S. securities laws already recognize that QIBs do not require the same statutory protections that other investors may require. Currently, without incurring an Exchange Act reporting obligation, many foreign private issuers offer equity securities to QIBs without reference to a numerical or volume limitation. Similarly, in determining whether to extend the benefit of ongoing reporting in this context, we do not believe the rules need to focus on this class of investor.

Moreover, our own experience bears out the fact that large institutional investors are extremely sophisticated and capable of making investment decisions in non-U.S. markets (whether or not the companies have an Exchange Act reporting obligation) based on the financial disclosures provided under home country practices and as a result do not require the same protections of a continuing Exchange Act reporting obligation.

Raise the Record Holder Threshold from 300 to 3,000

You have asked for comment as to whether the record holder threshold should be raised from 300. We believe that this number should be raised.

As you noted, the 300 holder test is several decades old and may easily be exceeded. In light of the trends toward internationalization of the securities markets that you have identified and the other conditions and protections that you have built into the proposed rules, we believe that it would be appropriate to raise this number, at least for well known seasoned issuers (WKSIs), to something more substantial such as 3,000. While no specific number will provide a perfect measure for the level of interest of U.S. residents, based on our own experience a number such as 3,000 still represents a modest number of beneficial holders relative to the total number of beneficial holders of equity securities in public companies like ours.

Expand Exceptions to One Year Dormancy Condition

The One Year Dormancy Condition Should Not Prohibit Unregistered Offerings

You have invited comment as to whether the one year dormancy condition should prohibit unregistered offerings. We believe the required one year dormancy condition, as currently drafted, is excessively restrictive and should not prohibit unregistered offerings.

While we understand the rationale for not being able to deregister shortly after having conducted a registered offering, we believe an unregistered offering is different.

First, by definition, in conducting an unregistered offering an issuer does not take advantage of its status as an Exchange Act reporting entity. A foreign private issuer is simply doing what any other foreign private issuer is able to do without incurring an Exchange Act reporting obligation, and in the context of an unregistered offering, we do not believe that the investor avails itself of or has the same right to insist on the protection of ongoing reporting. Moreover, the investors in unregistered offerings, where sales and resales are generally restricted to sophisticated investors, generally do not need the protections afforded by ongoing reporting.

Second, by restricting both registered and unregistered offerings, the dormancy condition provides any foreign private issuer, whether or not it has actually made a decision to deregister, an incentive to exclude all U.S. investors from any securities transaction in order to maintain the flexibility for a potential future deregistration. We believe that a condition that encourages the blanket exclusion of U.S. investors from potential offerings is not in the interest of U.S. investors.

Third, this incentive has the discriminatory result of encouraging a non-U.S. issuer that is Exchange Act registered to exclude U.S. investors in transactions where a comparable non-U.S. company that is not Exchange Act registered could readily include U.S. investors – thus reinforcing the notion that it is advantageous not to register in the U.S. to begin with. You have indicated that if you only proscribe registered offerings, the condition could act as a disincentive to a foreign private issuer to conduct a registered offering.[4] However, whether or not you also proscribe unregistered offerings, the condition itself will already act as a disincentive to conduct a registered offering for a foreign private issuer that may seek to exit the U.S. Under the proposed rule, the result is that an issuer may make no offering at all to U.S. investors, and a restriction on both registered and unregistered offerings appears only to be punitive to those issuers who would seek an eventual deregistration.

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[4] In fact, the fungibility requirement of Rule 144A already makes it more difficult for reporting foreign private issuer to conduct an unregistered equity offering in lieu of a registered equity offering. This is also another example of a restriction imposed on a foreign private issuer with a U.S. listing that is not similarly imposed on other foreign private issuers.

Dormancy Condition Should Not Prohibit the Offering of Restricted Securities as Consideration in Private Merger or Acquisition Transactions

Moreover, the dormancy condition, as drafted, could discourage certain transactions that are otherwise beneficial to U.S. persons, such as private merger and acquisition transactions where at least one target shareholder is a U.S. person and restricted securities might otherwise be offered to target shareholders.

If the Commission decides to use the dormancy period condition to preclude certain unregistered offerings, it should narrow the scope of unregistered offerings encompassed by the condition and allow an issuer to offer restricted securities pursuant to Section 4(2) or Regulation D to a U.S. resident as consideration for a private merger or acquisition transaction (e.g. a transaction with less than 15-20 target shareholders). Absent this exemption, an issuer may be required to forego (or incur significant costs to structure around) beneficial corporate transactions if a U.S. shareholder of a potential target is present. We do not believe that the dormancy requirement is necessary to protect investor expectations in that scenario or prolong the period of Exchange Act registration. Nor do we believe that this exclusion will discourage an issuer from otherwise making a registered offering.

Clarification of Exemption for "Issuer's Employees"

The dormancy condition, as drafted, exempts sales to the "issuer's employees." We would ask the Commission to clarify in either the rule or the adopting release that this exemption includes sales to former employees and other persons who are entitled to purchase securities registered on Form S-8.

<u>Voluntary Deregistration for Issuers within Designated Markets</u>

We also believe the Commission should consider other creative exit alternatives to attract non-U.S. issuers, such as voluntary deregistration in certain circumstances. For example, if an issuer meets the two year Exchange Act reporting condition, the one year dormancy condition and the home listing condition, we believe that it should be able, acting under the direction of its supervisory bodies (e.g. the board of directors or a shareholders meeting), to provide reasonable notice (such as one year) and voluntarily deregister, without measuring compliance with the other thresholds. To protect investors and ensure a liquid market and ongoing information, the Commission could limit this alternative to WKSIs and impose additional conditions such as an undertaking to continue to provide English language documents pursuant to Rule 12g3-2(b) for a period of time.

We believe that the notice period, together with the two year Exchange Act reporting condition, would guarantee U.S. style reporting for a substantial minimum period (e.g. 3 years), thus avoiding the risk that an issuer would simply take advantage of interest generated by a registered offering and then cease ongoing U.S. reporting.

Under an additional exit alternative such as we have suggested, an issuer would be encouraged to register its securities with the Commission, knowing that there is a definitive exit route available, if it so chooses.

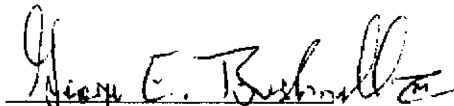
If the result of not giving issuers a definitive exit route is that they forego U.S. registration, we believe it would be better to allow for voluntary deregistration and give investors the opportunity to adjust their expectations about ongoing reporting in deciding whether or not to invest in the securities of such issuers, rather than being denied the opportunity to invest altogether. Similarly, an investor is arguably better off benefiting from the statutory protections of U.S. securities laws during the offering and for a minimum period afterwards than investing abroad without the same protections.

Allow Market Forces to Define the Conditions of Termination of Exchange Act Reporting Obligations

Finally, we believe the Commission can go further to attract non-U.S. issuers knowing that the market is able to define stricter conditions for issuers to terminate their Exchange Act reporting obligations. Investors are in a position to protect themselves. This occurs right now, for instance, in the high-yield debt market, where it is common for issuers at the insistence of investors and underwriters to bind themselves in an indenture to ongoing reporting obligations even when they might otherwise be entitled to cease their Exchange Act reporting obligations. Similarly, investors in equity securities could guarantee a longer reporting period for equity securities or insist on stricter conditions to termination of reporting than those provided by the rules ultimately adopted by the Commission by requiring contractual provisions in underwriting agreements or depositary agreements to that effect.

We appreciate the opportunity to comment on the proposed rules. We would be pleased to discuss further any of our comments.

Very truly yours,



George E. Bushnell III
Senior Vice President and
Deputy General Counsel
Vivendi Universal S.A.