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April 24, 2008

By Electronic Mail

File No. S7-04-08 - Exemption From Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers (the "**Proposal**")

Ladies and Gentlemen:

We are submitting this letter in response to the request of the US Securities and Exchange Commission (the "**Commission**" or "**SEC**") for comments in respect of the Commission's proposal to amend Rule 12g3-2(b), which provides an exemption from the registration requirements of the Securities Exchange Act of 1934 (the "**Exchange Act**") for foreign private issuers. We represent foreign private issuers who report under the Exchange Act, as well as those that claim the exemption from registration provided by Rule 12g3-2(b) under the Exchange Act ("**Rule 12g3-2(b)**"). We also represent global financial institutions that advise a wide range of foreign private issuers on the structuring of their capital raising transactions. We regularly advise these clients on the application of the US federal securities laws, including with respect to their assessments regarding the costs and benefits associated with entering, or with advising their clients to enter, the US securities registration and reporting regime.

We believe the Proposal contains a number of salutary features that we applaud. In particular, we agree that Rule 12g3-2(b) should be self-executing. The absence of a requirement to compile and submit a paper filing will no doubt present significant advantages for foreign private issuers. We also support the condition that non-US disclosures furnished by foreign private issuers be made available in electronic form.

However, we are writing primarily to express our concern that the inclusion of a new trading volume disqualification in the Proposal marks a fundamental departure both from the Commission's historical attitude toward foreign private issuers and from the more recent accommodations the Commission has made to the foreign private issuer community in the form of deregistration reform and elimination of the US GAAP reconciliation requirement under certain circumstances. We believe this departure is not justified by any developments, policy or other reasons. Since the adoption of Rule 12g3-2(b) in 1967, foreign private issuers who do not list securities on a US exchange or make a public offering of securities in the United States have been exempt from Exchange Act registration requirements, notwithstanding the level of US ownership (and as long as that ownership does not contribute to the loss of foreign private issuer status) if they provide certain voluntary disclosure. Under the Proposal, issuers can be forced to incur the costs, burdens and liabilities associated with Exchange Act registration as a result of the activities of other market participants, irrespective of their own conduct.

The Trading Volume Disqualification

For issuers that have not terminated their registration or reporting obligations pursuant to Rule 12h-6 under the Exchange Act, the Proposal conditions initial eligibility for the exemption on US average daily trading volume ("**ADTV**") in the subject securities being below 20% of worldwide trading volume during the issuer's most recently completed fiscal year. For all issuers, continuing eligibility for the exemption requires US ADTV to remain below 20% of worldwide trading volume in each fiscal year. We do not support conditioning eligibility for the exemption from registration provided by Rule 12g3-2(b), either initially or as a continuing criterion, on satisfying the 20% trading volume test.

We believe that it is unnecessary, unfair, impracticable and prejudicial to the interests of US investors as well as foreign private issuers to impose the costs, burdens and liabilities of registration on a foreign private issuer who has not sought a US securities exchange listing or publicly offered securities in the United States.

The philosophy behind Rule 12g3-2 is that the burden of requiring foreign private issuers who have not publicly offered their shares in the United States or listed on a US exchange to comply with the full Exchange Act registration regime is not justified where these issuers provide certain voluntary disclosures. Indeed, the adoption of Rule 12g3-2 followed expressions of concern, including by the Canadian and British governments, that subjecting a foreign private issuer to Exchange Act registration, without such issuer having sought a public market for its securities in the United States through a public offering or stock exchange listing, might violate international law. The burden was especially objectionable in light of — in the Commission's words — the continuing improvement in the quality of the information then being made public by foreign issuers.[1] If this approach had any validity in 1967, it has far more today, when the quality of non-US disclosure has by all accounts vastly improved[2] and the availability of that disclosure has been revolutionized through the Internet. We see no reason why that original principle should now be abandoned.

Foreign private issuers have limited control over the level of US trading in their equity securities. An issuer's US trading volume may rise above 20%, notwithstanding the absence of any US-related actions by an issuer. This danger is especially acute for an issuer whose securities are thinly traded in its home market. Trading volume in the equity securities of a foreign private issuer may also rise as a result of unsponsored ADR programs, created without the participation of the issuer. Thus, if the Proposal were adopted as proposed, the activities of other market participants who are unrelated to the foreign private

[1] See Exchange Act Release 8066, Adoption of Rules Relating to Foreign Securities (1967).

[2] See, e.g., Interim Report of the Committee on Capital Markets Regulation (November 20, 2006), at 4 (noting "increase in the integrity of and trust in major foreign public markets resulting from more transparency and better disclosure").

issuer, including institutional investors, hedge funds and broker-dealers, could result in a registration requirement for the foreign private issuer. Considering the time and expense an issuer must devote to becoming and remaining a registrant, we feel strongly that this is not fair to the foreign private issuer.

Further, we believe that US ADTV may not be well-suited for use as a standard pursuant to which registration can be imposed on foreign private issuers. The US ADTV standard contemplated by the Proposal includes off-exchange trading volume and trading volume in unlisted securities. The Commission is well aware of the difficulties in determining off-exchange trading volume.[3] To the extent that information with respect to off-exchange trades outside the United States is not reflected in the calculation of trading volume, US trading volume as a proportion of worldwide trading volume will be over-represented. In addition to myriad imperfections in reporting and identifying trades, as trading of all types becomes increasingly global, the challenge of determining where an off-exchange trade takes place is certain to intensify. While we recognize that ADTV has been used successfully in the deregistration context, the role of the ADTV calculation under the Proposal fundamentally differs from the role it plays in Rule 12h-6. In the deregistration context, failure to satisfy the trading volume condition results merely in a continuation of the status quo, with the issuer being unable to extinguish its obligations. Under the Proposal, by contrast, failure to satisfy the trading volume condition imposes a substantial new burden. We feel it is not appropriate to apply this metric, which as noted risks overstating the level of US interest in an issuer's securities, given the potentially significant implications of the calculation.

We would expect the trading volume criterion of the Proposal, if adopted as proposed, to lead to a reduction in US investors' access to investment in non-US companies. Because of their limited ability to control the US trading volume of their securities, foreign private issuers that are not SEC registrants would likely seek to control, to a substantially greater extent than they do now, both (1) the number of their US shareholders, by limiting or prohibiting transfer of their securities to US residents and (2) the US ADTV, by limiting or prohibiting transactions in the subject security that would count toward the US ADTV. Such restrictions may already be found in certificates of incorporation of issuers who seek to avoid registration or terminate their ADR programs.[4] Implementation of these restrictions is surely to the detriment of US investors, who will be denied access to opportunities to invest in foreign private issuers.[5]

We note further that the consequences of an anomalous spike in US trading volume or decline in non-US trading volume will have far-reaching consequences: Once registered, an issuer would not be able to exit the SEC-reporting regime until it had been subject to reporting obligations under the Exchange Act for at least 12 months, had filed one annual report on Form 20-F and had either reduced the number of its US shareholders below 300 or reduced its US trading volume, not to below 20%, but to below 5% of its worldwide trading volume. The asymmetry between the exit and entrance rules exacerbates the unfairness of the Proposal and the likelihood that it will act as a powerful force to incentivize foreign private issuers to keep their securities out of US investors' hands.

Imposing US requirements on issuers who have not sought a US exchange listing or publicly offered securities in the United States seems, to us, to be inconsistent with the Commission's recent efforts to accommodate foreign private issuers within the US capital markets. That rulemaking has recognized that duplicative or contrary regulations can compromise investor protection and place an unnecessary burden

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[3] Exchange Act Release No. 34-55540, Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (2007) (**"Deregistration Adopting Release"**), at 22 et seq. (acknowledging that trading volume information about over-the-counter trades is more readily available in the United States than in many foreign jurisdictions).

[4] Further, in our experience it is issuers with strong compliance and reporting cultures that are more likely to be aware of the risk of registration in the United States and thus most likely to take steps to limit access of US investors to their securities.

[5] Cf. Deregistration Adopting Release, at 39 (Rule 12h-6 dormancy condition limited to registered offerings, so as to avoid driving private placement financings offshore, "to the detriment of US investors and US broker-dealers").

on issuers, investors and other market participants and that to the extent that such action does not compromise investor protection, those regulations should be eliminated or clarified.[6] In addition, two recent rule changes (the revisions to the deregistration rules for foreign private issuers and the elimination of the US GAAP reconciliation requirement for foreign private issuers who prepare their accounts in accordance with International Financial Reporting Standards ("**IFRS**") as published by the International Accounting Standards Board (the "**IASB**") took great pains to ensure that the changes made did not place issuers in a "worse" or more onerous position than they were in before the new rules were adopted. We are unaware of, and the Proposing Release for the Proposal (the "**Proposing Release**") does not point out, any problem to which the trading volume disqualification is a remedy, yet it imposes significant and in some cases massive new burdens on foreign private issuers.

Adopting the Proposal with the trading volume criterion could be seen to undercut much of the goodwill created in the foreign private issuer community as a result of the changes to the deregistration rules and the elimination of the US GAAP reconciliation requirement for issuers who report in IFRS as adopted by the IASB. Further, we believe the United States would be alone in subjecting issuers organized in other jurisdictions to the full scope and burden of its regulatory regime by virtue of the trading activities of other actors over which they have no control.

We fundamentally disagree with the imposition of a trading volume disqualification, as articulated above. However, we believe that if an exemption "ceiling" based on US trading volume were to be adopted, it should be set at greater than 50%, rather than 20%, of an issuer's worldwide trading volume. Raising the threshold to 50% would decrease the risk that an active trading period in a thinly-traded company would trigger a registration requirement. Further, we believe that a 50% trading volume represents a clearer demarcation and justification for US regulatory interest as the majority of the trading volume would be in the United States.

The Requirement to Count Shareholders

The Proposing Release states that a foreign private issuer will be able to claim the Rule 12g3-2(b) exemption, as amended by the Proposal, "without regard to the number of its US shareholders."[7] The importance of counting US shareholders, however, would be no different than it is at present if the Proposal were adopted as proposed. Once a foreign private issuer claims the 12g3-2(b) exemption, that issuer does not have to continue to count the number of US persons who hold its shares. However, foreign private issuers currently must, and would continue to be required to, have regard to the number of their US shareholders in order to determine if they need to comply with Rule 12g3-2(b) in the first place. Thus, as under the current Rule 12g3-2(b), a foreign private issuer who has fewer than 300 US shareholders, and accordingly is exempt from the registration requirements of the Exchange Act pursuant to Rule 12g3-2(a), needs to monitor its US shareholder numbers in order to determine whether it must rely on Rule 12g3-2(b). For these reasons, we believe it is incorrect to state that "the proposed regime does not depend on an issuer's determination of the number of its worldwide or US shareholders".[8] Rather, the need to count US shareholders to determine whether reliance is necessary remains as pressing as under the current rule.

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In addition to our more general concern with the Proposal, we would like to raise a number of specific points.

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[6] See Former Chairman Donaldson's January 2005 speech in London: US Capital Markets in the Post-Sarbanes-Oxley World: Why Our Markets Should Matter to Foreign Issuers, available at http://www.sec.gov/news/speech/spch012505whd.htm.

[7] Proposing Release at 17.

[8] Proposing Release at 18.

Transition Proposals

Under the Proposal, an issuer who exceeds the 20% US ADTV standard at the time the rules are adopted will have three years from the effective date of the proposed rule amendments to file a Section 12 registration statement. While we believe a generous transition period is warranted given the difficulties posed by registration, we believe that in the event the trading volume disqualification is adopted further clarification of the mechanics of this transition period would be helpful. Importantly, how does the Proposal treat an issuer who exceeds the 20% trading volume standard, and thus becomes required to register, in Year 1 but then drops below 20% in Year 2? In these circumstances, it would seem unfair to continue to impose the registration requirement.

Further, the Proposal does not appear to provide a transition period for issuers who exceed the 20% trading volume standard subsequent to the adoption of the proposed rule amendments. These foreign private issuers face the same difficulties and burdens of becoming SEC registrants as those that become subject to the registration requirement at the time of the adoption of the rule amendments. If the SEC's proposal to accelerate the filing deadline for Annual Reports on Form 20-F after the end of an issuer's fiscal year is adopted as proposed, a foreign private issuer with a December 31 fiscal year end that exceeds the 20% trading volume standard at the end of the fiscal year could be forced to file a registration statement in April. It is hard to imagine how a company could prepare a management report on internal control over financial reporting, implement adequate disclosure controls and procedures, draft registration statement disclosure and (potentially) prepare US GAAP financials or a reconciliation statement in 120 days. For these reasons, an ongoing transition period of at least three years, with the possibility that the obligation would not be triggered if the US trading volume in the tolling period declines below the threshold – or a lower threshold – should be implemented.

Compliance Date

Currently, a foreign private issuer may claim the Rule 12g-3(b) exemption if it exceeded the Section 12(g) shareholder thresholds on the last day of its most recently completed fiscal year only if the statutory 120-day period for filing a Section 12(g) registration statement has not lapsed. The Proposal would eliminate this 120-day submission requirement on the basis that the requirement is no longer necessary to protect investors. We agree with the proposal to eliminate the 120-day submission requirement and believe such elimination will encourage compliance with Rule 12g3-2(b) as it means that there will be no time limit for compliance with the rule.

12g3-2(b) List

In certain capital markets transactions, market participants rely on the fact that a foreign private issuer has claimed the Rule 12g3-2(b) exemption from registration. In Rule 144A resale transactions, shareholders of foreign private issuers rely on the fact that the issuer has claimed the Rule 12g3-2(b) exemption and makes information available pursuant to that rule as satisfying the information furnishing requirement of Rule 144A(d)(4). Similarly, depositaries rely on the fact that an issuer claims the Rule 12g3-2(b) exemption to establish unsponsored depositary receipt programs. In both of these circumstances, market participants can objectively and independently determine that an issuer has claimed the Rule 12g3-2(b) exemption by reviewing the SEC's List of Foreign Issuers that have Submitted Information under the Exemption Relating to Foreign Securities.

Under the automatic exemption contemplated by the Proposal, market participants would no longer be able to independently and authoritatively determine which foreign private issuers were claiming the Rule 12g3-2(b) exemption. Rather, they would have to make their own assessment based on their reading of the rules and their assessment of the issuer's conduct.

We believe that this loss of clarity would have a detrimental effect on these transactions. Therefore, we respectfully suggest that the SEC continue to maintain a list of issuers who claim the exemption from registration provided by Rule 12g3-2(b). Entries for this list could be determined by a simple "Notice of Claiming Exemption" form, which could be filed, perhaps electronically, with the Commission. This would make available the benefits of the automatic exemption process, while preserving the certainty provided to market participants by having a readily available list of issuers who claim the exemption provided by Rule 12g3-2(b).

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We would be pleased to respond to any enquiries regarding this letter or our views on the Proposal generally. Please contact Edward Fleischman (edward.fleischman@linklaters.com), Jeff Cohen (jeff.cohen@linklaters.com), Thomas N. O'Neill, Jr. (thomas.oneill@linklaters.com), Jennifer Schneck (jennifer.schneck@linklaters.com) or Lawrence Vranka, Jr. (larry.vranka@linklaters.com), or any of the above by telephone at (212) 903 9000, if you would like to discuss any of these matters. We thank the Commission in advance for considering our and others' comments on the Proposal.

Yours sincerely,

/s/ Linklaters LLP

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