

New York State Bar Association
One Elk Street
Albany, NY 12207
518-463-3200

Business Law Section
Committee on Securities Regulation

March 3, 2006

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

E-mail address: rule-comments@sec.gov

Attention: Nancy M. Morris, Secretary

Re: File No. S7-12-05
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;
Release No. 34-53020; International Series Release 1295.

Ladies and Gentlemen:

The Committee on Securities Regulation (the "Committee") of the Business Law Section of the New York State Bar Association appreciates the invitation in Release No. 34-53020; International Release 1295 (the "Release") to comment on the proposal to amend the rules allowing a foreign private issuer to terminate the registration of a class of equity securities under section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") and to cease its reporting obligations regarding a class of equity or debt securities under section 15(d) of the Exchange Act.

The Committee is composed of members of the New York Bar, a principal part of whose practice is in securities regulation. The Committee includes lawyers in private practice and in corporation law departments. A draft of this letter was reviewed by certain members of the Committee, and the views expressed in this letter are generally consistent with those of the

majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, are those of the Committee and do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

Summary

We strongly support the Commission's initiative to amend the rules governing a foreign private issuer's ability to terminate its Exchange Act reporting obligations. We believe that the current system, preventing many companies from permanently deregistering, is unfair, and that changes to the international securities markets, coupled with the increased costs of compliance with United States reporting requirements, have contributed to the distress experienced by many foreign private issuers that are seeking an alternative to perpetual U.S. regulation. In addition, in many instances, the current rules are both impractical and unusable. We strongly support implementing a deregistration system for foreign private issuers that addresses these concerns.

We understand that a primary motivation for relaxing the deregistration standards is to ensure that the U.S. remains an attractive market for foreign private issuers seeking to list securities or to raise capital. While this letter focuses on the deregistration reforms proposed in the Release, we believe that overly restrictive standards for deregistration constitute only one of a number of substantive regulatory disincentives for foreign private issuers to enter the U.S. markets. We encourage the Commission to undertake a comprehensive review of the effects of U.S. securities regulation on foreign private issuers, with an objective of reducing any unnecessary regulatory burdens on such issuers. While we understand and agree with the need for investor protection, we also believe that the Commission should remain sensitive to the perception of many foreign issuers regarding the burdens of U.S. regulation. Specifically, we believe that the application of the Commission's rules implementing Section 404 of the Sarbanes-Oxley Act of 2002 should be revisited in the context of foreign private issuers. Ultimately, the ability to deregister will only have a significant effect in attracting foreign private issuers if the Commission is also able effectively to address the regulatory burdens imposed upon foreign issuers.

In our view, to be effective, the new deregistration rules must achieve three goals. Firstly, they must be practical and easy to apply with a reasonable degree of certainty. The rules should permit issuers, with reasonable ease, to determine whether or not they are eligible to deregister. As we discuss below, we believe that as proposed, rules that require issuers to determine the residency of their beneficial security holders in order to deregister are inherently difficult to apply in the international context and may consequently fail to achieve this goal. We suggest that a benchmark based solely on trading volumes would more efficiently achieve this goal without compromising the Commission's investor protection mandate. In this letter, we also identify a number of specific areas where, even if the Commission decides to retain a deregistration mechanism based on determining U.S. residency, we believe the rules would benefit from additional clarification. We also suggest that even if such a system is retained, the Commission consider adopting an alternative test which would enable issuers that are no longer listed on a U.S. securities exchange or on NASDAQ, and which have not engaged in registered offerings of securities for a period of time (for example, five years) to deregister if they maintain a listing on an established foreign exchange.

Secondly, we believe that to be effective, the rules must result in an appreciable increase in the number of foreign private issuers eligible to deregister. If the number of additional issuers eligible to deregister is insignificant, the new rules will fail, both in addressing the problems encountered under the current rules, and in encouraging additional foreign private issuers to consider registering or listing in the United States. A number of our suggestions below are intended as modifications of the proposed rules. For example, we suggest that the securities held by qualified institutional buyers ("QIBs") resident in the U.S. should be excluded from the percentage of securities held by U.S. holders relative to the total public float. In addition, we suggest that the dormancy period should not be affected by exempt transactions, registered offerings on Form S-8 or registered dividend or interest reinvestment plans. We believe that such modifications of the proposed rules would facilitate deregistration without adversely affecting the investment protection mandate of the Commission.

Lastly, the new rules must fairly balance the interests of both issuers and investors. We suggest that in its final rules the Commission deregulate the deregistration process, and eliminating unnecessary conditions to deregistration, to the maximum extent possible. We do not believe that permitting the deregistration of a number of foreign private issuers that have

taken steps to terminate their U.S. listings and have no desire to remain subject to U.S. reporting obligations will undermine our system of investor protections. We also believe that the degree of accommodation demonstrated by the Commission will be viewed by foreign private issuers as an indication of the Commission's desire to reasonably accommodate foreign issuers. As we move to international convergence of accounting standards, it may well be that U.S. investors would be best served by an active U.S. trading market for the securities of foreign private issuers and adherence to a U.S. disclosure regime that is not viewed as unduly intrusive or burdensome. We believe that a regime consisting of EDGAR submissions of material home country disclosure documents translated into English, accommodations with respect to disclosure standards, issuer consents to service of process and international cooperation in enforcement could best implement the Commission's investor protection mandate. We encourage the Commission to move in this direction, with the understanding that any initiatives undertaken by the Commission will be subject to further review and scrutiny as the global capital markets evolve. As discussed in more detail below, we also encourage the Commission to amend Rule 12g3-2(b) to permit issuers to establish the 12g3-2(b) exemption even if the exemption is claimed after a Section 12(g) application would otherwise have been required to be filed. Finally, we propose that the home country listing condition for issuers should be revised to allow an issuer to deregister if a substantial percentage of the issuer's securities trade on designated offshore trading markets and no exchange or trading market in the United States constitutes the issuer's largest trading market by volume.

The first part of the discussion below focuses on Proposed Rule 12h-6. We first discuss the numerical eligibility criteria in Proposed Rule 12h-6, and then address the non-numerical criteria. The second part of the discussion focuses on proposed amendments to Rule 12g3-2.

Discussion

I. Proposed Rule 12h-6

A. The Numerical Criteria for Deregistration in Proposed Rules 12h-6(a)(4)-(6) and the Counting Method in Proposed Rule 12h-6(e)

We strongly support expanding the current rules which require an issuer to have fewer than 300 U.S. holders (or fewer than 500 holders on a worldwide basis) in order to deregister a class of equity securities. Our primary reasons for supporting an expansion of the 300 U.S. holders requirement are that these numbers were established long ago prior to the significant expansion of share ownership, and that it is extremely difficult, and in many cases impossible, to determine the residency of beneficial security holders as required by Rule 12g3-2.¹ Under the current system, some foreign private issuers, despite the existence of very little U.S. market interest, either in terms of value of securities or in number of U.S. holders, are required to continue their Exchange Act reporting and incur reporting costs that, we believe, may be disproportionate to the benefit such reporting provides to U.S. security holders.

Under any of the criteria outlined in proposed Rules 12h-6(a)(4) - (6), an issuer seeking to deregister must make a determination regarding the U.S. residency status of its security holders. Notwithstanding the presumptions set forth in the proposed Rules, we believe this requirement does not fully consider the practical difficulties encountered by issuers in making this determination. First, as the Commission noted in the Release, in many cases, foreign banks and nominees are unable or unwilling to provide the requested information regarding account holders. Second, even when the information is produced, it is sometimes difficult to determine whether any particular account holder holds the securities for its own account or for the benefit of another holder. Third, the report of an independent service provider engaged by an issuer to collect information regarding its security holders may not be complete, and may differ from

¹ The alternative requirement of 500 holders of record on a worldwide basis is one which most foreign private issuers are unable to satisfy if they have active trading markets abroad.

publicly available records. Fourth, as certain no-action inquiry letters² indicate, strict adherence to Rules 800-802 under the Securities Act, which require a similar counting of U.S. resident holders of foreign private issuers, has proven very difficult. Taken together, these issues not only highlight the practical difficulties encountered in determining eligibility to deregister, but also demonstrate the possible unreliability of a measure based on U.S. residency status. Accordingly, we question whether any eligibility criteria that rely on determining the U.S. residency status of security holders are practical indicia of whether an issuer should be permitted to deregister a class of securities.

We note that proposed Rule 12h-6(e) is designed to ease the burden on foreign private issuers in determining the U.S. residency status of their security holders. We believe that accommodations such as those in proposed Rule 12h-6(e) are necessary and desirable in a system that requires an issuer to make such determinations where the necessary information may not be readily available. However, we also believe that the need for a counting rule like proposed Rule 12h-6(e) highlights the difficulties inherent in determining the residency of security holders, by virtue of its acknowledgement that primary information may be unavailable and that issuers may need to make assumptions or use other means to determine the required information. While we understand the compromise reflected in proposed Rule 12h-6(e), we believe that an alternative test that does not require a determination of U.S. residency status would be significantly more desirable.

The Release indicates that the Commission's reluctance to promulgate a rule based solely on trading volume stems from a concern that such a benchmark would not constitute an accurate representation of U.S. investor interest in the securities. We believe, however, that the focus of the Commission's efforts should be to protecting those U.S. investors who expect and require the protections afforded by Exchange Act disclosure. Especially in view of the ease with which U.S. investors may acquire securities of foreign private issuers (both in the world markets and in the U.S.), it is inappropriate to conclude that all U.S. investors expect the benefits of Exchange Act protection. We suggest a measure based solely on trading volumes because we believe that trading volume is both more readily ascertainable and an appropriate method of measuring the extent of U.S. market interest in an issuer's securities. In this regard, we believe that investors

² See, for example, *Alcan Inc.* (October 7, 2003); *Saipem SpA* (July 29, 2002); and *Equant N.V. and France Telecom S.A.* (April 18, 2005)

who trade foreign securities on foreign exchanges are unlikely to expect the protections of the Exchange Act, while investors who trade foreign securities on exchanges or trading markets located in the United States may be more likely to expect the benefits of the Exchange Act disclosure regime. While we concede that a measure based on relative trading volumes alone is not a perfect measure of the U.S. investor interest (for example, such a test would not reflect investors who hold, rather than trade, securities), we believe that it would be no less accurate, and far easier for issuers to comply with, than a test requiring research into the residency of individual account holders.³

In the event the Commission determines to retain a test based on the number or percentage of U.S. security holders, we have the following comments regarding Proposed Rules 12h-6(a)(4)-(6) and 12h-6(e):

First, we encourage the Commission to clarify how 10% (or 5%) of the “outstanding voting and non-voting equity securities” regarding which there is a reporting obligation, held by the issuer’s non-affiliates on a world-wide basis, should be measured. As we understand, this test, which is intended to measure worldwide public float, requires the aggregation of securities of the issuer among different classes. Even if, for example, a test based on total market value were possible, it would not necessarily address the fact that different securities may have substantially different rights and privileges. A related issue is how to treat securities that are convertible into equity securities, such as convertible debt or warrants. While we understand that the test proposed by the Commission was intended to take into account the overall U.S. holdings of the issuer (and not just securities of each particular class), and we agree with this concept, we believe that the Commission will still need to provide guidance as to how the aggregation is to be calculated.

Second, we believe that in determining the amount of securities held by U.S. holders, securities held by QIBs in the United States should be excluded. We suggest that in order to determine which securities are held by QIBs, an issuer be entitled to rely on such information as may be reasonably available to it, including (without limitation) information set forth on Form 13F reports filed within 120 days prior to the filing the Form 15F or on a certification of ownership by a QIB that is made within 120 days prior of the filing of the Form 15F. In our

³ We note that in promulgating Regulation S, the Commission specifically defined the term “substantial U.S. market interest” in a foreign issuer’s equity securities by reference only to trading volumes.

view, many QIBs acquire securities of foreign private issuers in offshore markets, and even those that acquire domestically may not rely upon, or expect, the continued protection of the Exchange Act.

Third, issuers are likely to encounter the following counting issues and additional rule guidance from the Commission would be useful in addressing these issues:

- (a) Issuers who have obtained the reports of third party independent information services providers may encounter difficulty reconciling these reports to the information set forth in publicly filed beneficial ownership reports, which under Proposed Rule 12h-6(e)(3) would be required to be counted to the extent that they indicate U.S. ownership. For example, if a U.S. ownership block appears in a publicly filed document, an issuer may be unable to tell whether that U.S. holding is already included in an information service provider's report (and therefore should not be double-counted). This may occur, for example, if the publicly filed document reports beneficial ownership but the information furnished by the service provider only identifies holdings in the name of a U.S. nominee or intermediary. In addition, it may be virtually impossible to determine the U.S. residency status of the security holders of foreign private issuers in certain jurisdictions as of a specific date, because inquiries made by information service providers of banks, brokers, dealers and nominees for the securities are received at different times and replied to within different timeframes.
- (b) In our view, the final rule should confirm that issuers should only be required to examine publicly filed reports of beneficial ownership under Section 12h-6(e)(3) if a copy of the report is required to be provided directly to the issuer. Otherwise, an issuer may have an open-ended obligation to search all publicly filed reports of beneficial ownership, including reports filed by third parties of which the issuer is not necessarily aware, and can not reasonably discover.
- (c) Section 12h-6(e)(2) requires that both a "reasonable inquiry" be made to obtain from the nominee information regarding its account holder's residency and that in addition a "reasonable effort" be made to obtain the

information notwithstanding the nominee's refusal to provide the information. We are uncertain what additional steps an issuer could take beyond a simple request of the nominee to provide the information.

Fourth, we note that the determinations of ownership and trading volumes in proposed Rule 12h-6(a)(4) are required to be calculated as of specific dates prior to the filing of the Form 15F. We encourage the Commission to clarify that an issuer who met those tests as of the dates provided in the rules would be permitted to deregister, even if on the date of filing the Form 15F or thereafter, the tests regarding ownership and trading volumes are not met. It would be unduly burdensome to require an issuer to re-perform the deregistration tests throughout the deregistration period.

Lastly, in the event that the Commission determines to retain the residency based test, we encourage the Commission to adopt an alternative test that would allow an issuer whose securities are no longer listed on a U.S securities exchange or on NASDAQ, and which has not engaged in registered offerings of securities for a long period of time (for example, five years), to deregister if it has a listing on an established foreign exchange.

B. The Eligibility Criteria for Deregistration in Proposed Rule 12h-6(a)(1)-(3)

Two-Year Exchange Act Reporting Condition

We believe that the two year Exchange Act reporting condition in Proposed Rule 12h-6(a)(1) should be revised in two respects. Firstly, it should not apply to issuers that do not have securities trading in the United States and do not, at the time of the proposed deregistration, have outstanding any securities issued in registered offerings in the United States (this would include, for example, issuers that issued debt securities that are no longer outstanding). Secondly, we believe that the Commission should reduce the proposed two year condition to one year to conform it to the existing requirement under Rule 12h-3.

One-year Dormancy Condition

We support the one-year dormancy condition, with the following revisions. First, we strongly believe that an issuer that has only engaged in exempt transactions during the dormancy period should be allowed to deregister, irrespective of the exemption used. Congress did not

extend the registration requirements of the Securities Act to those offerings for a number of reasons. Section 4(2) offerings are exempt from the registration provisions of the Securities Act because the investors in such offerings (perhaps together with purchaser representatives) are deemed to have sufficient knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment (or based on other comparable criteria). Because Section 4(2) does not necessitate the imposition of Exchange Act reporting obligations on an issuer, we see no reason to disqualify an issuer from the ability to deregister based upon the occurrence of a Section 4(2) offering within the one year period prior to deregistration.⁴ We also do not believe that schemes of arrangement under Section 3(a)(10) of the Securities Act should disqualify an issuer from being eligible to deregister. Section 3(a)(10) reflects a determination by Congress that the registration provisions of the Securities Act are unnecessary in the case of a transaction involving a fairness hearing where all persons to whom it is proposed to issue securities in an exchange transaction have the right to appear, and where the fairness of the exchange is reviewed and approved by a court or other governmental authority. In our view, a U.S. investor who receives the security of a reporting foreign private issuer pursuant to a 3(a)(10) transaction does not have any basis to expect that the issuer will continue to remain subject to Exchange Act obligations, nor would the court or other body reviewing the transaction base its fairness determination on this expectation. Also, it is not clear that a 3(a)(10) transaction by a foreign private issuer would necessarily result in a large increase in the number of U.S. holders of the issuer. As proposed, the involvement in a 3(a)(10) transaction would disqualify the issuer from deregistration for an entire year, even if the number of U.S. securities holders receiving securities in the transaction were minimal. We consider this to be an unreasonably harsh result.⁵

Second, we suggest that Proposed Rule 12h-6(a)(2)(i)(A), which exempts the sale of registered securities to employees from the one-year dormancy condition, be amended to exempt securities sold to any person who would qualify as an “employee” pursuant to an offering registered on Form S-8. As drafted, the rule would not appear to include securities issued under

⁴ As proposed, the issuance of securities to even one investor in the U.S. would trigger the disqualification.

⁵ We note that under the Proposed Rule, an issuer that has less than 300 U.S. holders would be disqualified from deregistering if during the one-year dormancy period it engaged in a 3(a)(10) transaction, even though under existing rules, such an issuer would be able to suspend its reporting obligation.

Form S-8 to the employees of an affiliate of the issuer or its advisers or consultants in compensatory circumstances.

Third, we suggest that Proposed Rule 12h-6(a)(2)(i) also exempt registered dividend or interest reinvestment plans. We do not believe that the registration of such plans should disqualify issuers from eligibility for deregistration. We note that the Commission has recognized the special status of such plans in other contexts.⁶

Home Country Listing Condition

We believe that the proposal that an issuer maintain a listing of the subject class of securities in the two year period prior to deregistration on an exchange in its home country, and that that exchange constitute the issuer's primary trading market should be revised. We suggest that the final rule entitle the issuer to deregister if for the two year period prior to deregistration, a substantial percentage (*e.g.*, 75% or greater) in the aggregate of the trading in the subject class of securities of the issuer took place on the facilities of one or more "designated offshore securities markets" as defined in Regulation S, and that for that two year period, no exchange or trading market in the United States constituted the single largest trading market by volume in the subject class of securities of the issuer.

We believe such a test would be preferable to the proposed home country listing condition for a number of reasons. First, the terms of the test are definitionally confusing. As defined in Form 20-F, the term "home country" refers to the country where the issuer is legally organized, incorporated and established and, if different the country where it has its principal listing.⁶ The term "principal listing" is undefined in Form 20-F, and the use of the term "and" in the definition suggests that a company may have two home countries. In our view, it would be far simpler to refer to a primary trading market or markets, without reference to a 55% qualification.

Second, we see no reason why this condition should be limited to a specific country. An issuer may determine to shift its primary listing from one foreign market to another, or the relative trading volumes in such markets (assuming that the issuer maintains listings in more than one foreign market) could change. If such shifts were to occur in the 12 months prior to deregistration, the issuer would not have a "primary trading market" as the term is defined in

⁶ See, for example, the instructions to Item 9.01 of Form 8-K and Instruction 2 to Item 8 of Form 20-F.

Proposed Rule 12h-6(d). In our view, such a shift should not affect the issuer's deregistration eligibility. Likewise, changes in the foreign markets themselves, such as a merger of one foreign market with another, should not implicate an issuer's deregistration eligibility.

Third, the Release states that the purpose of the home country listing condition is to "provide for a non-U.S. jurisdiction that principally regulates and oversees the issuance and trading of the issuer's securities and disclosure obligations by the issuer to its investors." We suggest that the proposed rule would more effectively achieve this purpose, be more practically useable and provide greater protection to investors if the condition were framed by reference to trading on one or more "designated offshore securities markets" as defined in Regulation S. We believe reference to such markets reflects a recognition of the bona fides of such markets (which would not necessarily be the case in the proposed rule), and that such markets are more likely to provide certain regulatory oversight of listed companies.

II. Amendments to Rule 12g3-2

We strongly support amending Rule 12g3-2 to permit issuers to establish a 12g3-2(b) exemption immediately upon deregistration pursuant to proposed Rule 12h-6. This would alleviate the burden which currently exists on companies whose reporting obligation is suspended to review their shareholdings each year, a process that can be time-consuming and expensive. However, we do have a few suggestions.

First, we would like to encourage the Commission to take this opportunity to revise Rule 12g3-2(b) further to permit companies that do not have securities trading in the United States, and have never engaged in registered offerings in the United States to establish the 12g3-2(b) exemption, even if the 12g3-2(b) application is made after the date on which a registration statement under section 12(g) of the Act would otherwise be required to be filed. Because of the increased internationalization of the securities markets and current book-entry transfer procedures, foreign private issuers are often unaware when the number of their U.S. shareholders exceeds 300. While some issuers are aware that their U.S. shareholdings require constant monitoring, others, especially those that have never engaged in offerings in the United States and had only limited business dealings in the United States, are surprised to discover that they are required to register under the Exchange Act. Unfortunately, that discovery often takes place

after the date on which a registration statement is required to be filed, thereby making such issuers ineligible to use Rule 12g3-2(b). Requiring such issuers to register seems particularly unfair because typically investors in such issuers never expected or required the protections of the Exchange Act.

Second, we suggest that the rule be amended to provide that documents published on the web may be removed after a certain period of time, for example, three years, to avoid having issuers populate their website with outdated documents.

Third, we suggest that the information that is required to be published on the website be limited to material information that is actually distributed to security holders. In many cases, information provided to stock exchanges and made public by stock exchanges is routine information that would not be of interest to typical investors. The obligation to translate and post this information on a website could prove quite burdensome. We believe that regardless of the Commission's determination regarding the issuer's web-posting obligation, any obligation to post information on a website should be subject to a materiality standard equivalent to that applicable to reports on Form 6-K.

Fourth, we are concerned that the exemption may be lost if it is later determined that a document that should have been posted was inadvertently not posted. We suggest that the Rule provide that an inadvertent failure to post a document that was required to be posted would not result in the loss by an issuer of its Exchange Act exemption if the issuer promptly posts the document as soon as practicable after discover of the failure to post the document.⁷

Lastly, we suggest that the obligation to provide documents on the issuer's website terminate automatically at such time as the issuer determines that the number of U.S. holders of its securities has decreased below 3,000 or such other number as the Commission determines to be appropriate for the alternative deregistration threshold.

⁷ See, for example, preliminary note 2(b) to Rule 164 under the Securities Act.

We hope the Commission finds these comments helpful. We would be happy to discuss these comments further with the Staff.

Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

By Michael J. Holliday
MICHAEL J. HOLLIDAY
CHAIR OF THE COMMITTEE

Drafting Committee:

Jeffrey W. Rubin, Co-Chair
Michael J. Holliday
Asi Kirmayer, Co-Chair
Guy P. Lander
Cathleen McLaughlin

Copy to:

The Honorable Christopher Cox, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Annette L. Nazareth, Commissioner

Martin P. Dunn, Esq., Acting Director, Division of Corporation Finance
Paul M. Dudek, Chief, Office of International Corporate Finance
Ethiopsis Tafara, Director, Office of International Affairs
Brian G. Cartwright, Esq., General Counsel