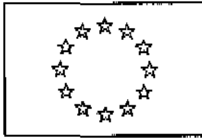

EUROPEAN COMMISSION
Internal Market and Services DG

Director-General

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Ms Nancy 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 (hereinafter, the SEC) in relation to its 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 (hereinafter, the Exchange Act).

The observations in this letter reflect extensive consultations with governments and securities regulators of the 25 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 25 Member States of the European Union*. The views put forward by the European Commission in this response are also supported by the Committee of European Securities Regulators (CESR), representing 27 securities regulators in the European Economic Area.

For some time the European Commission, on behalf of the Member States of the European Union, has signalled to the SEC the need for revision of the existing SEC rules on deregistration which have proved burdensome and impracticable for European companies listed on the US capital markets that seek to terminate that listing. The principal problems posed for such issuers by the current SEC rules are the temporary nature of deregistration, the counting rules by which the eligibility of a foreign private

issuer to deregister is determined, and the scope of availability of deregistration. We are pleased that the SEC's proposal attempts to tackle these three key issues.

Solving this issue of the deregistration of foreign issuers will be a clear signal that the transatlantic financial markets regulatory dialogue can deliver tangible results and could have positive effects in the context of other ongoing transatlantic discussions. We believe both Europe and the United States will benefit from more open and competitive markets, where European issuers are not kept in an asymmetric situation of being able to enter U.S. capital markets but virtually unable to exit them, whereas U.S. issuers do not encounter the same difficulties in the EU. **Based on our analysis and numerous consultations, however, we do not think the proposed rules resolve the deregistration issue.**

1. General Remarks

The European Commission welcomes the announcement by the SEC of a 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 welcome in particular the SEC's view that **the permanent nature of deregistration** should be a fundamental principle of the new deregistration rules. The current mechanism of dormant registration gives rise to legal uncertainty and we appreciate that the SEC has endeavoured to change it.

We also support the changes proposed by the SEC in relation to **the counting method** used to determine the size of the interest held by U.S. residents in a foreign private issuer. Given the nature of contemporary "dematerialised" securities markets, it is reasonable to permit foreign issuers to rely on the information provided by third party information services providers. For the same reasons, we agree with the SEC that, rather than being required to "look through" the holdings of "nominees" (brokers, dealers, banks etc.) worldwide, foreign private issuers should be allowed to limit their inquiry regarding the amount of securities represented by accounts of customers resident in the U.S. to "nominees" located in the U.S., in the issuer's jurisdiction of incorporation or, if different, the jurisdiction of the issuer's primary trading market.

However, our analysis has shown that, as drafted, the new rules would only assist very few European firms to deregister, and we therefore urge the SEC to reconsider some details of its proposal.

Information compiled by market participants, as well as estimates we have received from Member States, individual European companies and their associations, confirm that only a fraction of European companies currently registered with the SEC would be able to terminate their registration under the proposed rule changes. Specifically, according to estimates provided to the European Commission, of some 70 issuers incorporated in the Member States with the greatest market capitalisation and presence on the US capital markets, not more than 2 issuers from France, 2 from the United Kingdom, 1-2 from

Italy, 1 from the Netherlands and probably none from Germany[1] would be eligible to benefit from the new rules. There is a broad consensus in Europe that the technical reason for the restricted availability of permanent deregistration is that Rule 12h-6(a)(4), as proposed, sets the applicable threshold of U.S. shareholder interest much too low. Available data derived from a sample of large EU companies registered with the SEC indicates that typically US investors hold 21% of equity in such a company, with a 20 to 1 split between institutional and retail shareholders.

We note that the SEC's preliminary analysis delivered more encouraging results: some 26% of foreign private issuers would be able to deregister under the new rules[2]. Given the apparent difference between the data, and the fact that we are doubtful that the proposals will work for EU issuers, we would welcome a more detailed explanation from the SEC of the **methodology** used to obtain those figures, the **geographical breakdown** of the results, and information which European companies would be eligible to deregister.

Moreover, even if the SEC's estimate that 26% of foreign private issuers would be eligible to deregister permanently under the proposed new rule proves to be accurate, we would consider this to be an **unambitious target** for a jurisdiction such as the United States, that has consistently argued together with the European Union for the development of global, open and liquid financial markets. **The SEC's figures also mean that 74% of foreign private issuers cannot deregister.** It is, in our view, significant that no European Union Member State has similarly restrictive rules for the exit of foreign issuers from their financial markets to be necessary for the purposes of investor protection. We consider that "captive" measures are not a good way to maintain long term presence or attractiveness of securities markets. Similarly, we are sure that open access to deregistration would not make all foreign issuers leave U.S. markets but it would increase confidence and encourage free flow of capital between the EU and the US.

For these reasons, we believe that the SEC should **consider revising the eligibility criteria** for deregistration by foreign private issuers in the proposed Rules 12h-6(a)(4)-(6). Our extensive consultations with European stakeholders, together with our own analysis, suggest a number of options for amending the proposed rules so as to ensure an effective balance between adequate investor protection and open capital markets. These options as well as other considerations relating to the quality of reporting standards in the EU are outlined below.

2. INVESTOR PROTECTION

We appreciate that with the proposed rules the SEC aims to ensure the adequate protection of investors in the U.S. We fully share that objective. Indeed, in the past years the European Union has put in place a **comprehensive framework of disclosure and**

[1] In total, it is estimated that a maximum of 4 smaller German companies would be eligible to use the new rules.

[2] Page 34 of the introduction to the proposal.

reporting requirements imposed on issuers of securities, which should be considered by the SEC to be comparable and equivalent with U.S. disclosure rules.

Before they may publicly offer securities or request their admission to trading on regulated European exchanges, European issuers must publish an exhaustive **prospectus**, drawn up in accordance with detailed requirements as to its form and its content which are identical throughout the EU, and which reflect IOSCO standards. Before the prospectus can be published, it must be approved by an independent competent authority which ensures that it complies with the applicable requirements[3].

Subject to appropriate exemptions, all issuers with securities admitted to trading on a regulated market are required to comply with **extensive transparency rules**[4] which require the publication of the following periodic financial information and reports:

- **the annual financial report** – to be made public by the issuer no later than four months after the end of each financial year;

- **the half-yearly report,** which is obligatory for issuers of shares or debt securities: this covers the first six months of the financial year and must be made public as soon as possible after the end of the relevant period, but at the latest two months thereafter;

- **interim management statements**: relating to each six month period of a financial year, and consisting of an explanation of material events and transactions which have taken place during that period, and a general description of the financial position and performance of the issuer and any entities which it controls. The statement must be made public during the third or fourth month of the six-month period to which it relates by any issuer that does not **already publish quarterly financial reports**.

The annual and half-yearly financial reports must be made available to the public for at least five years.

From 2005 all listed EU companies (including banks and insurance companies) have been required to prepare their consolidated financial statements in accordance with **IFRS**[5].

The harmonised EU regime regulating market transparency also requires full notification of all **acquisitions or disposals of major shareholdings** and major proportions of voting rights in traded companies, and ensures that such information is made public in a timely manner.

Finally, "**market abuse**" legislation[6] introduces an exacting regime designed to prevent market manipulation, including insider trading, and market distortions caused by

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[3] Cf. Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC and Commission Regulation 809/2004 on Prospectus.

[4] Cf. Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive2001/34/EC.

[5] Cf. Regulation 1606/2002 on the application of international accounting standards.

[6] Cf. Directive 2003/6/EC on insider dealing and market manipulation and its implementing directives (2003/124/EC, 2003/125/EC, 2004/72/EC).