BUSINESSEUROPE

The Honorable Christopher Cox
Chairman
Securities and Exchange Committee
100 F. Street N.A.
Washington D.C. 20549
United States of America

08 February 2007

THE SECRETARY GENERAL

Dear Chairman Cox,

I am writing to you concerning the SEC's proposals on interpretative guidance for management to improve Sarbanes-Oxley 404 implementation and on the new rules allowing foreign private issuer deregistration under the Exchange Act as put forward during the SEC meeting held on 13 December.

As you know, BUSINESSEUROPE has been following and actively participating in the SEC consultations on the above-mentioned subjects, expressing European business concerns. We would like to reiterate that both topics are of prime importance for European companies.

We consider that the two above-mentioned proposals are positive improvements for European companies and therefore support them. We believe that, on the one hand European companies listed in the US or wanting to enter the US market will benefit from a streamlined application of Sarbanes-Oxley. On the other hand European companies wishing to enter or leave the US market will now benefit from a real deregistration option.

(i) Interpretative guidance for management to improve Sarbanes-Oxley 404 implementation

Regarding Section 404 of Sarbanes-Oxley Act, we have on many occasions underlined the huge negative impact that these rules are having on European companies listed or considering listing in the USA. Our main concerns reflect the extremely costly and disproportional implementation requirements imposed by this legislation. Therefore, Section 404 was considered to put EU companies listed on US markets at a

THE CONFEDERATION OF EUROPEAN BUSINESS a.i.s.b.l.

AV. DE CORTENBERGH 168
BE-1000 BRUSSELS
BELGIUM
VAT BE 863 418 279

TEL +32(0)2 237 65 11
FAX +32(0)2 231 14 45
E-MAIL: MAIN@BUSINESSEUROPE.EU
WWW.BUSINESSEUROPE.EU

competitive disadvantage compared with their peers that have not chosen to have their securities listed in the US.

The SEC proposal provides new guidance to company management on application of section 404 of the Sarbanes-Oxley Act on internal controls. This should partly relieve listed companies from the current disproportionate financial and administrative requirements.

(ii) New rules on deregistration

BUSINESSEUROPE has argued time and again that companies should not remain subject to US reporting requirements unless there is a genuine and continuing interest in US public securities markets. This is why we welcome the SEC proposal to modernise the 300-holder standard in order to make deregistration permanent.

The new rule coincides with BUSINESSEUROPE's long-standing view that trading volume is a more appropriate and reasonable indicator. We are therefore pleased with this proposal since, once adopted, it should have a positive impact on EU companies. This rule will also make the US market more attractive for EU companies which will know that they now have a real deregistration option, contrary to the current situation. However, for the sake of greater effectiveness we believe that some points of the proposed rule should be clarified. In this context, you will find at annex a copy of our comments on deregistration.

I would like to take this opportunity to let you know that our organisation has changed name. We are now called BUSINESSEUROPE. The change means to put business and companies at the centre of the European debate.

We remain at your disposal should you wish to discuss this further.

Yours sincerely,

Best regards,

Philippe de Buck

BUSINESSEUROPE

08 FEBRUARY 2007

BUSINESSEUROPE COMMENTS ON 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 13(A) OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934

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However, for the sake of greater effectiveness we believe that some points of the re-proposed rule should be clarified:

1. **Calculation of the threshold/determination of trading volume**: under the proposed rule, the 5% trading volume threshold is calculated by dividing an issuer's US trading volume (numerator) by its primary market trading volume (denominator). In this respect, the new quantitative benchmark is not fully clear. We consider that the denominator and numerator in the average daily trading volume ("ADTV") calculation should include the same type of trading data. Trades that occur over-the-counter or otherwise off-market should not be excluded from the ADTV calculation, as the inclusion of such trades is considered generally beneficial to foreign issuers. To the extent a foreign private issuer can obtain reliable data about off-market trades in its securities, such trades will increase the ADTV numbers for the primary trading market and, therefore, decrease the percentage of US trading, which will facilitate exiting the United States. Moreover, off-market trading in securities listed in the United States is reported as part of the US transaction reporting plan and is therefore included in the numerator of the 5% ADTV test. While not all off-market trades in Europe are currently reported to an exchange, the Markets in Financial Instruments Directive (so-called MIFID, Directive 2004/39/EC) will require such trades to be reported to an exchange or other designated third parties, thus increasing transparency and making such data readily obtainable. In addition, we believe that off-market trading in Europe is likely to represent a higher share of trading than does off-market trading in American Depositary Receipts in the United States. Therefore, including off-market trades in Europe would generally

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E-MAIL: MAIN@BUSINESSEUROPE.EU
WWW.BUSINESSEUROPE.EU

be favourable to issuers, as it would have the effect of lowering the US trading ratio.

Alternatively, the US ADTV component of the proposed trading volume benchmark should include only trading that occurs on organised stock exchanges in the United States. In this case, off-market trading in the US should be excluded, because it would complicate use of the rule and such trading is not necessary to assess US investor interest in a registered security of a foreign private issuer that is listed on one or more national stock exchanges in the United States.

We support the inclusion of worldwide trading volume in the denominator of the 5% ADTV calculation, as this benchmark will more accurately determine the relative US interest in the issuer's securities and enhance the consistency of the calculation of the among issuers. We also agree that, at a minimum, an issuer's US trading volume must be included in both the numerator and the denominator. Should neither worldwide trading nor US ADTV be included in the denominator of the ADTV test, the SEC should consider increasing the percentage of primary trading market volume represented by U.S. trading, for example to 10%.

We consider that the SEC should also clarify that, for purposes of aggregating two primary trading markets when determining whether 55% or more of the trading volume in the issuer's securities takes place outside the United States, the issuer can include a market where its securities are listed but where no trading takes place.

2. **Definition of equity security** In general, the calculation should be based on homogeneous data which should be rectified where necessary. In particular, the proposed rule defines an "equity security" to include not only shares, but also equity-linked securities (e.g. convertible bonds). Therefore, in determining whether the 5% trading volume test is met, an issuer may have to include trading in equity-linked securities, and not only trading in shares. This seems to be inappropriate, because equity-linked markets are significantly different from share markets, and information on trades in equity-linked securities is more difficult to obtain. Moreover, if equity-linked securities continue to be counted, in certain cases the data should be rectified so that the numerator and denominator are fully comparable. Furthermore, one single ADR do not necessarily represent one single share issued in the EU. Thus rectification should be explicitly mentioned in the final rule.

3. **300 record holder test**: the application of rule 12h-6 to prior Form 15F filers which have benefited only from a regime suspending their registration obligations and not definitive deregistration is not logical as it requires these companies to establish and certify a second time that they have fewer than three hundred US-resident shareholders at the time of their application for definitive deregistration when this criterion would not be required for companies

initiating a deregistration procedure (moreover, not being eligible to use the new counting rules). On the contrary, it would be desirable for the new deregistration rules to apply without distinction to companies applying for deregistration for the first time and to companies whose registration obligations are currently suspended. Moreover, the SEC still does not take into account that under EU provisions and national laws the foreign issuer does not have full access to information regarding its own final shareholders, especially if the shares are held by nominees.

4. **Registration**: the proposed rule does not deal with one of the preconditions for deregistration, the fact that registration under US securities laws is compulsory if the issuer has more than 300 holders of its securities residents in the US on the last day of its most recently completed fiscal year. In this case, registration is automatic, not based on a voluntary decision by the issuer. Imposing registration on occurrence of this case is extremely burdensome and disproportionate considering that the foreign issuer has no control over trades in its securities on secondary markets and may have no intention to enter into US markets and hence deal with US investors and, as a consequence, with US securities laws.

5. **Termination of ADR programmes**: the period of one year required between the termination of the ADR programme and the filing of a Form 15F represents a constraint to European companies and is therefore undesirable.

6. **Going private transactions**: the SEC should clarify that the re-proposed rules will not prevent an issuer from deregistering in the United States in the context of a going-private transaction which also terminates its reporting abroad. The re-proposed rule, as written, can be construed to require that a deregistering issuer must continue to maintain a listing in a non-US jurisdiction. However, such listing will not be in place if the issuer is withdrawing its securities from public markets worldwide. Because there is no longer a need to protect public investors in a going private scenario by requiring continued regulatory oversight and disclosure, the SEC should clarify that, in a going private context, an issuer that satisfies one of the quantitative tests for deregistration can deregister without complying with the foreign listing condition.

   Also, in the context of a deregistration as part of the going private transaction, we would suggest that the SEC not require that the 12-month trading period be measured by reference to a period ending within 60 days prior to the date the deregistration form is submitted to the SEC, but by reference to a period ending within 60 days prior to the date the transaction is announced, so that the period captured includes the "normal" trading pattern of the securities, rather than one which may have been distorted by the announcement of the transaction.

7. **Electronic publishing of Home Country Documents**: we agree with the Commission's proposal requiring the issuer to publish – in English on its internet web site or through an electronic information delivery system generally available to the public in its primary trading market – *inter alia* all other communication and documents distributed directly to the security holders of each class of securities to which the exemption concerned relates, provided that such documents are exclusively those covered by Form 6-K.

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