311 Going Private, Going Global-Options for Dealing with Increased U.S. Securities Regulation

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Faculty Biographies

Antonio Governale

Antonio Governale is a manager within the corporate advisers team at the London Stock Exchange. He is responsible for managing the Exchange's relationship with corporate advisers including sponsors, law firms, and nominated advisers, particularly with regard to business development activities worldwide.

Prior to joining the London Stock Exchange, Mr. Governale was senior associate for the corporate advisory team at Credit Suisse bank in London, responsible for managing capital raising transactions for privately-owned small and medium companies, and a member of the equity capital markets team at UBS.

Mr. Governale holds a B.A. and a Masters degree in Finance from the London School of Economics.

Laura Hodges Taylor

Laura Hodges Taylor, a partner of Goodwin Procter LLP in Boston and former co-chair of the firm's corporate group, focuses her practice on corporate finance and securities law. Ms. Hodges Taylor works with a range of financial, investment management, and investment banking institutions, as well as with corporations, limited partnerships, REITs and business trusts in a variety of industries, including technology, biotechnology, financial services, real estate, communications, environmental, manufacturing, and retailing. Ms. Hodges Taylor has extensive experience in representing institutional investors in structuring and effecting investments.

Ms. Hodges Taylor has represented institutional and private equity investors, issuers and underwriters in numerous financings, including private placements and public offerings of senior and subordinated debt, preferred stock, common stock, warrants, and convertible and exchangeable securities with a range of pricing mechanisms, and including investments by mutual funds, hedge funds, real estate opportunity funds, venture capital, and private equity funds and other pooled investment vehicles, and fund formation transactions. She has also represented issuers, financial advisors, and investors in restructurings such as exchange offers, tender and self-tender offers, going private transactions, rights offerings, and leveraged buyouts. In addition, Ms. Hodges Taylor has represented buyers and sellers in merger and acquisition transactions involving both private and public companies.

Ms. Hodges Taylor has been selected for inclusion in Chambers USA: America's Leading Business Lawyers, as well as in Best Lawyers in America.

She received her B.A. from Wellesley College and her J.D. from Harvard Law School.

Robin Johnson

Robin Johnson is an equity partner at Eversheds in London.

Mr. Johnson is a corporate finance and commercial partner specializing in M&A, private equity, purple book, and joint venture work with a strong emphasis on technology and healthcare. Mr. Johnson also has extensive experience on public takeover bids, having been involved in over 35. Some of Mr. Johnson's key clients include: SPX Corporation, Parker Hannifin Corporation, Marmon Holdings Inc, Cardinal Health Inc, Wal-Mart Europe, and Richmond Foods.

Mr. Johnson was voted one of the top M&A lawyers by Legal Business in 2002. In 2004 he was voted fifth in the UK by Legal Week and also received the award of International Lawyer of the Year as voted by his regional chapter of the Law Society England & Wales in October 2004. Mr. Johnson has authored many articles including recently in the Baird Monthly M&A Monitor and International Financial Law Review. Mr. Johnson is a member of the regional advisory group for the London Stock Exchange, the ABA international task force, the Canadian Chamber of Commerce, and a leading member of Eversheds' corporate group in North America.

Steven Webb

Steven Webb has been the company secretary and general counsel of Premier Farnell plc in the United Kingdon since 2000. The company is a leading, global distributor of electronic and other industrial products. As well as responsibility for all legal issues and corporate governance, Mr. Webb leads the company's corporate responsibility program.

Prior to joining Premier Farnell, Mr. Webb was company secretary and general counsel of Kelda Group plc, a privatized United Kingdom water utility.

Steven Webb's career in private practice focused on corporate law and he trained with London and international firm, Norton Rose.

Mr. Webb graduated with a degree in law from King's College, University of London.

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The focus of this session is focusing on how companies can raise capital in the global environment and we would be looking in particular at the merits of registering and selling shares on a non US exchange. We are extremely fortunate today to have Antonio Governale of the London Stock Exchange who will talk specifically about AIM which is one of the markets in the UK which has seen phenomenal growth over the last few years where many non UK resident companies have raised significant amounts of capital. From a US perspective, we have John Le Claire, the Head of Private Equity at Goodwin Procter LLP, a substantial US law practice. I personally have worked with John on a number of transactions and his outstanding expertise in the private equity arena and excellent presentational style means that his presentation is one that we should really be listening to closely and very uniquely, we have Steven Webb, the General Counsel of Premier Farnell who will tell us about the experience he has been through in recent times of delisting on a US exchange but maintaining a listing in the UK. Steve will explain the reasons why his company did this and give us a unique insight to a ground breaking transaction. Finally, I myself will take you through a real life example of a company which happens to be a UK company but the facts could equally apply to a US company who has been through a number of issues relating to the raising of equity.

People who know me know I like to keep things very simple and when one talks about raising capital in the global environment, in my view what we are talking about is what is the best way of being able to first attract money and then use money within a business. In this day and age, there are so many different ways in which you can raise capital. There is of course the traditional public equity route led by the US and the UK which have very mature public equity capital markets. There is private capital and some of you may have read my article in the Journal of Private Equity earlier this year published by the University of Chicago which set out some very interesting facts in terms of the expansion of the private equity asset class which I can only see expanding over the next few years though it still will be insignificant compared to the public markets. There is venture capital, there is government funding, government loans, then there is the debt market, traditional bank lending but also the ability to issue bonds and other debt instruments though, for example, securitisation of assets on public markets, commercial paper programmes, factoring and a series of off balance sheet arrangements. What any company needs to have in my simple world is an appropriate mixture of access to capital which they appropriately select to get the right return on capital. Any company that does that inevitably is going to be successful. It is the companies that either have too much debt or haven't got appropriate business plans or haven't got a business that can raise the appropriate debt or equity structure that fail. So in my simple world, when we talk about capital, particularly in this global environment, it is a question of finding the

best deal in the best country for the best price. That is why a lot of companies have such big internal Treasury functions these days.

I am now going to turn you over to Steven Webb who will give you a fascinating session on the issues associated with Premier Farnell and their deregistration from the US exchanges.

Steven ………

Antonio ……..

John ……

… You have now heard from Steven Webb in relation to the issues that Premier Farnell had. We have had a very interesting session from Antonio Governale on the London Stock Exchange and John Le Claire has given us an insight into issues associated with the private equity world in the US. To finish off the session, I will give you a brief case study which subject to the time we have left I may need to miss out some of the story but the whole history appears on the ACC website. This is a true life situation, however, the facts have changed and the names that I am using are not the same. I got permission from the people concerned to tell you about their story but they did not want to personally be present to tell you themselves. They have reviewed what I am saying today and are satisfied that while the facts are broadly correct, they are sufficiently different so you are unable to identify who the company is concerned. Some of you however may be able to do so. Anyone who does, will get a bottle of champagne from me. Here then is my case study:

During the second world war, there was a young guy called Jack Carter. His family owned a private company, Carter & Son in the engineering sector. His eyes were opened to the world as a result of the Second World War and through the people he had met. He had been on the Africa campaign and in Italy. He had had exposure to people he would never have dreamt of meeting. When he came back to the UK, he saw opportunities for his family owned private company, Carter & Son, to expand internationally. He persuaded the family and approached an investment banker in the City of London who he had met during his campaigns. The Carter family were very keen to keep control of the business and have a majority stake but as with a number of other companies, were happy to tap into the equity markets after the second world war to expand their business. Through the investment banker, the Carters raised a significant amount of money and based on the valuation give to the existing business of Carter & Son, they gave up just over 25% of their equity to institutions. They actually needed to raise a bit more money than was available through an ordinary stock issue and they also did a preference stock issue to the same institutions that subscribed for the ordinary equity which

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gave the institutions a preferred dividend but critically no voting rights in respect of that preferred stock. Unusually a couple of years later, the Carter family went back to the equity markets and issued another series of preferred stock with similar but not identical rights. Again the preferred stock had no voting rights but another preferred dividend entitlement. This all happened in the late forties/early fifties and the Carter family used the monies raised to expand their businesses internationally. Consequently, by the late 70s, Carter plc was a substantial internationally focused business, still family controlled with a fairly illiquid stock but with institutions that were broadly supportive of their strategy. The Carter family still owned 70% of the ordinary stock. In terms of corporate governance there was no real corporate governance , all the directors of the business were Carter family members. They had however a non executive Chairman who was in fact the investment banker who had originally raised the money but had had been the Chairman for over 20 years. In terms of internal controls, again there were none. In effect there was a number of long serving family retained financial controllers who reported to the Carter Board. There was an in-house lawyer. He was not a Carter person but his real role was to just look after the Carter family affairs. It was a pretty unexciting company as far as legals were concerned.

One of the Carter competitors was called Jacksons. They were again a UK company but they were privately owned. They had never tapped the public markets and consequently, they had not had the same accessibility to capital as the Carters had had and not expanded as fast. However, it was a good business. Mr Jackson was about the same age as Mr Carter, they had both fought in the second world war and indeed one of the Jacksons had married one of the Carters. Mr Jackson had decided it was time to retire and he entered into negotiations with the result that Carter plc bought Jacksons by issuing Carter equity to the Jackson family. By today's standards, this was an extraordinarily friendly deal. There was very little if any due diligence done as I understand it, and it as more done by way of a handshake. One of the big concerns that the Carters had with this deal was to try and maintain some sort of control of Carter plc which was clearly being diluted by issuing stock to the Jackson family. Some of the Jacksons equally wished to realise cash and not just take equity in the enlarged Carter and Jackson and so what was quite a common mechanism was put in place where in effect the stock was issued to the Jackson family but the investment bank involved, which happened to be the Chairman's investment bank, then placed some of the stock with institutions. This mechanism was called a vendor placing.

At the time these were very attractive mechanisms as by doing a stock for stock exchange deal for Jackson, Carter was able to take advantage of certain merger relief taxation and

accounting treatments to avoid treating some of the consideration as goodwill. Following the deal between the Carter and Jackson families on a diluted basis, they still owned over 60% of the stock though no longer did the Carter family have an absolute majority. Institutions had around 40%. In terms of the Board, this still consisted of Carter and Jackson people, there were no external advisors except the Chairman. The original Chairman who had been there for 20 years took the opportunity as a result of the Carter/Jackson deal to retire and a new Chairman was appointed. A few years later in the mid 80's, the original Jack Carter, who was still the CEO, and had been for the last 30 years was taken ill and eventually retired. I think he was actually appointed life President or something like that, but then quite quickly Jack Carter died.

Things then moved on apace but let me just summarise where we had got to, we have a business here called Carter & Jackson. It has been on the equity markets for over 30 years, still controlled by the Carter and Jackson family with supportive institutions, a pretty illiquid stock. It has got these historic preference stock which was issued at the time when the Carter family did not want to lose control of the business but needed the capital to expand. It has got operations throughout the world, primarily in South Africa, Australia and New Zealand and America, ie the English speaking world with no internal controls and no external non family directors. It had a non executive Chairman who had been in place for approximately four or five years and had taken over from a Chairman who had been there for many years.

A couple of months after Jack met his death, the Chairman phoned up one of our Senior Partners at the time and asked him to come to a meeting that afternoon at the Chairman's office. He asked for our Senior Partner to bring along two young people who he would need to assist him on a very delicate matter. My involvement with Carter & Jackson started. At the meeting that August day was the Non Executive Chairman and the in-house lawyer. There was no Carters nor Jacksons present. Advice was being sought as to whether or not Carter and Jackson had to make an announcement to the London Stock Exchange under their continuing obligations in relation to potential financial irregularities in their South African subsidiary. Their South African subsidiaries was very profitable business but, (in the days before they were called whistleblowers), someone in the South African organisation had anonymously sent a dossier to the Chairman of Carter & Jackson with supporting papers showing long term fraud within that operation. The in-house lawyer had looked at the papers, the Chairman and the in-house lawyer decided not to discuss this with the Carter and Jackson families until they had got external advice which they were now seeking. Our advice that day was to get further information and establish the facts. So Eversheds together with KPMG

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launched an investigation into the South African subsidiary. It became apparent that the facts were completely substantiated and Carter & Jackson issued an announcement to the London Stock Exchange informing the investors that following a review of the financial position in South Africa, this would have a materially adverse effect on the Carter & Jackson consolidated figures. This opened a can of worms. It turned out there wasn't just fraud going on in South Africa but there had been fraud going on throughout Carter & Jackson due to the fact that there was no internal controls. Everyone "knew" the organisation was a soft touch. Within less than six months, the entire Carter & Jackson directors, every single one of them, had resigned and left the business and the non executive Chairman who clearly saw this as a major reputational issue for himself got heavily involved in the business and had appointed professional external management to run the Carter & Jackson business.

Six months later, the professional management came up with their proposals which involved a complete restructuring and radical reorganisation of Carter & Jackson. Suddenly Carter & Jackson having been a sleepy engineering multi national company in the UK was hitting the business press. The professional management announced their strategy at the next Annual General Meeting. What they and the Chairman had not done however was handle the family resentment and there was the backlash from the Carter & Jackson families. You must remember that they still owned a majority of the ordinary stock and rather than accepting the reorganisation and restructuring, they challenged it and indeed sought to remove the professional management that had been appointed and reappoint their own nominees. There then proceeded an almighty public proxy battle between the Jackson and Carter dynasties and the institutions and the Chairman and professional management. The institutions backing the professional management absolutely. I have to say initially it looked like the Carter/Jackson dynasty would win and this business would go back to being run by the Carter/Jackson people. However, the institutions actually became very agitated about this and through the Chairman they managed to create a split in the Carter & Jackson family. Certain of the Jacksons took the view that actually it might be better to see how the professional management get on and indeed there was talk about taking the Carter & Jackson family out. On the day of the shareholders meeting, the vote was remarkably close but with just a 2% majority, the professional management won out and the Carters and some of the Jacksons went away to brood. The result of this was that the professional management realised that they couldn't actually do what they wanted to do with this business with having the Carter & Jackson family in a majority position. They realised they could well get outvoted on matters, there was no guarantee the institutions would be as active in supporting them on other matters and so rather than doing the restructuring and reorganisation through Carter & Jackson in the public arena, they decided to take the business private. They had the support of a number of

private equity firms and the Carter & Jackson families quickly accepted the fact that providing they got a good premium to the current price which had collapsed following the fraud allegations a year or so ago, they would sell out. The professional management therefore embarked on taking the business private. However, and you probably have forgotten this part of the deal, there were preferred stock still in existence and it turned out that the preferred stock while having no voting rights in normal circumstances did have voting rights if the company ceased to have a listing. Having approached the preferred stockholders, it turned out that they did not wish the company to go private and so it looked like we were unable to take Carter & Jackson private because of this small number of preference shareholders who as a Class had Class rights. As I mentioned at the beginning, those rights were actually slightly different and in effect if you could get rid of the first class of preference shares, the second class of preference shares automatically had to be redeemed. The question was how to get rid of the first class of preference shares. The Eversheds team looked at various ways forward. Any action which required the consent of the preference shareholders was going to get defeated. It turned out however that in some of the files that had been found dealing with the original preference shareholder rights, there were some board minutes from Carter & Sons which indicated that the rights of the preference stock shareholders did not have the voting rights in the event of a cancellation of share capital. The initial view was that this would apply only where both ordinary stock as well as the preferred stock was cancelled, however we went to a London leading Queens Counsel, a barrister, who opined that on a strict interpretation of the preferred stockholders rights, we were able to get rid of the stockholders on a reduction of share capital, even if the reduction of share capital only applied to the preferred stock. We therefore went through this process, the preferred stockholders initially tried to challenge this process but ultimately we were successful.

This then allowed the private equity player to come in and take the business private and take out the Carter & Jackson families through a friendly takeover bid. This then allowed the professional management to reorganise and restructure the business. The structure adopted allowed bank and mezzanine funders to support the private equity funding thus making the business more financially astute and creating the opportunity for significant equity returns. The private equity player introduced very attractive share option schemes with performance hurdles which if met meant the professional management got an increasing percentage of the ordinary share capital of the business. There was an old defined benefits scheme which was shut down. The professional management sold a number of businesses, restructured the business, put a franchise operation in place, had distribution arrangements put in place, put internal controls into the business, all done outside of the public arena but with the support of private equity players who had given them the necessary private equity support.

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Five years later, Carter & Jackson which had been renamed as one of these trendy 90's names rejoined the London Stock Market and the institutions that had supported it many years ago came back in as new investors. The private equity player got its return which was significant. The professional management got a substantial stake in the business and because really this company was suited to the public markets because of the sector it was in and the opportunities that were there and the yields it could create, there was appetite amongst the institutions for the company to be in the public arena. That wasn't quite the end of the story. It turned out that when they were doing the restructuring with the support of the private equity players, there was an American industrial company that was very interested in certain of the operations of Carter & Jackson and once the business had been reorganised and it was announced that they were going to seek another public listing, the American company actually approached the private equity player with a pre-emptive bid to stop the company going public again but instead for it to be sold to the American industrial company. The private equity player said no and what was interesting, the reason they said no was that they had supported the professional management and the professional management they thought should be given a chance to expand this business. Three years later however after it had gone public, the US company came knocking again, the private equity player had gone by this stage and the professional management felt they had no choice but to accept the offer. Carter & Jackson through another public takeover offer was then acquired by an American multi national where it now sits today. The professional management made significant capital gains and at least one of them is certainly very active involved in the US multi national and is President of their European operations.

If one then looks at what this business did, it raised money in equity markets just after the Second World War which allowed the family to remain in control of the business. It issued preferred stock as a way to raise further capital. It then merged with a private competitor and used paper, ie equity as the consideration for that deal but also allowed some of the equity to be released to institutions via a vendor placing. The lack of internal controls, the lack of change at the management level, the control that the families exerted ultimately proved its downfall in those greedy days of the late 70s/early 80s. There was a public scandal. The family had to go, professional management came in, the family then regrouped and tried to challenge the professional management but failed. Professional management then realised they couldn't sort this business out in the public arena and got the support of a private equity player to back it. The private equity player bought the family out and then there was a restructuring and reorganisation of the business behind closed doors, putting in appropriate public company internal controls with a view to then coming back to the market under a new

name but fundamentally the same business. The use of share options enabled professional management to get their appropriate return but ultimately the strength of the American competitor meant that this business got taken over by the American company and now sits within an American operation.

In my view, this was a very good case study of how to use equity and how to use the markets and the issues associated with being public. I hope you have found this of interest.

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ACC ANNUAL MEETING 17 – 19 OCTOBER 2005

SESSION 311

GOING PRIVATE, GOING GLOBAL – OPTIONS FOR DEALING WITH INCREASED U.S. SECURITIES REGULATION

STEVEN WEBB – PREMIER FARNELL PLC

Premier Farnell plc – de-listing from NYSE and de-registration under Securities and Exchange Act 1934

Premier Farnell plc (the **Company**) is a leading global marketer and distributor of electronic, maintenance, repair and operations products. Total sales in its last financial year were £776 million, with 45% arising in the US. The Company employs approximately 4,000 people.

A. Background to US listing and registration

In April 1996, Farnell Electronics plc acquired Premier Industrial Corporation, a US listed company with a predominantly US shareholder base. Ordinary shares and preference shares in Farnell Electronics were issued to the former shareholders of Premier Industrial Corporation as part of the consideration for the acquisition. The enlarged company was renamed Premier Farnell plc.

As a result of the acquisition, the ordinary shares, preference shares and American Depositary Shares (**ADSs**) representing both classes were listed, and the ADSs admitted to trading, on the New York Stock Exchange (**NYSE**). Because of the NYSE listings, the Company also registered the ordinary shares, preference shares and ADSs with the Securities and Exchange Commission (**SEC**) under the Securities Act of 1933 and the Securities and Exchange Act of 1934. As a result, the Company became subject to the regulations of the SEC and the NYSE as they apply to non-US companies.

Because Premier Industrial Corporation had a substantial US shareholder base, US shareholders represented a sizeable portion of the shareholdings of the Company immediately following the acquisition. In June 1996, approximately 25.3% of the outstanding ordinary shares and almost all of the outstanding preference shares were held by persons with US addresses. In both cases, almost all of these shares were held in ADS form.

B. Decline in US shareholding and trading

Despite its strong operational presence in the US and concerted investor relations efforts on the part of the Company's senior management, the US shareholder base decreased considerably over time. By December 2004 only 2.3% of the Company's ordinary shares and 14.8% of the preference shares were held as ADSs.

The total US holding of ordinary shares was larger (although still considerably less than in 1996) as a further 7.9% was held by or on behalf of US investors outside the ADS programme. The total holding of 10.2% (7.9% + 2.3%) represented approximately 36 million ordinary shares.

Over the same period, dealings in the Company's shares in New York had also declined so that, by December 2004, they represented less than 1% of the total trading in ordinary shares.

Another striking feature of the Company's US investor base was the extremely long tail of very small shareholdings. Of the 36 million ordinary shares held by or on behalf of an estimated 3,500 US holders, over 85% were held by about 190 holders. Nearly 700 of these holders had fewer than 50 shares and nearly 950 held fewer than 100 shares.

The equivalent figures for the preference shares showed that, of the estimated 2,500 holders, over 75% were held by fewer than 300 holders. Of the balance, there were over 700 holders with fewer than 25 shares and over 950 with fewer than 50 shares.

C. Costs of US listing and registration

At the same time as the benefits of the US listing and registration were in decline, the costs of complying with the applicable SEC and NYSE regulations were increasing sharply. These included costs of preparation of reports in accordance with US regulations, costs to reconcile financial statements to US GAAP and other compliance costs.

The third party costs of the Company's NYSE listing and SEC registration in respect of the year ended 1 February 2004 were approximately £265,000. In addition, over 1,000 hours of senior management time were absorbed by these compliance activities.

These costs and time requirements increased sharply with the new SEC rules introduced under the Sarbanes-Oxley Act. Specifically, section 404 of the Act required management to prepare an annual report regarding the Company's internal control over financial reporting, and the Company's external auditor to prepare an annual report attesting to the accuracy of management's report. All of this work would have been in addition to the requirements of the UK corporate governance regime, under which management and the auditors review internal financial controls on an annual basis.

Based on the widely reported experience of US companies who went through the process ahead of foreign companies, the Company (conservatively) estimated a first year cost of £1.3 million for compliance, once it had to implement section 404. This included a significant increase in the fees of the external auditor and an estimated 12,000 hours of management time. Not included was the opportunity cost that the Company would suffer by virtue of the management effort required to meet these compliance requirements. This re-direction of management time and focus was bound to have had a significant impact on a relatively small company with limited resources and would have delayed other business initiatives.

The Company's board concluded that the costs of maintaining the Company's US listing and registration far outweighed the benefits and that it was therefore in the interests of the Company and its shareholders as a whole to de-list and de-register.

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D. Identifying the process

The Company investigated for some time the possibility of de-listing and de-registration before arriving at a process it felt to be suitable and practicable. A number of advisers were consulted and the standard responses were either that it "could not be done" or that the Company would have to implement a scheme of arrangement. These views were based on the difficulty of complying with the SECs rule requiring that de-registration could not take place until the number of *underlying* US shareholders (more about the "look-through" requirement later) was below the arbitrary threshold of 300.

Any form of voluntary process (a tender offer to US holders, for example) ran the risk of the Company incurring considerable time and expense but still ending up with over 300 shareholders and the whole exercise having "failed".

A scheme of arrangement would require the incorporation of a new parent company that would make an offer to acquire all of the shares in Premier Farnell in return for shares in the new company, with US holders being excluded from the offer and, instead, being cashed-out. This is a complex process and includes gaining the sanction of the Court and preparing lengthy shareholder documents. However, some UK companies have used this process to achieve a de-registration (either as the sole purpose or to meet some other corporate aim).

Eventually an alternative was found in the form of a relatively simple amendment to the Company's articles of association, giving the board authority to identify US shareholders and, if necessary, require them to sell their shares to non-US persons (the **Compulsory Sale Power**).

The scheme of arrangement and the Premier Farnell routes are both described in more detail in the attached article (item 1) prepared by Shearman & Sterling LLP, the Company's advisers on this process.

E. The process in detail

De-listing announced – 9 December 2004

The first public step in the process was to announce (on 9 December 2004) the termination of the Company's Deposit Agreements with the Bank of New York for the ADS programmes (leading to the closure of the programmes) and the voluntary de-listing of the ordinary and preference shares from the NYSE. The announcement also referred to the fact that the Company was "seeking ways in which to de-register from the SEC".

It was not possible to refer to the full process at the time of that announcement because the Financial Services Authority (**FSA**) (the UK equivalent of the SEC for these purposes) was still considering the Company's proposed amendment to its articles of association. The Company was confident of the outcome of the FSA's deliberations and did not want to wait for their decision before getting the process underway.

Extraordinary general meeting announced – 10 January 2005

By January 2005, the FSA had cleared the proposed amendment to the articles and, on 10 January 2005, the Company announced that it would be holding an Extraordinary General Meeting of shareholders on 9 February 2005 to consider the board's recommendation that the articles be amended to include the Compulsory Sale Power.

A copy of the relevant section of the Company's articles is attached as item 2.

Extraordinary general meeting held – 9 February 2005

All holders of ordinary shares were entitled to attend and vote at the general meeting. In the event, all votes were cast by proxy and no shareholders (other than directors and officers) attended the meeting. There was a high voting turnout; approximately 75% of the ordinary shares were voted and, of these, almost 97% were in favour of the change to the articles. The Company's preference shares do not carry any right to vote other than in limited circumstances.

NYSE de-listing effective and ADS programmes closed – 16 February 2005

The SEC order confirming de-listing took effect on 16 February 2005 and, from that date, there was no further Company sponsored trading in the Company's shares or ADSs in the US market. The Company's ADS programmes closed on the same day.

Holders of ADSs then had 60 days in which to surrender their ADSs and receive the underlying ordinary or preference shares (as the case may be). Holders who did not surrender their ADSs would have their underlying shares sold by the Bank of New York (**BoNY**) and the sale proceeds distributed to them.

Sale of shares underlying the ADSs not surrendered – 18 April 2005

Once the deadline for surrender had passed, BoNY started to sell the underlying shares that remained. This process took several days, mainly due to the illiquidity of the preference shares.

US sub-registers created – May 2005 to 1 July 2005

Once the sales by BoNY had been completed, it was possible to begin the compilation of the US sub-registers (one for ordinary and one for preference shares) required under the new articles. The first step was to take any holder on the main UK share register with a US address and enter them on the US sub-register. Next the Company, with advice from its brokers and registrars, identified every person on its UK share register that was a bank, broker, dealer or nominee and issued notices to them under section 212 of the Companies Act 1985. This section of the Companies Act is intended to allow public companies to identify those persons interested in their shares and requires a person receiving a notice to respond giving the identity of any person so interested.

Where the response to a notice revealed an underlying holder that was itself a bank, broker, dealer or nominee, a further notice was served on that holder, and so on until the ultimate beneficial owner was identified.

Ultimate beneficial owners who were US persons were added to the relevant US sub-register.

Notification of termination of registration filed – 1 July 2005

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On 1 July 2005, the US sub-registers were complete and each showed less than 300 US holders (190 in respect of ordinary shares and 83 in respect of preference shares). Form 15, the notification of termination of reporting obligations, was therefore filed with the SEC on that day. Immediately on filing of the form, the Company's SEC reporting obligations were suspended. Termination of the Company's registration took effect 90 days after the filing of Form 15.

Ongoing requirement

Under existing SEC rules it is necessary for the number of US shareholders in each class to remain below 300 in order to avoid the SEC reporting obligations re-commencing. It will be necessary for the Company to assess the numbers of US holders at each financial year-end and, if necessary, utilise the Compulsory Sale Power to reduce the number of US holders to below 300.

F. The practical issues

Understanding the underlying US shareholder base

As part of the decision making process on whether to proceed with the de-listing and de-registration, the Company's board were keen to understand exactly how many US shareholders the Company had and who they were. This proved difficult to determine.

First, the position was complicated by having to look at two share registers, the UK register maintained by the Company's registrars and the ADS register kept by BoNY. There were also UK nominees on the UK share register that the Company's brokers had identified as holding for US investors. This position is illustrated on the slide attached as item 3.

Second, BoNY had limited visibility of the number and identity of holders underlying their register. As can be seen from the slide, the vast majority of the ADSs registered with BoNY were in the names of four nominees.

We undertook two exercises to achieve greater clarity – a "non-objecting beneficial owner" (NOBO) search and an analysis of the register by ADP. The NOBO search was of very limited use, as it only identified around 36% of the underlying holders. The ADP analysis was more useful; it covered over 90% of the total ADSs, although it only provided data showing the number of holders in various bands based on size of shareholding, and no information as to the identify of these holders.

It was the aggregation of this data that enabled the Company to determine with a reasonable degree of certainty how many US holders would be affected, even if it was not possible to identify all of them.

The inability to identify clearly all holders of the Company's shares was very frustrating and this frustration was all the more keenly felt in the light of the English law approach that it is a company's right to know who is interested in its shares (reflected in the section 212 process mentioned above).

Communicating with US shareholders

Owing to the prevalence of individuals holding shares through brokers or nominees and the existence of the ADS programme, very few of the communications issued by the Company reach the underlying shareholders directly. As each item passed from the Company to BoNY and from BoNY to a broker and from a broker to its client there was always the possibility that the message changed slightly en route and there were clear examples of this.

In one case a broker confused the CUSIP numbers of the two classes of shares on the letters it sent to its clients, leading a shareholder to believe that he was being made to exchange a preference share that had been trading at around $24 for two ordinary shares trading at around $3 each. His reaction – to write a letter of complaint to the SEC – was understandable.

A number of organisations confused the expression "ordinary shares" when used by the Company to denote the class of shares, to mean the underlying shares (of either class) represented by the ADSs.

This issue of clear communication was never resolved in a completely satisfactory way and probably could not have been, given the way the US equity market operates, but one step the Company took was to prepare a script for BoNY to use when responding to shareholder enquiries. This aimed to summarise, in as clear terms as possible, the process and highlight the most important elements. This script was updated as the process progressed. A copy is attached as item 4.

FSA clearance

Under the UK listing rules certain shareholder documents require approval by the FSA before they can be issued, others never require approval and some only require approval if they are unusual in some respect. A circular convening a shareholder meeting to amend a company's articles falls in the last category. The Company's legal advisers and brokers did not consider there to be anything unusual in this case and, in an initial conversation with the FSA, this view was confirmed. The FSA indicated that they did not wish to review the circular before it was issued.

However, shortly after receiving this confirmation, the Company became aware that the FSA was reviewing a circular proposed in connection with a similar amendment to another company's articles. In this case that company had been obliged to submit its document for approval because the articles amendment was part of a larger transaction. With this information, the Company decided that it should approach the FSA again to obtain confirmation of its initial view and was then informed that the draft circular should be submitted for approval.

The FSA referred to rule 9.16 of the then current listing rules:

"A company having listed shares must ensure equality of treatment for all holders of such shares who are in the same position."

The Company successfully argued that US shareholders were not "in the same position" as other shareholders due to the disproportionate burden their existence placed on the Company. In effect, the minority of shareholders were having an adverse effect on the majority.

The look-through process

This element of the transaction proved very time-consuming.

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As described above, one of the first steps in creating the US sub-registers was to issue section 212 notices. Several thousand were issued and, while many of these were responded to within the five-day time limit set out in the notice, a minority required reminder notices and, ultimately, telephone calls.

A considerable number of the initial responses revealed underlying banks, brokers, dealers or nominees which then had to be served with a further notice and some of these uncovered yet further nominee layers.

A number of US institutions appeared to be unfamiliar with this type of notice and either did not understand what information they were being asked to provide or simply indicated that they had no intention of responding. In some cases it was necessary to escalate the process at this point by serving a notice under article 26(b) indicating that, if no response was received, the board would be entitled to assume that the underlying holders were US persons and issue a sale notice under the Compulsory Sale Power. This encouraged institutions to provide the information requested.

Some organisations indicated that their policies and/or privacy requirements prohibited them from disclosing the identity of their clients.

In some cases, subsequent disclosures by underlying holders revealed earlier information to be incorrect, as account names were not recognised, addresses provided were out of date and so on. A considerable amount of "detective" work was required at the very end of the process to track down the final pieces of outstanding information.

G. Employee issues to consider

There were a number of employee issues that required careful planning and communication.

Section 401k plan

The Company's section 401k plan allowed investment in Company stock. The number of employees that had taken up this option was close to the 300 US shareholder limit for de-registration. After lengthy consideration, it was decided that Company stock should be withdrawn from the plan and employees asked to transfer their investment to other funds available under the plan.

This was a step that the Company would have preferred not to have to take, but given the low shareholder limit and the lack of any exemption for employee holders, there was no alternative.

Stock option plans

A number of US employees are option holders under the Company's plans. Concern was expressed that an employee might exercise an option and then be forced to sell his/her shares under the Compulsory Sale Power. The Company had originally included a provision in the proposed amendment to its articles allowing the board to exempt US employee shareholders when exercising the Compulsory Sale Power. Unfortunately, the FSA would not accept this and insisted that the power would have to be exercised in more mechanical way, starting with the compulsory sale of the smallest shareholding first and working upwards.

The possibility of replacing the stock option plans with cash-based incentives mirroring these plans was carefully considered. However, the combined impact of the US Jobs Creation Act on deferred compensation arrangements and the introduction of International Financial Reporting Standards regarding the accounting treatment of such arrangements made this unattractive.

Ultimately, the Company decided to leave in place its existing plans for US employees.

Employee communications

A full communication programme was planned in detail before any public announcement was made regarding the de-listing and de-registration. This included a letter from the Company's CEO to every US employee, with a set of customised questions and answers for employees who were members of the 401k plan and/or held stock options or were not involved in either arrangement.

Conference calls were also held on two separate occasions, attended by the whole of the Company's senior management team, during which the background to the board's decision and the process were explained in detail by those involved. This enabled senior managers proactively to both brief their teams and respond to questions and concerns.

H. Conclusion

The requirements of a US listing and registration are now very onerous, particularly for foreign companies that already have to comply with their local governance regime. It is likely that, in a number of cases, this burden will outweigh the benefits of access to the US equity market.

UK companies have been struggling for some time to find an effective route to de-registration under the existing SEC rules. While it is encouraging to hear that the SEC is reviewing these rules, I anticipate that a number of other UK companies will follow the Premier Farnell path to de-registration.

This approach has proved to be effective and relatively straightforward.

Steven Webb
Company Secretary and General Counsel
Premier Farnell plc

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SEC deregistration

A growing trend?

Jim Bartos and **Peter King** of **Shearman & Sterling LLP** look at how and why UK companies are seeking to deregister from the SEC.

Artist: Satoshi Kambayashi

The introduction of the Sarbanes-Oxley Act of 2002 (2002 Act) as a response to accounting scandals such as those of Enron, has had a knock-on effect on non-US companies with a US listing. The additional regulatory and administrative requirements, in particular, section 404, which requires an audit of internal controls, have caused these companies to reconsider the benefits of listing in the US.

This article examines the issues which arise in a deregistration of securities from the US Securities and Exchange Commission (SEC) and explains some of the innovative structures that have been developed by companies wishing to deregister.

Why register in the US?

Over the years, there have been many reasons for UK and other non-US companies to raise capital in the public markets in the US or to list their securities there, with resulting SEC registration and reporting requirements. Key among these is the fact that the US capital markets have constituted the largest source of funds available for investment in the world. The privatisations and other large UK issues went to the US simply because of the size of the issue, and often this was done on a registered basis with a US listing.

The US also has had investor groups and analysts that either have had more experience with, or provide more favourable methods of valuation for, or simply provide deeper pools of funds with respect to certain industries than has been the case in the UK and European markets. For instance, US investors had many years of experience in investing in public utilities, which were publicly quoted in the US before utilities were floated here. Also, investor opportunities exist for biotech and other hi-tech companies in the US not present here. The high yield debt market started as a US market and the US remains a key component of it.

Companies have also sought a US registration for other purposes. For companies with operations and employees in the US, a US listing provides US employees with a dollar-quoted share that they can invest in, through benefit plans similar to those in the home market. For acquisitive companies, registration was thought to provide "acquisition currency", namely, registered stock which could be used in a US acquisition. Finally, many companies have listed in the US at a time when the US listing fit the profile of the company's peer group internationally or fit the consumer profile for a company with significant sales in the US.

American Depositary Receipts

To facilitate the purchase and trading of equity by US investors, UK companies list their equity on a US securities exchange or Nasdaq for trading in the form of American Depositary Receipts (ADRs) rather than shares. To establish an ADR facility, a UK issuer and a depositary enter into a deposit agreement. Brokers may then deposit ordinary shares with the depositary's custodian in the UK, which holds the shares. The depositary in the US issues ADRs to the broker that are the physical certificates (or book entry) representing American Depositary Shares, which in turn represent the ordinary shares. Clearance and settlement of ADR trading takes place in the US, with transfers recorded on the books of the depositary.

Sarbanes-Oxley

It has always been the case that the US securities markets had barriers to entry, in particular, US GAAP (generally accepted accounting principles) reconciliation and the initial and ongoing reporting pursuant to SEC disclosure requirements. Companies entering the US markets have always had to make a strategic cost benefit analysis as to whether they considered that the exercise was worth the initial and ongoing effort.

Going in

- Listing a class of securities (equity or debt) on a US securities exchange or Nasdaq or a US public offering of securities (equity or debt) combined with a listing triggers registration of the class with the US Securities and Exchange Commission (SEC) under the Securities Exchange Act of 1934 (1934 Act), which in turn triggers ongoing reporting and corporate governance obligations.
- US public offering of securities without a US listing (likely to be debt) triggers the same ongoing reporting obligations as registration and most corporate governance obligations.
- Going over 300 US resident holders of a class of equity securities without the above activities (no listing and no public offering) does not trigger 1934 Act registration or reporting, but does require an application for exemption on the part of the issuer that requires furnishing to the SEC home country reporting on an ongoing basis under Rule 12g3-2(b) of the 1934 Act.

The 2002 Act has now shifted the balance of the cost benefit analysis and has prompted companies with a long history of listing and reporting in the US to re-evaluate the current benefits (*see News brief "Corporate governance: changes sweep in from the Atlantic", www.practicallaw.com/A25716*).

Section 404 requirements. There have been two waves of reaction to the 2002 Act. After the initial shock that it would apply to foreign private issuers, in the same way as other SEC and stock exchange rule-making, the first reaction generally was that it wasn't so bad after all and maybe did some good. ("Foreign private issuer" is the SEC's term for a non-governmental foreign company that is eligible to file with the SEC as a foreign rather than a domestic company.) The initial focus of foreign private issuers after passage of the 2002 Act was on reviewing and possibly enhancing disclosure procedures and other "soft" areas which brought internal enhancements with little cost. UK companies generally already complied with or exceeded most of the new corporate governance requirements relating, for instance, to the board and audit committee.

The second reaction has been to the much greater costs, both in terms of cash and management time, relating to the requirements under section 404 of the 2002 Act for management to report on its assessment of internal controls over financial reporting and for the auditors to attest to the management report. This has created in effect a requirement for two audit reports: the traditional audit report on the financial statements; and an audit report on controls.

The audit report on controls has in turn meant that companies for the first time have needed to put in place an audit trail with respect to controls so that the auditors can conduct an audit. Many companies are therefore undertaking extensive programmes to enhance not only internal controls but, in particular, the audit trail relating to them.

For foreign private issuers on a calendar year, the first section 404 report will be

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due in 2007 in relation to the 2006 year. This reflects a recent one-year extension for foreign private issuers. Domestic issuers must file now in relation to 2004. While preparation for the section 404 report is causing upset at many companies, at least one major foreign private issuer has voluntarily complied with section 404 early and has already filed its report with respect to 2004.

Reasons for pulling out. The cost of compliance with section 404 in both the initial stages and increased audit fees on an ongoing basis has led many foreign private issuers to re-evaluate their need for an SEC registration and reporting. When looking at their US listing, some companies have found that the volume of trading in the form of American Depositary Receipts (ADRs) in the US is low and that US institutional investors have mostly accessed their shares through the London or other home country market (*see box "American Depositary Receipts*).

Additionally, companies have found that, although they may have originally intended to access the US capital markets, the reality has been that they have not done so for some time and have no current intention of doing so. Many companies with US listings also do not have operations or employees in the US. Smaller companies, even with US employees, find that the cost of section 404 compliance is so large in comparison to their other costs that de-registration is attractive in any event.

Obviously, each company will weigh these factors differently and will make different decisions as to whether or not delisting and deregistration is desirable. Equally, companies that have not yet entered the SEC reporting system will continue to find that even with section 404 costs, a US listing provides an attractive international market for their stock and a corporate governance benchmark for the company which is worthwhile.

SEC registration

A foreign private issuer with securities registered with the SEC needs to comply with section 404 of the 2002 Act, US disclosure requirements and many of the US corporate governance requirements. The obligation to file SEC-mandated reports derives either from having conducted a public offering of securities in the US or from registration of a class of securities under the Securities Exchange Act of 1934 (1934 Act) due to a listing on a stock exchange or quotation on Nasdaq, the US screen-based system for the quotation of securities (*see box "Going in"*).

A foreign private issuer with over 300 US resident holders of a class of equity securities which has not carried out either a public offering or a listing in the US does not need to register with the SEC and can furnish to the SEC home country reporting in lieu of SEC reporting provided it applies for the exemption in Rule 12g3-2(b) under the 1934 Act.

Getting out

A foreign private issuer , for example, a UK issuer with a US listing:

- Must not have any securities listed on a US exchange or Nasdaq, that is, must delist (this is a fairly automatic process).
- Must have fewer than 300 US resident holders of any class of securities registered under the Securities Exchange Act of 1934.
- Must have fewer than 300 US resident holders of any class of securities for which there is a reporting obligation due to a prior public offer.
- Must have fewer than 300 US resident holders of any other class of equity security, such as options.

If all the above requirements are met, certification may be made to the US Securities and Exchange Commission on Form 15 of the number (under 300) of US resident holders of each class of registered securities or for which there is a reporting obligation. Reporting obligations will cease on certification and deregistration will occur 90 days later.

Deregistering from the SEC

To deregister and to suspend SEC reporting obligations, pursuant to Rules 12g-4 and 12h-3 under the 1934 Act, a foreign private issuer must have under 300 US resident holders of any class of securities that has been registered or pursuant to which there is a reporting obligation (*see box "Getting out"*). Also, depending on the prior history of the issuer in the US, these thresholds of security holding must not be exceeded at certain points in time for either 18 months or forever.

Under US tender offer rules, it is not permissible for a company to offer to purchase its shares from US resident holders without making the offer available worldwide, nor is there any mechanism for foreign companies to force their holdings to below the required levels. Any such exercise would need to be undertaken on the basis of UK or home country corporate law or through a corporate transaction that is not a tender offer. UK company law has permitted a number of innovative solutions, which, however, may not be available in other countries (*see below*).

Under the US rules, holders must be counted on the basis of the number of ultimate beneficial holders. For companies in many countries it is difficult to access information with respect to beneficial holdings that are held through banks, brokers, dealers or other nominees. However, in the UK, the so-called sweep procedure under section 212 of the Companies Act 1985 (1985 Act), which requires UK nominees to divulge beneficial holdings, benefits UK companies that are attempting to identify and count their US resident holders.

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Premier Farnell

In April 1996, Premier Farnell plc (PF) acquired Premier Industrial Corporation, an Ohio incorporated company with a principally US shareholder base. Ordinary and preference shares were issued to the former shareholders of Premier Industrial Corporation as part of the consideration for the acquisition. As a result, PF listed the shares on the New York Stock Exchange (NYSE) and put in place an American Depositary Receipt (ADR) programme in respect of each class of share (*see box "American Depositary Receipts"*). In addition, the shares were registered with the US Securities and Exchange Commission (SEC).

Since 1996, PF's US shareholder base has decreased substantially, as have trading volumes on the NYSE. This decline, and the considerable cost of complying with US regulations (including the Sarbanes-Oxley Act of 2002), led PF to decide to terminate those arrangements and to take steps to deregister.

PF applied on 9 December 2004 to have its NYSE listings terminated. In addition, notice was given of the termination of the ADR programmes. The NYSE listings and ADR programmes terminated on 16 February 2004.

In parallel, PF convened an extraordinary general meeting at which a resolution was passed amending the company's articles of association to include a provision enabling the directors to require US shareholders to sell their shares, failing which the directors could sell the shares on behalf of the US shareholder in question. In deciding how to exercise this power, the directors intend to take into account the relative size of the holdings of US shareholders and apply the power first to those US shareholders with the smallest holdings of shares.

PF intends to terminate the registration of its shares with the SEC when the number of US holders of each class of share falls to below 300, whether as a result of the directors exercising the new power contained in the articles of association, or otherwise.

Possible UK solutions

As UK companies have grappled with these issues, a number of solutions have emerged. These fall into three main categories:

Wait and see. A company could undertake a delisting and termination of the ADR facility and then see what happens. A company that does this hopes that the delisting will lessen US interest in its securities to such an extent that natural attrition brings it below the 300 shareholder level. While termination of the ADR facility will mean that some of the ADR holders will become shareholders, some will also be cashed out by the depositary either because they do not wish to become direct shareholders in a stock with no US listing or because they fail to give the depositary stock custody instructions (*see box "American Depositary Receipts"*).

This approach was adopted successfully by lastminute.com plc and might be called the "wait and see" approach.

Amend the articles. A company could pro-actively adopt a provision in its articles of association allowing the company to require US shareholders to sell their shares, and if they fail to do so, empowering the company to force a sale of the shares on their behalf. This sort of provision is a development of the provisions restricting foreign ownership or ownership of more than a certain percentage of the share capital which have been adopted by many companies (such as some privatised companies and companies in industries where there are statutory restrictions on foreign ownership).

This approach was taken by Premier Farnell plc (*see box "Premier Farnell"*) and lastminute.com plc has also now adopted similar provisions in its articles.

Scheme of arrangement. A company could take steps as part of a larger corporate transaction, or even undertake a separate corporate transaction, in order to remove a sufficient number of US shareholders from the share register. This approach has been adopted by mmO$_2$ plc and ITV plc, which both entered into schemes of arrangement under section 425 of the 1985 Act (scheme of arrangement) (*see boxes "mmO$_2$ scheme" and "ITV scheme"*).

Which of these approaches is right for any particular company is likely to depend on a detailed analysis of its share register and the extent of its US ownership as well as consideration of any other corporate objectives it may have.

UK legal issues

When considering deregistering from the SEC, companies listed on the Official List in London need to be aware that amending their articles of association to provide for compulsory sale of shares held by US resident shareholders raises a number of issues under the UK Listing Authority's (UKLA) Listing Rules. Similar issues are raised by schemes of arrangement that are designed to treat US shareholders differently from other groups of shareholders.

The key issue relates to Listing Rule 9.16: "A company must ensure equality of treatment for all shareholders which are in the same position". Companies such as Premier Farnell, mmO$_2$ and ITV have successfully argued that US shareholders are not "in the same position" as other shareholders, since their existence creates disproportionate and duplicative regulatory burdens on the company. The UKLA requires companies to be specific about these burdens in the disclosures they make to their shareholders when seeking their approval.

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Litigation risk

Could a disgruntled US shareholder challenge these proposals in a court? Any challenge in a US court based on unfairness or breach of fiduciary duty is unlikely to succeed, since the US courts, under the so-called "internal affairs" doctrine and as a matter of *forum non conveniens* would regard the relationship between companies and their shareholders as solely a matter of the law and for the courts in the jurisdiction in which the company is incorporated.

In the UK courts, it would be possible for a minority shareholder to challenge under section 459 of the 1985 Act the exercise of powers under the articles of association to dispose of his shares compulsorily. However, analysis of the relevant authorities leads to the conclusion that it is highly unlikely that such a challenge would succeed unless the powers have themselves been exercised in a capricious way in order to target a particular shareholder or group, rather than on some objective basis.

The safest course for companies wishing to exercise these powers would be to set a "clearing level" with respect to the number of shares held by each shareholder which would reduce the number of US shareholders well below the 300 threshold and exercise the powers in relation to all shareholders holding a number of shares falling below the clearing level. The provisions adopted in the articles of association of those companies which have taken this step are sufficiently flexible to allow this.

If a scheme of arrangement is used, any shareholder may appear at the court hearing to sanction the scheme in order to object to it. Although the court has a broad discretion, it seems unlikely that it would be exercised against a company proposing a scheme along the lines of the mmO_2 or ITV schemes which have now been approved by the court.

US legal issues

The compulsory sale amendment to the articles of a UK company described above does not directly present any US legal issues in its implementation. Foreign

mmO_2 scheme

The mmO_2 plc scheme had three objectives:

- To create distributable reserves. Although mmO_2's business has been highly cash generative, the structure of its demerger from British Telecommunications plc (BT) and its 3G (third generation) licences left it with a significant deficit on distributable reserves (*for a feature article on the demerger, see "BT demerger: reversing the trend", www.practicallaw.com/A21848*). This situation can be resolved through the type of scheme which has been used in the past by a number of companies, including Rolls-Royce plc and The Berkeley Group plc, under which a new holding company is superimposed which immediately reduces its capital, creating significant distributable profits.
- To deal with the problems caused by a large number of smaller shareholders. mmO_2 has over 1.5 million shareholders, 65% of whom by number hold less than 3% of the total shares in issue. In many cases, sending the dividend cheque will be more expensive than the amount of the cheque itself.
- To effect a reduction in the number of US shareholders. mmO_2's US reporting requirements arose simply because it inherited US shareholders and a US listing from BT on its demerger. It had never raised any capital in the US public markets.

The scheme therefore provides for the new holding company, O2 plc, to acquire the existing mmO_2 for a mixture of its own shares and cash. All shareholders had the right to elect for shares or cash (and therefore the scheme required approval of all shareholders voting together as a single class), but the amount of cash available was limited to the amount raised by O2 in a placing of shares carried out immediately after effectiveness of the scheme. Any shareholder who did not return a form of election was deemed to have elected to receive cash. The cash amount included a premium of 5p over the price at which the shares were placed. The cash elections and deemed elections of smaller shareholders were satisfied in full, while those of larger shareholders were declined.

The scheme was approved by mmO_2 shareholders by an overwhelming majority at meetings held on 14 February 2005 and by the High Court on 10 March 2005.

The new holding company did not apply for a New York Stock Exchange listing, nor did it establish an American Depositary Receipt facility (*see box "American Depositary Receipts"*). The cash election mechanics reduced the number of US shareholders. O2's articles include compulsory sale provisions, which will become operable three months after the scheme becomes effective. US shareholders therefore had the choice of electing for the premium price available under the cash election, or running the risk of their shares being compulsorily sold under the provisions in the articles. Since mmO_2 had never raised capital in the US public markets, these provisions are only required in order to keep the number of US shareholders below 300 for 18 months after deregistration, and they expire at that point.

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ITV scheme

ITV's US reporting requirements arose largely as a result of a convertible preference share issue into the US public market effected by Carlton Communications plc, one of its predecessor companies.

The ITV scheme was conceived with the sole purpose of reducing the numbers of US shareholders on ITV's share register. ITV has both ordinary shares and convertible preference shares in issue. Under the ITV scheme, two separate classes of US shareholders were constituted, one relating to the ordinary shareholders and one relating to the convertible preference shareholders. This created a complex approval process requiring five separate meetings of ITV shareholders:

Meeting	Required majority
US ordinary shareholders (meeting convened by the court)	Majority in number representing 75% by value of those present in person or by proxy and voting
US convertible preference shareholders (meeting convened by the court)	Majority in number representing 75% by value of those present in person or by proxy and voting
Ordinary shareholders (class meeting convened by ITV)	75% by value of those present in person or by proxy and voting
Convertible preference shareholders (class meeting convened by ITV)	75% by value of those present in person or by proxy and voting
Extraordinary general meeting of all shareholders	75% by value of those present in person or by proxy and voting (convertible preference shareholders were permitted to vote as well as ordinary shareholders)

The scheme provided for cash payments to be made to US shareholders holding less than 175,000 shares in consideration of the cancellation of their shares. ITV had calculated that it had fewer than 300 US shareholders above that level. The cash was funded by a placing of the relevant shares, but also included a premium of 15% of the market price of the shares as well as an additional payment of $500 to each affected US shareholder. In order to avoid any possible arbitrage, the class was defined by reference to the position on the day before the scheme was announced. The scheme was approved by the High Court on 11 March 2005.

It remains possible that ITV may have US shareholders exceeding the 300 threshold after the scheme becomes effective. In addition, since it has raised capital in the US public markets, it must keep the number of its US shareholders below that number without limit in point of time. The articles of ITV have therefore been amended to include compulsory sale provisions to enable the directors to ensure that ITV does not again become subject to US reporting requirements and these provisions do not have an expiry date.

private issuers are exempt from the US proxy rules so for a UK company the vote required and the materials that would be sent to shareholders to vote on the amendment would be governed by English law. The legality of the amendment and of the exercise of compulsory transfer procedures is also a matter of English company law and the Listing Rules, just as any matter involving a company's constituent documents would, under choice of law principles, be a matter of the law of jurisdiction of incorporation.

A scheme of arrangement involving a delisting does raise US legal issues in two principal respects:

Distribution. If the scheme involves a distribution of shares in a new holding company, this means that the distribution must either be registered with the SEC under the Securities Act of 1933 (1933 Act) or must be exempt from SEC registration. The exemption from registration traditionally relied on for schemes of arrangement is under section 3(a)(10) of the 1933 Act, which provides an exemption for securities issued in exchange for outstanding securities where the terms and conditions are approved, after a hearing on the fairness, by a court. A line of SEC no-action letters specifically sanctions the UK scheme of arrangement as meeting the requirements of section 3(a)(10).

Another possible exemption for the distribution of shares in a scheme has been

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created by the cross-border rules, which exempt an exchange of securities for securities of a foreign private issuer in any business combination if the level of US ownership is below 10% and if certain other conditions are met (*Rule 802, 1933 Act*).

Going private rules. The going private rules must be complied with in a transaction where there is a purchase of any equity security by the issuer or an affiliate and where there is a going private effect, including delisting from a US securities exchange (*Rule 13e-3, 1934 Act*).

Technically, it would appear that schemes of arrangement involving a delisting would come within the going private rules unless an exemption is available: for example, where the transaction is a business combination under the cross-border rules where under 10% of the shares are held by US resident holders. If there is no such exemption, then it may be that an extensive disclosure schedule meeting the requirements of the going private rules with respect to the fairness of the transaction would need to be prepared, filed with the SEC and reviewed by the SEC. To date, none of the UK transactions have followed this route.

Jim Bartos and Peter King are partners at Shearman & Sterling LLP. *The authors acknowledge the assistance of Alison Abram and James Comyn, associates with Shearman & Sterling LLP, in the preparation of this article.*

Shearman & Sterling LLP represented Premier Farnell plc and mmO$_2$ plc in the transactions described above. Freshfields Bruckhaus Deringer represented ITV plc in relation to its scheme of arrangement and Herbert Smith represented lastminute.com plc.

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Argles & Court
4 years, Consultant
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26. Limitations on shareholdings by US Holders

(a) Purpose and interpretation

(i) The purpose of this article is to restrict the number of US Holders who hold or have an interest in shares of any class in the capital of the Company, so as to enable the Company to suspend its obligations under the US Securities Exchange Act of 1934 and to prevent any such obligations from arising again in the future.

(ii) For the purpose of this article:

(A) **interest** in relation to shares, means any interest which would be taken into account in determining for the purposes of Part VI of the Act whether a person has a notifiable interest in a share (including any interest which he would be taken as having for those purposes) and interested shall be construed accordingly;

(B) **Relevant Shares** means shares in the Company (including, without limitation, shares now or at any time represented by American depositary shares) which are held by US Holders in any manner described in Rule 12g 3-2(a)(1) of the US Securities Exchange Act of 1934 (including directly or through or as nominee) or which are deemed pursuant to this article to be so held;

(C) **Required Disposal** means in relation to any Relevant Shares a disposal or disposals of such shares or interests therein which will result in such shares ceasing to be Relevant Shares;

(D) **Register of US Holders** means the register to be maintained in accordance with article 26(d);

(E) **US Holder** means (I) persons resident in the US who hold shares in the Company (including, without limitation, shares now or at any time represented by American depositary shares) in any manner described in Rule 12g 3-2(a)(1) of the US Securities Exchange Act of 1934 (including directly or through or as nominee) and (II) persons who appear, at any time, to the Board to fall within sub-paragraph (I) of this definition of US Holder; and

(F) **US** means the United States of America, its territories and possessions, any state of the United States, and the District of Columbia.

(b) Disclosure notices

(i) The board may by notice in writing require any member or other person appearing to be interested or appearing to have been interested in shares in the Company to disclose to the Company in writing such information as the board shall require relating to the ownership of or interests in the shares in question as lies within the knowledge of such member or other person (supported if the board so requires by a statutory declaration and/or by independent evidence) including (without prejudice to the generality of the foregoing) any information which the Company is entitled to seek pursuant to

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section 212 of the Act and any information which the board shall deem necessary or desirable in order to determine whether any shares are Relevant Shares.

(ii) Whether or not a notice pursuant to article 26(b)(i) has been given, the board may by notice in writing require any member or other person appearing to be interested or appearing to have been interested in shares in the Company to show to the satisfaction of the board that the shares in question are not Relevant Shares. Any person on whom such a notice has been served and any other person who is interested in such shares may within 14 days of such notice (or such longer period as the board may consider reasonable) make representations to the board as to why such shares should not be treated as Relevant Shares but if, after considering any such representations and such other information as seems to them relevant, the board believes such shares to be Relevant Shares, the board may determine that such shares shall be deemed to be Relevant Shares and they shall thereupon be treated as such for all purposes of this article.

(iii) The board may give a notice pursuant to article 26(b)(i) or (ii) or both of them at any time and the board may give one or more than one such notice to the same member or other person in respect of the same shares.

(c) Notification obligation

Each member shall notify the Company immediately upon becoming aware that any shares in which he is interested (i) is or has become a Relevant Share or (ii) has ceased to be a Relevant Share.

(d) Register of US Holders

(i) The board shall maintain, in addition to the register, a register of US Holders, in which there shall be entered particulars of any shares which are or have been deemed to be Relevant Shares. The particulars entered on the Register of US Holders in respect of any share shall comprise, in addition to the name of the holder, the name of any US Holder interested or who appears to the board to be interested in such share and such information as has been supplied to the board pursuant to article 26(b)(i) or (ii) or otherwise or, if no such information has been supplied, such information as the board considers appropriate.

(ii) The board shall remove from the Register of US Holders particulars of any share if there has been furnished to it a declaration (in such form as the board may from time to time prescribe) by the holder of such share, together with such other evidence as the board may require, that satisfies the board that such share is no longer a Relevant Share.

(e) Required Disposal

(i) The board may give notice to the holder of any Relevant Shares and, if it so chooses, to any other person appearing to it to be interested in such Relevant Shares calling for a Required Disposal of some or all of the Relevant Shares held by him to be made within 21 days or such longer period as the board considers reasonable. The board may extend the period in which any such notice is required to be complied with and may withdraw any such notice (whether before or after the expiration of the period referred to) if it appears to it that the shares to which the notice relates are not or are no longer Relevant Shares or in any other circumstances the board sees fit. If the board is not satisfied that a Required Disposal has been made by the expiry of the 21 day period (as may be extended), no transfer of any of the Relevant Shares to which the notice relates may be made or registered other than a transfer made pursuant to article 26(e)(ii) or unless such notice is withdrawn.

(ii) If a notice given under article 26(e)(i) above has not been complied with in all respects to the satisfaction of the board or withdrawn, the board shall, so far as it is able, make a Required Disposal (or procure that a Required Disposal is made) and shall give written notice of such disposal to those persons on whom the notice was served. The holder of the shares duly disposed of and all other persons interested in such shares shall be deemed irrevocably and unconditionally to have authorised the board to make such Required Disposal. The manner, timing and terms of any such Required Disposal made or sought to be made by the board (including but not limited to the price or prices at which the same is made and the extent to which assurance is obtained that no transferee is or would become a US Holder) shall be such as the board determines (based on advice from bankers, brokers, or other persons the board considers appropriate to be consulted by it for the purpose) to be reasonably obtainable having regard to all the circumstances, including but not limited to the number of shares to be disposed of and any requirement that the disposal be made without delay; and the board shall not be liable to any person (whether or not a US Holder) for any of the consequences of reliance on such advice.

(iii) For the purpose of effecting any Required Disposal, the board may:

(A) authorise in writing any officer or employee of the Company to execute any necessary transfer on behalf of any holder; and/or

(B) convert any share from uncertificated form to certificated form,

and may enter the name of the transferee in the register in respect of the transferred shares notwithstanding the absence of any share certificate and may issue a new certificate to the transferee and an instrument of transfer executed by any officer or employee of the Company so authorised by the board shall be as effective as if it has been executed by the holder of the transferred shares and the title of the transferee shall not be affected by any irregularity or invalidity in the proceedings relating to the sale. The proceeds of the Required Disposal shall be received by the Company or by any person nominated by the Company whose receipt shall be a good discharge for the purchase money and shall be paid (without any interest being payable in respect of it and after deduction of any expenses incurred by the board in the sale) to the former holder (or, in the case of joint holders, the first of them named in the register) upon surrender by him or on his behalf to the Company for cancellation of any certificate in respect of the transferred shares.

(f) **Miscellaneous**

(i) Nothing in this article shall require the board to assume that any person is a US Holder unless the information contained in the register, the registers kept by the Company under Part VI of the Act or in the Register of US Holders,

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appears to the board to indicate to the contrary or the board has reason to believe otherwise, in which circumstances the board shall make enquiries in good faith to discover whether any person is a US Holder.

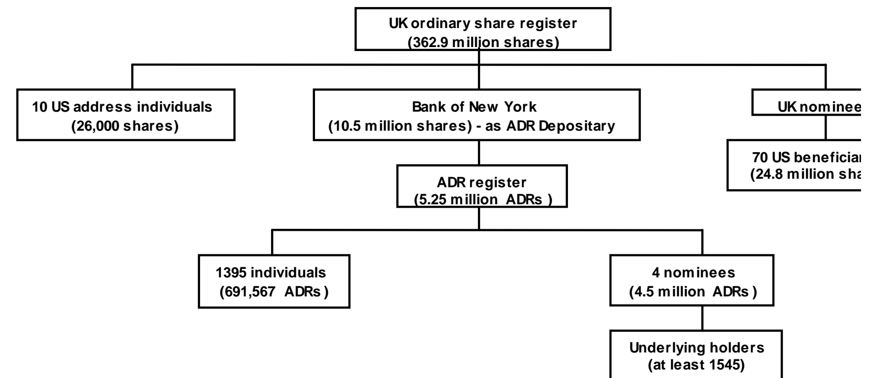
(ii) The board shall not be obliged to give any notice otherwise required under this article to any person if it does not know either his identity or his address. The absence of such a notice in those circumstances and any accidental error in or failure to give any notice to any person to whom notice is required to be given under this article shall not prevent the implementation of, or invalidate, any procedure under this article.

(iii) Save as otherwise provided in this article, the provisions of these articles applying to the giving of notice of meetings to members shall apply to the giving of any notice required by this article. Any notice required by this article to be given to a person who is not a member, or who is a member whose registered address is not within the United Kingdom and who has not given to the Company an address within the United Kingdom at which notices may be given to him, shall be deemed validly served if it is sent through the post in a pre-paid envelope addressed to that person at the address (or, if more than one, at one of the addresses), if any, at which the board believes him to be resident or carrying on business or to his last known address as shown in the register. The notice shall in such a case be deemed to have been given on the third day following that on which the envelope containing the same is posted. Proof that the envelope was properly addressed, pre-paid and posted shall be conclusive evidence that the notice was given.

(iv) Any resolution or determination of, or decision or exercise of any discretion or power by, the board or any director or by the chairman of any meeting under or pursuant to the provisions of this article (including without prejudice to the generality of the foregoing as to what constitutes enquiries made in good faith or as to the manner, timing and terms of any Required Disposal made by the board under article 26(e) above) shall be final and conclusive; and any disposal or transfer made, or other thing done, by or on behalf of, or on the authority of, the board or any director pursuant to the foregoing provisions of this article shall be conclusive and binding on all persons concerned and shall not be open to challenge, whether as to its validity or otherwise on any ground whatsoever. The board shall not be required to give any reasons for any decision, determination or declaration taken or made in accordance with this article.

(v) Nothing in this Article shall constitute the holders of Relevant Shares as a separate class.

(vi) This article shall apply notwithstanding any provision in any other of these articles which is inconsistent with or contrary to it.



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Premier Farnell plc

termination of ADR program, de-listing from NYSE and compulsory sale power

Holders of Ordinary Shares and Preference Shares of Premier Farnell plc, and of ADSs in respect of those shares, are referred to the Company's circular to shareholders dated 10 January 2005 and to the notice sent by the Bank of New York, as ADR Depositary (the ***Depositary****), to holders of ADSs dated 9 December 2004. Those documents should be read in full. Terms defined in the circular and notice to holders of ADSs have the same meaning in this summary.*

1. On 9 December 2004, Premier Farnell gave notice to the Depositary to terminate the ADR program. Each Ordinary Share ADR represents two Ordinary Shares in the Company; each Preference Share ADR represents one Preference Share in the Company. The Ordinary Shares and Preference Shares trade on the London Stock Exchange.

2. On the same date the Company applied to have its shares removed from trading (de-listed) on the New York Stock Exchange (**NYSE**) and the de-listing has taken effect. The Company also stated its intention to seek ways to de-register from the Securities and Exchange Commission (**SEC**).

3. As termination of the ADR program and de-listing from the NYSE have both taken effect it is no longer possible to buy and sell Ordinary Share ADSs or Preference Share ADSs on the NYSE.

4. If holders of Ordinary Share ADRs or Preference Share ADRs wish to receive the Ordinary Shares or Preference Shares which are represented by the Ordinary Share ADRs or Preference Share ADRs held by them, they will have until 15 April 2005 to surrender their Ordinary Share ADRs or Preference Share ADRs to the Depositary. They will then have the appropriate number of Ordinary Shares or Preference Shares distributed to them by the Depositary.

5. After the 15 April 2005 the Depositary will sell all Ordinary Shares and Preference Shares underlying any Ordinary Share ADRs or Preference Share ADRs that have not been surrendered. The proceeds of sale net of the Depositary fee of $5.00 per 100 ADSs (or portion thereof) surrendered and the expenses of sale and any applicable taxes or governmental charges, will be distributed to the relevant ADR holders.

6. A person who surrenders **Ordinary Share ADRs** by 15 April 2005 will receive sterling denominated Ordinary Shares. Any future dividends on these Ordinary Shares will be paid in sterling and it will be for the holder to arrange the exchange of these sterling payments into dollars. An ADR holder who surrenders **Dollar Preference Share ADRs** will continue to receive dividend payments in US dollars.

7. The distribution by the Depositary of underlying Ordinary Shares or Preference Shares to a person who surrenders their ADRs will be subject to the Depositary's charges and expenses of $5 per 100 ADSs (or portion thereof), $7.50 transmission costs per holding and to a UK tax (stamp duty) of £5 per holding.

8. Following de-listing from the NYSE, the Ordinary Shares and Preference Shares remain listed on the London Stock Exchange. However, no organised trading market is expected to develop for the shares in the US and, therefore, the ability to trade them within the USA is likely to be extremely limited.

9. The Company will not be able to file for de-registration from the SEC until the number of US Shareholders (whether holding directly or through nominees) of each class (i.e. Ordinary Shares and Preference Shares) falls below 300 and remains below 300 at each subsequent financial year end. The Company estimates that, as at 10 January 2005, there are approximately 3,500 US holders of Ordinary Shares and 2,300 US holders of Preference Shares.

10. **The Company has therefore announced further proposals, which were approved by shareholders at a shareholder meeting held on 9th February 2005. These give the Company power to require the sale of Ordinary Shares or Preference Shares held by US Shareholders. If a US Shareholder fails to sell its Ordinary Shares or Preference Shares to a non-US resident when required to do so by the Company, the Company itself will be able to arrange for the sale to take place on behalf of the US Shareholder.**

11. If the Company sells shares on behalf of US Shareholders, either as part of the initial de-registration process, or at a subsequent year end in order to remain de-registered, they will be sold at the best price reasonably obtainable in the market at the time of sale. The sale proceeds will be paid to the holder after deduction of the expenses of the sale. The price at which Ordinary Shares or Preference Shares may be sold pursuant to this compulsory process may be lower or higher than the market price of the Ordinary Shares on Preference Shares at the date of this document.

In summary, holders of ADRs can either:

- Do nothing (in which case their holdings will be sold by the Depositary approximately after 15 April 2005) and receive the net sale proceeds of their holding (subject to them surrendering their ADRs to the Depositary); or
- Surrender their ADRs to Depositary by 15 April 2005 and receive the underlying Ordinary Shares or Preference Shares.

In light of the matters described above, including the amendments to the Company's articles of association which have now been approved by shareholders, ADR holders should carefully consider which course of action is more suitable for them.

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GOING GLOBAL, GOING PRIVATE

Options for Dealing with Increased US Securities Regulation

Laura Hodges Taylor

October 17, 2005

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New trends fuel alternatives

- Confluence of trends causing companies and financial sponsors to explore alternatives to US public market financings/exits
- These trends are affecting both private and public businesses

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Private Companies

- High level of fundraising and investment activity by financial sponsors since 2000
- Many sponsors now seeking liquidity
- Traditional home run exit is US IPO, but maybe not as attractive an alternative for some companies today
  - US public markets remain fickle
  - Some businesses not suited to managing for quarterly earnings expectations
  - Risks and burdens of being public have increased

Public Companies

- Regulatory environment increasing burdens of being US public company
  - Compliance obligations
  - Ongoing costs
  - Significant effect on small cap and middle market companies
- Pressure on investment banking firms means more limited coverage for same companies
  - High volatility
  - Thin trading volume

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Seeking alternatives for capital raising and/or liquidity

- Private financing sources
  - Debt
  - Sales
  - Going private
- Alternative public markets
  - New securities
  - Canada
  - UK

Private Financing

- Availability of debt at low interest rates and on relatively flexible terms
  - Senior debt markets
  - Mezzanine debt
  - Second lien debt
- Finance traditional activities (cap ex, acquisitions, growth)
- Finance liquidity for private company financial sponsors (leveraged recap with distribution)

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Non-debt liquidity/financing

- Sale-leaseback transactions
- Asset sales
- Secondary sales by sponsors
  - Full or partial
  - Strategic or financial buyer

Going Private

- Increased financial sponsor investment activity
  - Significant fundraising
  - Bigger fund size
  - New entrants to private equity markets
  - Availability of debt
- Public company burdens
- High level of going private activity

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Alternative public market financings

- High-dividend common offerings
  - Low interest rate environment
  - Appetite for yield oriented securities
  - Different investor base than traditional public equity market
- Canadian income trust/income securities offerings
  - Companies with predictable cash flow
  - Lack of developed high yield market in Canada
  - Favorable tax structure (for now)
- Other non-US markets

Case Study

- UK-US business
  - Nasdaq listing
  - Significant financial sponsor ownership
- Listing on AIM
  - Currency for UK acquisitions
  - Possible de-listing in US
- Anticipated savings
  - $4 million annually
  - 7 cents/share

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