

2000 SEC No-Act. LEXIS 40

Securities Act of 1933 -- Rule 903

January 7, 2000

[*1] **Australian Stock Exchange** Limited

TOTAL NUMBER OF LETTERS: 2

SEC-REPLY-1: SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

RESPONSE OF THE OFFICE OF INTERNATIONAL CORPORATE FINANCE
DIVISION OF CORPORATION FINANCE

January 7, 2000

Re: Regulation S - Initial Public Offerings of U.S. Companies on the
Australian Stock Exchange Limited ("ASX")
Incoming letter dated January 7, 2000

Based on the facts presented, and noting that (1) U.S. entities do not participate in the ASX market, either as brokers or as market-makers, and (2) no ASX trading screens are placed in the United States, the Division will not recommend enforcement action to the Commission if equity securities of non-reporting U.S. companies are offered and sold in initial public offerings offshore pursuant to Regulation S in connection with a listing on ASX ("Regulation S Securities") without implementation of the stop-transfer provisions and other procedures set forth under Rule 903(b)(3)(iii)(B), Rule 903(b)(3)(iv) and Rule 904(b)(1)(ii). In reaching this conclusion, the Division is relying on your opinion that the alternative restrictions and arrangements described in your letter provide reasonable procedures to prevent public distribution of the Regulation S [*2] Securities in the United States. The alternative arrangements include the following restrictions during the applicable distribution compliance period:

(1) the prospectus used in the offering of Regulation S Securities will disclose that all purchasers from a distributor in the offering will be deemed to have made representations regarding their non-U.S. status (or other exempt status, such as qualified institutional buyer status under the Rule 144A exemption from registration) and agreements regarding restrictions on resale and hedging under Regulation S (and, where appropriate, Rule 144A);

(2) no ASX Participating Organisation (as that term is defined in your letter) may execute a transaction on ASX in Regulation S Securities if that Participating Organisation knows that the purchaser is a U.S. person or is acting for the account or benefit of a U.S. person, and ASX Participating Organisations must make reasonable efforts to ascertain whether a purchaser is a U.S. person or is acting for the account or

benefit of a U.S. person, and implement measures designed to assure reasonable compliance with this requirement;

(3) any certificated securities, including global securities, [*3] certificates into which global certificates may be subdivided, and any physical, certificated securities issued to holders prior to the expiration of the distribution compliance period, will bear the restrictive legend required by Rule 903(b)(3)(iii)(B)(3). Thereafter these certificated securities will bear a restrictive legend to the extent consistent with Rule 144. Any definitive securities that are issued during the distribution compliance period (other than in a transaction in compliance with Rule 144A) must satisfy all of the requirements of Rule 903(b)(3)(iii)(B), including the legending and certification requirements;

(4) the Regulation S Securities will be identified in the records maintained by entities such as the CUSIP Bureau as restricted, as described in your letter, so that participants in book-entry clearance facilities and others that trade the securities will have notice that transfers of the securities to U.S. purchasers are restricted and must qualify under an appropriate exemption (absent registration);

(5) any information provided by the issuer or managing underwriters to publishers of publicly available databases about the terms of any new issuance of [*4] Regulation S Securities will include a statement that the securities have not been registered under the Securities Act and are subject to restrictions under Regulation S;

(6) the trading symbol that identifies particular securities on ASX trading screens and elsewhere will be modified by adding a common identifier to indicate that the Regulation S Securities are restricted;

(7) beginning a reasonable period prior to the initial listing of any Regulation S Security on ASX and continually thereafter, ASX will publish widely an explanation of the restricted stock identifier,

(8) the confirmation sent to each purchaser of Regulation S Securities in either the initial offering or in the secondary market trading will include a notice that the securities are subject to the restrictions of Regulation S;

(9) the issuers of Regulation S Securities must provide assurances that no securities bearing the legend required by Rule 903(b)(3)(iii)(B)(3) may be transferred by the issuer's transfer agent without a favorable opinion of counsel or other assurance that the transfer complies fully with the Securities Act; and

(10) the issuer of Regulation S Securities must provide notification [*5] of the Regulation S status of its securities in shareholder communications such as annual reports, periodic interim reports, and its notices of shareholder meetings.

Because these positions are based on the representations set forth in your letter, it should be noted that any different facts or conditions might require a different conclusion. Furthermore, this

response represents the Division's position as to enforcement action, and does not express any legal conclusions with respect to the specific questions presented.

Sincerely,

Felicia H. Kung
Special Counsel

INQUIRY-1: ASX

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January 7, 2000

1933 ACT/REGULATION S/RULES 903, 904

Mr Paul M Dudek
Chief Office of International Corporate Finance
United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549
UNITED STATES OF AMERICA

Dear Mr Dudek

**Regulation S - Equity Securities of Domestic Companies Traded on the Securities Market
[*6] Operated by Australian Stock Exchange Limited ("ASX")**

The **Australian Stock Exchange** Ltd. ("ASX") operates a wholly screen-based securities market in Australia without a trading floor. The ASX trading system, known as SEATS, is wholly electronic. Through a wholly owned subsidiary, ASX Settlement and Transfer Corporation Pty Limited ("ASTC"), ASX utilises an electronic system for the clearance and settlement of transactions in securities traded on ASX, and for the transfer of ownership pursuant to such transactions. This system is known as the Clearing House Electronic Subregister System ("CHESS"). n1

n1 The ASX is a "designated offshore securities market" listed in SEC Rule 902(b)(1). The ASX and its CHESS system have been the subject of several no-action letters issued by the SEC staff. CUFS, SEC No-Action Letter dated September 3, 1996; ASX Settlement and Transfer Corporation Pty Ltd, SEC No-Action Letter dated August 13, 1996; ASX Settlement and Transfer Corporation Pty Ltd, SEC No-Action Letter dated April 19, 1994.

Recently, the professional advisers for certain U.S. companies have expressed the opinion that these companies would be interested in listing their [*7] securities on ASX in connection with offerings made in reliance on the safe harbour provisions of Regulation S ("Regulation S") under the Securities Act of 1933, as amended (the "Securities Act") without simultaneous registration under the Securities Act (hereinafter "Regulation S Securities") n2. Because of the manner in which securities listed on ASX are traded and settled however, it is not possible for the offering, sale and resale of Regulation S Securities traded on ASX to comply strictly with some of the requirements of Regulation S. This letter describes certain alternative arrangements that may be implemented in connection with offerings of ASX-quoted Regulation S Securities. ASX believes that these arrangements meet the underlying investor protection concerns of Regulation S and provide reasonable procedures to prevent public distribution of Regulation S Securities in the United States to US residents.

n2 As will be discussed in more detail below, securities of non-Australian companies are traded on the ASX through a system known as Chess Units of Foreign Securities ("CUFS"), pursuant to which investors own beneficial interests in "global" securities deposited with a CHESS depository in a manner similar to American Depository Receipts utilized in the U.S. companies issued without SEC registration pursuant to Regulation S and to the CUFS form of such securities proposed to be traded on the ASX. [*8]

Accordingly, ASX respectfully requests confirmation that the Division of Corporation Finance will not recommend enforcement action to the Commission in connection with the registration requirements of the Securities Act if Regulation S Securities are offered, quoted and traded on ASX in accordance with the procedures and restrictions described in this letter.

ACCESS TO CAPITAL FOR CERTAIN US ISSUERS THROUGH ASX LISTING

ASX believes that establishing a set of procedures under which US issuers could offer and sell their ASX-listed securities in reliance on Regulation S could have significant benefits for a particular class of US companies - namely, smaller, privately-held, non-reporting, growth-oriented companies. Such companies may have difficulty competing for attention in the crowded US securities markets, making it difficult to raise capital on advantageous terms through a US public offering. At the same time, such companies face a potentially significant illiquidity discount in connection with any non-listed offering of their securities outside the United States.

Accordingly, certain US companies, via their Australian professional advisers, are now expressing interest [*9] in carrying out ASX-listed Regulation S offerings. Australian investors, the holders of the vast majority of the securities quoted on ASX, are showing a significant and increasing appetite for technology stocks and as a result an ASX listing for these companies may substantially enhance access to this investor base. Also, the liquidity promised by an ASX listing can help lower their cost of capital.

DESCRIPTION OF ASX MARKET

Supervision of the Market

ASX is subject to the Corporations Law, the legislation that regulates stock exchanges in Australia. Under the Corporations Law, the functioning of the ASX is subject to two levels of supervision: (i) the regulation of admission, trading, clearing and settlement by ASX itself; and (ii) regulation of ASX as a securities exchange and the market operated by ASX by the Australian Securities and Investments Commission ("ASIC").

Regulation of Admission, Trading, Clearing and Settlement by ASX

ASX is responsible for admission of issuers to the official list, quotation and trading of securities and clearing and settlement of securities.

The ASX Listing Rules are the Rules which regulate the admission of entities to [*10] the official list of ASX and the quotation of securities and impose ongoing obligations on listed entities. The ASX Business Rules regulate the rights and obligations of brokers who have access to ASX's trading system, SEATS. The SCH Business Rules' are the clearing and settlement rules and regulate participation in CHES.

By virtue of the Corporations Law, the ASX Business Rules and SCH Business Rules have the effect of a statutory contract between various parties (Sections 772A and 779F). The Corporations Law also impose a statutory obligation to comply with the Listing Rules.

Sections 777 and 1114 of the Corporations Law empower ASX to apply to the court for enforcement of the Listing Rules of ASX. Section 779G enables a court to enforce the SCH Business Rules on the application of SCH.

The ASX Listing and Business Rules and the SCH Business Rules empower ASX to take action against a party for a breach of the Rules by:

1. in the case of issuers, suspending the quotation of their securities, or in more extreme circumstances, delisting the issuer;
2. in the case of brokers, imposing a fine, sanction or, in more extreme circumstances, suspending the broker from trading; or [*11]
3. in the case of clearing and settlement, by sanctioning or fining a broker, institution or issuer for a breach of the SCH Business Rules or, in more extreme circumstances suspending or terminating participation in CHES.

The regulation of ASX and its market

A securities exchange has an obligation under the Corporations Law to observe ongoing requirements, including the obligation to do all things that are necessary to ensure each stock market of the exchange is an orderly and fair market. An exchange

must also have adequate arrangements for monitoring and enforcing compliance with its business rules and listing rules and have adequate arrangements for the settlement of transactions that result from trading of securities on a stock market of the exchange (section 769A). The Minister (the Treasurer) has the ability to direct the exchange to do specified things that will promote compliance by the exchange with those requirements, if the Minister is of the opinion that the exchange is not complying (section 769B). In addition, the exchange is required to provide an annual report on compliance (section 769C). The Minister may require a special report to be prepared at any time [*12] (section 769D) and may require the exchange to obtain an audit report on any such special report.

ASIC has the ability under sections 777, 1114 and 779G, referred to above, to seek a court order for compliance with the ASX Listing Rules and Business Rules and the SCH Rules. In addition, ASIC has other specific powers, for example to request the exchange to suspend securities and to prohibit trading (section 775) and to require the assistance of the exchange in the performance of ASIC functions (section 776).

n3 SCH stands for "Securities Clearing House," the term used in the Corporations Law to refer to the approved clearing house in Australia. The actual name of this corporation, which operates CHESS, is ASX Settlement and Transfer Corporation Pty Ltd.

Requirements for Participating Organisations

The ASX Business Rules (5A.2.1) create a number of conditions that must be fulfilled before ASX will allow an organisation to become a "Participating Organisation" and to have trading access to its market. n4 These requirements include the requirements that the organisation become (or establish adequate operational linkages with) a Participating Organisation in CHESS, [*13] and that the organisation meet the ASX audit, inspection and capital liquidity requirements. These capital liquidity requirements include, for example, an annual auditor's opinion on the financial accounts and compliance at all times with the ASX specified minimum capital amounts. All Participating Organisations must also report their financial position to ASX on a monthly basis. More frequent reporting may be required and enforced by ASX in certain circumstances.

n4 ASX Participating Organisations are the equivalent to "members" of ASX, albeit not in the sense of a mutually owned organisation. ASX was demutualised in 1998 and is now a publicly listed company owned by its shareholders. Participating Organisations are those entities permitted to have direct trading access to the ASX market through the SEATS system.

In addition, those persons with executive and senior operational responsibility for the organisation's business in Australia must be resident in Australia, of good fame and character and high business integrity and the organisation must hold a dealer's licence granted by ASIC. All Participating Organisations are subject to the ASX Business Rules and SCH Business [*14] Rules which comprehensively cover the dealing, settlement and client relationship aspects of a securities

business. US entities do not participate in the ASX market as brokers or market-makers, and there are no ASX trading screens located outside of Australia. n5

n5 The ASX has announced that it is interested in establishing a trading link with Nasdaq. Although the discussions relating to the creation and characteristics of such a link are only in the early stages and may never come to fruition, it is possible that such a link, if established, will entail the placement of ASX trading screens in the United States. ASX understands that the relief it is seeking in this request will be based on the current facts (including the fact that there are no ASX trading screens in the United States) and that such relief, if granted, will remain applicable only so long as there is no material change in these facts. In this connection, it should be noted that under the current proposals only the most liquid ASX stocks would be visible on trading screens located outside Australia. The ASX has the technological capability, and will retain the legal right, to determine the specific stocks that are visible on screens outside Australia. These stocks will not include any Regulation S Securities. [*15]

Requirements for Listing of Securities

As stated above, the ASX Listing Rules regulate the admission of entities to the official list and quotation (hereinafter referred to as listing) of securities. The admission requirements include that an entity issue a prospectus, or, if ASX agrees, an information memorandum. The Corporations Law, which is administered by ASIC, regulates when a prospectus is required and the contents of any such prospectus. It is only if the Corporations Law does not require a prospectus (e.g. if there is no issue of securities) that ASX will agree to an information memorandum. ASX regulates the content of the information memorandum through the Listing Rules and the requirements are based on those in the Corporations Law for a prospectus.

The basic disclosure requirement in the Corporations Law for a prospectus is as follows:

...such a prospectus shall contain such all such information as investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:

*(a) the assets and liabilities, financial position, profits and losses, and prospects [*16] of the corporation; and*

(b) the rights attaching to the securities (section 1022).

The prospectus or information memorandum is released by ASX through its Company Announcements Platform, which is a centralised system for the receipt and distribution of all announcements from listed entities. In terms of distribution, brief headlines of company announcements are available at no charge from the ASX website. ASX also provides two products, image announcements, which provide an exact copy of an announcement as received by ASX, and text-based announcements (known as Signal G) which provide an edited version of the announcement. The image announcements are available from ASX and ASIC for a fee. Both the

image and text-based versions of the announcements are sold to third party information providers such as Reuters and AAP and are widely distributed.

Announcements are processed and disseminated on a continuous basis, as they are received by ASX. From 31 January 2000, it is proposed to make text-based announcements available after a 20 minute delay on the ASX website, at no charge.

After listing, the entity is subject to the ongoing requirements in the Listing Rules. These [*17] include continuous and periodic disclosure (Chapters 3 & 4). The main continuous disclosure Rule is Listing Rule 3.1 which, subject to specified exceptions, requires the following:

Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information...

The periodic reporting includes half yearly and annual reporting.

Operation of the ASX Market

The Trading System (SEATS)

SEATS is an electronic trading system. Brokers electronically enter bids and offers. Bids and offers are matched electronically by a computer on a time price priority basis, and a binding trade is created. The ASX (SEATS) trading system is order driven and trades are automatically queued and matched electronically by time/price priority. It is a natural consequence of this ASX trading environment that market participants cannot determine who is to be the counterparty to a transaction. That function is performed randomly and electronically by computer. We note that market makers, in the US sense, are not a part of, and do [*18] not operate in, the ASX market.

It should also be noted, however, that the ASX Business Rules do, in certain circumstances, allow brokers to do trades "in-house", or as between two brokers as a prearranged trade, when they have both a buying client and selling client for the same security, and (generally) the transaction is of high value. This is known as a "crossing", which is an exception to the general principle of the ASX market being anonymous and order driven.

ASX will also shortly be introducing a trial trading facility called "BLOX", whereby some brokers and institutions may effect large transactions through brokers via anonymous electronic routing through brokers, the brokers reporting the resultant trade on SEATS. A pro rata based matching algorithm will apply to the BLOX market. In addition, the BLOX product will only be available in respect of a limited range (the 70 most liquid) of ASX listed stocks, and it is not proposed to permit Regulation S Securities to be included as BLOX securities.

Each security listed on ASX is identified by the name of the issuing company and a security identifier, which can have up to nine characters. The security identifiers reflect

[*19] the type of security in question. For example, common stock is typically identified as "FPO" ("fully paid, ordinary") and debentures are typically identified as "DB". Thus, the trading information applicable to the common stock of ABC company would be referred to as ABC - FPO, while the trading information applicable to debentures issued by ABC company would be referred to as ABC - DB.

Clearing and Settlement Services (CHESS)

As mentioned previously, the clearing and settlement of transactions executed on ASX's market takes place via the CHESS system. The CHESS system issues on a monthly basis to each holder of securities whose holding of securities has changed, a "Holding Statement" reflecting the securities owned by the holder. Technically, CHESS operates as a "sub-register" and in that capacity is agent of the issuers. Under the Corporations Law and the SCH Business Rules, its records are evidence of legal title to the securities shown. The Holding Statements have sufficient space for a notice concerning the securities shown thereon. This space is typically used, for example, to display an explanation of the foreign ownership restrictions applicable to "FOR" securities, [*20] discussed below. A brief notice concerning the restricted status of Regulation S Securities could be added to the Holding Statement in appropriate cases, and would reflect the obligations of the issuer to disseminate that information under Regulation S. *See* further discussion below.

CHESS Units of Foreign Securities ("CUFS")

Because the corporate laws applicable to entities incorporated in the US and some other foreign countries do not recognise CHESS as a method of electronic transfer of legal title to their securities, ASX has developed a system called CHESS Units of Foreign Securities ("CUFS"), which is analogous to an electronic depository receipt. The SEC has previously issued a "no-action" letter in respect of CUPS. n6

n6 The citation to this letter is contained in Footnote No. 1. There is a technical distinction between investments in CUFS securities and investments in securities of Australian companies. In the former case, Holders Statements issued by CHESS represent beneficial interests in the "global" securities certificate issued by the issuer and held by the CHESS depository, while in the latter case the Holders Statements are issued by CHESS as agent for the issuers and therefore represent evidence of legal title in the securities in question.

Securities issued by US companies, including Regulation S Securities, must be settled via the use of CUFS. In the case of CUFS holdings, the Holding Statement bears a statement which explains CUFS. In the case of Regulation S Securities, the CUFS statement for CHESS holdings will be modified by the addition of language putting the holder on notice that the security is a Regulation S Security. The message field on a holding statement is limited to [*21] 180 characters. Part of this message field is already taken up with other information, and therefore the amount of space available to

describe the Regulation S restriction is limited. The statement will be substantially as follows:

"US Persons, as defined under U.S. law, are prohibited from holding these securities."

The CHESSE Foreign Ownership Restriction ("FOR") Facility

To accommodate companies that have issued securities with various types of restrictions on ownership by foreign persons, ASX developed and has in place an electronic facility for monitoring and enforcing foreign ownership levels. Essentially, this facility enables an issuer to request that its securities be identified on trading screens as being on the "Foreign Ownership Restriction" ("FOR") list, which is published as a Schedule to the SCH Business Rules. The FOR facility also enables the amount of foreign ownership of these securities to be monitored by the CHESSE system.

The securities on the FOR list are identified by the use of a "FOR" annotation as part of the security description. For example, if the common stock of ABC company were to be subject to a restriction concerning foreign ownership, [*22] the trading information for this security would be referred to as ABC - FPOFOR. In this way, the entire market is put on notice that the securities are subject to a Foreign Ownership Restriction. These details are included as part of the security description on a contract note n7 sent to the investor.

n7 A "contract note" is a notification sent to each purchaser and seller of securities shortly after the trade. It is the substantial equivalent of a "confirmation."

The definition of "Foreign Person" varies from issuer to issuer. Details of what constitutes a "Foreign Person" for the purposes of each issuer are provided to SCH by the issuer and circulated to all Participating Organisations and all CHESSE Participants. In the case of Regulation S Securities, "Foreign Person" would be defined as "US Person" as defined under Regulation S, and the permitted Foreign Ownership level would be zero.

Circulation of this information is effected by way of Market Circulars and Bulletins, which are disseminated in electronic and hard-copy form to Participating Organisations on a daily basis. These circulars and bulletins serve as one of the principal means of advising the market of all relevant announcements and applicable conditions. In the case of notifications concerning issuers subject to Foreign Ownership levels, these notifications include details of [*23] the relevant securities, the foreign ownership level, and applicable divestment procedures as well as the relevant full definition of "Foreign Person." The information is updated on a regular basis.

The Foreign Ownership restrictions are also included as a Schedule to the SCH Business Rules. The SCH Business Rules impose important obligations on brokers and institutions in respect of the securities that are included in the FOR Schedule.

For example, the SCH Business Rules impose an obligation on brokers to designate a residency indicator on the holding records of every investor whose holdings they look after, where that investor intends to hold securities included in the FOR Schedule. The designation is either:

- . "D" for domestic;
- . "F" for foreign; or
- . "M" for mixed (indicating that both foreign and domestic persons have interests in one holding; this designation is generally used by custodian companies).

For accounts designated "F," before a broker places a "buy" order, he or she is required to determine whether the buying client is a "Foreign Person" as defined with respect to the specific security in question. In the case of Regulation S Securities, "Foreign Person" would [*24] be defined as a "US Person," and the broker would not place the order on behalf of a US Person.

A "Mixed" holding indicates that at least some of the holding is owned (either legally or beneficially) by a foreigner, and thus the zero foreign ownership standard would have been breached. In the case of Regulation S Securities, a "Mixed" holding would be treated as the equivalent of an "F" holding, because the foreign ownership level would be set at zero.

Violations of the FOR rules would result in automatic divestment action by the issuer. For example, assume that Company A, whose securities are subject to the Regulation S restriction, lists on ASX and advises ASX it wishes those securities to be included as FOR securities with a foreign ownership level of zero, the definition of foreign being according to the Regulation S requirements. ASK disseminates the information given by Company A, but a custodian inadvertently sets up a holding of "A" securities as "Mixed", which indicates that the custodian holds "A" securities in an omnibus holding on behalf of a number of clients, some of whom are not US residents under the definition disseminated to the market, and some of whom are US [*25] residents for the purposes of the definition. The holding is reported back to the registry at end of day, which indicates on the face of the register that a person who is a US resident has an interest in the "A" securities. As the foreign ownership level is zero, the registry automatically identifies all the securities in the Mixed Holding as "Excess Securities" (as it cannot go behind the holding and determine the beneficial owners) and commences divestment action, which it is entitled to do under the Rules. The divestment action would result in extinguishing the rights of the transferee in the shares, effectively reversing the transaction that violates the FOR rules.

Proposed Addition of an Identifier for Regulation S Securities

In the case of Regulation S Securities, it is proposed that the definition of "foreign" ownership will be specified as being ownership by any US Person (as that term is defined in Regulation S), and that the notation be "FORUS." This notation will provide notice that the Foreign Ownership Restriction for the security in question relates to US residents.

Dissemination of Information concerning Regulation S Securities

The "FOR" notation is [*26] widely publicised in electronic information disseminated to information vendors. The same notation appears in the securities details reproduced in the press.

Additionally, there is a 20-character security parameter in the information sent to information vendors such as Bloomberg and Reuters who further transmit the information to the market at large. This 20 character parameter is less frequently accessed by brokers and other users of the information but will carry the following notation "ORD US PROHIBITED." The reference to "ORD" in this context is a reference to a fully paid ordinary share. Finally, there is a fifty character set which is security specific and also disseminated in ASK information. There will be a fuller description of the US prohibition in that character set.

Moreover, at the time that securities with various restrictions are quoted, circulars are sent to: (a) information vendors; (b) brokers; and (c) settlement participants. In the case of Regulation S Securities, these circulars and bulletins will explain the FORUS notation and the nature of the restriction.

As outlined above, details of FOR securities are also included as a Schedule to the SCH Business Rules [*27] and that Schedule is regularly updated and circulated to the market. Brokers are cognisant of the need to be fully informed as to which securities are included in the Schedule, as ignorance may result in divestment and client loss (see above re "Mixed" holdings), and prosecution by ASX for breach of the ASX and SCH Business Rules. At its most extreme, in such a circumstance, a broker could also be liable to an issuer for consequential loss. For example, the SCH Business Rules provide that where a broker specifies an incorrect residency indicator, the broker indemnifies both SCH and the relevant issuer against all losses, damages, costs and expenses the issuer may suffer or incur by reason of that holding being established.

In these ways, the market, information vendors and members of the public will be aware of the prohibition on US Persons owning shares and the notation referable to these companies which shows this prohibition.

[*28]

COMPLIANCE WITH AMENDED REGULATION S

As a result of the manner in which securities are traded and settled on ASX, strict compliance with certain aspects of Regulation S - specifically, the requirements of Rule 903(b)(3)(iii)(B), Rule 903(b)(3)(iv) and Rule 904(b)(1)(ii) - is not feasible in connection with the initial offering and secondary-market trading of ASX listed securities of US issuers. The certifications, agreements and monitoring obligations could be met only by requiring ASX securities to be held in definitive registered form, which is inconsistent with the operational rules of the CHESSE. The trading and clearing system operated by ASX does not have facilities that allow participants to obtain transaction-by-transaction representations or certifications from purchasers. The purchaser representations required- by Rules 903(b)(3)(iii)(B)(1) and (2) cannot be obtained in the context of a book-entry system. By the same token, the stop-transfer requirements of Rule 903(b)(3)(iii)(B)(4) cannot be complied with in the case of transfers of beneficial interests in a global security.

Moreover, ASX has investigated the possibility of complying with the notification [*29] requirements contained in Rules 903(b)(3)(iv) and 904(b)(1)(ii) through language added to confirmations or placed on the computer screens employed in trading. ASX has been informed by

its Participating Organisations, however, that their computer systems are not configured in a way that would permit strict compliance with Rules 903(b)(3)(iv) and 904(b)(1)(ii).

Accordingly, unless it is possible to implement alternative means of achieving the purposes underlying the provisions referred to above, U.S. issuers seeking to raise capital in the offshore public markets will be denied access to the potential advantages associated with ASX-listed offerings.

PROPOSED ALTERNATIVE RESTRICTIONS AND PROCEDURES n8

n8 ASX rules do not govern the alternative restrictions and procedures described below, *e.g.*, issuer notifications to shareholders, and ASX does not have direct, legal authority over several of them; for example, under the Corporations Law, the content of a prospectus is not within ASX's jurisdiction. However, ASX understands that the relief being requested in this letter will be applicable only when each of these alternative restrictions and procedures is complied with. [*30]

As a basis for relief requested by this letter ASX is proposing the following alternative restrictions and procedures for US non-reporting companies that are conducting initial public offerings in connection with admission to trading on ASX to satisfy the requirements of Rule 903(b)(3)(iii)(B), Rule 903(b)(3)(iv) and Rule 904(b)(1)(ii).

The Commission indicated a general receptiveness to arrangements of the type that are proposed by ASX. In response to the observation that, in its current form and as applied to US domestic issuers, Regulation S may be inconsistent with offshore public offering practices and the requirements of foreign trading markets, the Commission has stated that it "believes that offering practices can be adopted to allow ... a public offering by domestic issuers" to proceed offshore in reliance on Regulation S, Sec. Act Release No. 7505, 63 FR 9632 (February 25, 1998) (the "1998 Adopting Release"). ASX submits that the procedures and restrictions described below are precisely the kind of "offering practices" to which the Commission was referring - they are designed to put market participants on notice of the restrictions applicable [*31] to Regulation S Securities and to prevent "flowback" into the United States.

A. Deemed Representations

The prospectus relating to an offering of a Regulation S Security will prominently disclose that all purchasers of the securities from a distribution participant will be deemed to have made specified representations (as to non-US, QIB or other permissible exempt status) and agreements (as to restrictions on resale and hedging) pursuant to Regulation S (and, where appropriate, Rule 144A).

B. Requirements Applicable to ASX Participating Organizations

In connection with the admission to trading of any Regulation S Security, ASX will advise its Participating Organisations that, during the one-year distribution compliance period, no ASK Participating Organisation may execute a transaction on ASK in a Regulation S Security if such Participating Organisation has knowledge that the buyer

is a US person (as defined in Regulation S) or is acting for the account or benefit of a US person. ASX will also advise its Participating Organisations that they must make all reasonable efforts to ascertain whether such a buyer is a US person or is acting for the account or benefit [*32] of a US person, and that they must implement measures designed to assure reasonable compliance with this requirement.

When a crossing transaction occurs, the broker will be aware of the nature of the Regulation S Security by virtue of the security code notation on the trading terminal. The broker will therefore know that a US resident is prohibited from purchasing the security and as a result, will have to ensure that the purchaser is not a US resident.

C. Legending Requirements

The 1998 Adopting Release contemplates the development of "measures like those required in Category 3" to prevent the abusive practices at which the 1998 Amendments to Regulation S were aimed. 1998 Adopting Release, 63 FR at 9636. The release specifically permits "notices of the restrictions to investors on the confirmation or allotment telex, use of global securities held in a depository, and restrictions on trading in the United States through the use of restricted CUSIP numbers" as alternatives sufficient to satisfy the legending requirements of Rule 903(b)(3)(iii)(B)(3). *Id.*, 63 FR at 9636, n. 31.

1. Securities Held in Global [*33] Form

Equity securities of domestic issuers issued pursuant to Regulation S will be held in global certificated, registered form directly or indirectly by a depository for CHESSE. Offshore purchasers will hold interests in the global security through direct or indirect participants in such facilities, including other offshore book-entry clearance facilities. The requirement that securities be held in global form will be subject to customary exceptions such as the unwillingness of the depository to continue in such capacity.

2. Restrictive Legends on Certificated Securities - Certifications

Any certificated securities, including global securities, certificates into which global certificates may be subdivided, and any physical certificated securities issued to holders prior to the expiration of the distribution compliance period, will bear the restrictive legend required by Rule 903(b)(3)(iii)(B)(3). This condition will apply to the global certificate deposited directly or indirectly with the CHESSE system. Such certificated securities will also bear a restrictive legend to the extent required by Rule 144. In addition, any definitive securities issued during the [*34] distribution compliance period will satisfy all the requirements of Rule 903(b)(3)(iii)(B), including the legending and certification requirements.

3. Restricted CUSIP/ISIN Numbers

Regulation S Securities will be identified in the records maintained by entities such as the CUSIP Bureau ("CUSIP") as restricted under the Securities Act. n9 CUSIP and other similar entities assign a number to each security that identifies the issuer and each outstanding security of that issuer. Each number has an associated security description, which, in the case of Regulation S Securities, will include an indication that such securities are subject to restrictions under the Securities Act. The security description associated with each CUSIP/ISIN number is also included in an electronic data field provided by ASX Securities Administration to its participants. n10 Therefore, participants in book entry clearance facilities and others that trade the securities will be aware that transfers of the securities to purchasers in the United States are restricted and must qualify under an available exemption. In addition, statements or communications confirming or summarizing the terms of any new issuance [*35] of Regulation S Securities by the issuer or managing underwriters to publishers of publicly available databases will include a statement that such securities have not been registered under the Securities Act and are subject to Regulation S. n11

n9 In cases where the security trades offshore, the CUSIP number is referred to as an ISIN number. CUSIP publishes each number and identifying description in the CUSIP Directory, in the case of CUSIP numbers, and the International Securities Identification Directory (the "ISID"), in the case of ISIN numbers. The CUSIP and ISID databases, including the information identifying the securities as restricted, are licensed to all the major providers of securities trading software, ensuring that the security description will be used to identify securities on a trader's screen as well as at the clearing agency for the trade.

n10 It is not practical to indicate restrictions as part of the CUSIP or ISIN number itself (whether by using a particular numbering system or by attaching a permanent "restricted field" to the number), as the number would then have to be reissued when the restriction is lifted and holdings in the restricted number converted into the unrestricted number. It is also not possible using present technology for the security description associated with a CUSIP/ISIN number to automatically appear on participants' screens each time participants enter instructions to settle a trade. However, participants have access to the data field containing a description of the security (including the restrictions) at all times, and can easily ascertain whether a security is restricted and the terms of such restriction.

n11 It is our understanding that after the issuer and underwriters agree to the terms of a proposed offering, underwriters confirm to providers of financial databases (e.g., the BLOOMBERG service) pertinent information regarding the subject securities, including CUSIP and/or ISIN number and whether the securities were registered under the Securities Act or are being sold in reliance on Regulation S. ASX understands that Bloomberg includes information confirmed to it in its securities listings, and that Bloomberg data "screens" for Regulation S Securities currently include legends indicating that such securities have not been

registered under the Securities Act. Because issuers and underwriters do not contract directly with financial database providers (other than as purchasers of database products), it would not be feasible to mandate that issuers or underwriters require database providers to include restricted security legends.

4. Identifier Indicating Restricted Status Added to Trading Symbol

As is more fully described above, the letters that are used to identify particular securities on the ASX trading screens and elsewhere will be modified during the distribution compliance period by adding a common identifier, such as "FORUS," at the end thereof. For example, a company whose common stock would be identified as "FPO" would have its common stock identified as "FORUS" during the distribution compliance period; it would revert to "FPO" once the distribution compliance period terminates, upon receipt of notice from the issuer.

(a) Periodic Publication of Identifier

Beginning a reasonable period prior to the first listing of any Regulation S Security on the ASX market and continually thereafter, ASX will publish widely, *e.g.*, in its periodic publications and on its Internet website, an explanation of the restricted stock identifier, identifying [*36] Regulation S Securities as having restricted status under the U.S. securities laws.

(b) Inclusion of Identifier on Confirmation and Other Notices

During the one-year distribution compliance period, each sale of a Regulation S Security will be reflected by a contract note (confirmation) that will indicate that the security is a Regulation S Security and thus subject to the restrictions of Regulation S, by virtue of the stock code which includes the restricted stock identifier.

In the context of discussing the Category 2 issuer **safe harbor**, Release No. 33-6863 specifically recognized that "screen notices [stating that the purchaser is subject to the same restrictions on offers and sales that apply to the distributor] may be given in summary form, provided all subscribers to the screen-based system are sent, prior to first use and periodically thereafter, a key that indicates what each summary notice represents and includes the full text of each notice." Sec. Act Release No. 6863 (April 24, 1990) at Section III.B.2.b.(1)(d). In footnote 129 to such release, the Commission recognized that the confirmation delivery requirements in the third issuer **safe harbor** category were [*37] the same, implying that screen notices might be employed in the context of Category 3.

[*38]

D. Issuer Instructions to Registrar and Transfer Agent

The issuer of Regulation S Securities, will provide assurances that no securities bearing the legend required by Rule 903(b)(3)(iii)(B)(3) may be transferred by the issuer's

transfer agent without a favourable opinion of counsel or other assurance that the transfer is in full compliance with the Securities Act.

E. Issuer Notifications to Shareholders

The issuer will include notifications of the Regulation S status of its securities in shareholder communications such as annual and other periodic reports, and in its notices of shareholder meetings.

CONCLUSION AND REQUEST FOR RELIEF

ASX hereby respectfully requests that the Division of Corporation Finance confirm that it will not recommend enforcement action to the Commission in connection with the registration requirements of the Securities Act, if Regulation S Securities are offered, sold and traded on ASX in accordance with the procedures and restrictions described in this letter.

If you have any questions or comments concerning this request, please contact the undersigned, or Dana T. Ackerly II of Covington & Burling at 1201 Pennsylvania [*39] Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044-7566, tel. 202-662-5296 and fax 202-778-5296.

Sincerely yours,

Catherine Officer
Senior Lawyer
Trading & Clearing

Michael Dalby
Senior Business Analyst
New Business Development