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File No. S7-12-05
SEC Release No. 34-53020

Ladies and Gentlemen:

We write with respect to the proposal by the Securities and Exchange Commission (the "Commission") set forth in Release No. 34-53020 (the "Proposing Release") that would amend the rules allowing a foreign private issuer to terminate the registration of, and to cease its reporting obligations regarding a class of, equity or debt securities under Sections 12(g) and 15(d), respectively, of the Securities Exchange Act of 1934 (the "Exchange Act"). While we agree with the broad approach adopted by the Commission in the Proposing Release, we would like to address several specific issues that we believe should be considered further.

One Year Dormancy Condition (Rule 12h-6(a)(2))

We recommend that the One Year Dormancy Condition set out in the Proposing Release (Rule 12h-6(a)(2)) be modified in the following respects:

- Unregistered Primary Offerings and Placements. We believe that Rule 12h-6(a)(2)(ii) should be modified to exclude unregistered offerings and placements made in the United States pursuant to Section 4(2) or Rule 144A of the Securities Act of 1933 (the "Securities Act") from the One Year Dormancy Condition. Investors who purchase securities through unregistered offerings and placements in the United States understand that such purchases do not give them any rights to receive, and the issuer is not required to produce, Exchange Act reports in respect of such securities, unless there is a contractual undertaking to that effect. Because there is no risk that an issuer who makes such an unregistered offering has "garnered investors who are entitled to the protections of the Exchange Act" (one of the Commission's

reasons for the dormancy condition), except by virtue of any such contractual undertaking, there is no need to condition deregistration for such an issuer on the passage of time.

If the Commission decides to retain unregistered offerings and placements within the One Year Dormancy Condition, we propose that, at a minimum, unregistered offerings and placements of debt securities (under Section 4(2), Rule 144A or otherwise) only be considered if the relevant issuer is seeking to deregister a class of debt securities. Since a foreign private issuer would never be subject to Section 12(g) registration solely on the basis of the issuance and sale of debt securities, and would never be subject to Section 15(d) by virtue of unregistered offerings and placements, we do not see why it should be precluded from deregistration by such issuances and sales (unless such issuer has registered a class of debt securities under Section 12(b) of the Exchange Act).

- Secondary Offerings. We recommend that Rule 12h-6(a)(2)(i) be modified so that *all* secondary offerings are excluded from the One Year Dormancy Condition. The Commission's current proposal would exclude non-underwritten offerings by selling security holders that are registered under the Securities Act. We believe that this should be expanded to include underwritten transactions as well.

  The Commission has stated in respect of the One Year Dormancy Condition:

  > "The purpose of this condition is to help ensure that Rule 12h-6 would only be available to a foreign issuer when the U.S. securities markets have relatively little interest and the issuer is not trying to create or take advantage of that interest. A foreign company that has actively engaged in U.S. capital raising efforts and sold securities to U.S. investors relatively recently should not be permitted to exit the Exchange Act reporting regime under Rule 12h-6 on the grounds that the U.S. securities markets no longer represent a viable option for capital raising."[1]

  In our view, all secondary offerings fall outside this stated purpose and therefore should be excluded from the One Year Dormancy Condition. We do not see any reason to limit the exclusion to a subset of secondary offerings. This is consistent with the Commission's exclusion from the One Year Dormancy Condition of employee share schemes and certain offerings under Section 3 of the Securities Act, as such secondary offerings are similarly not for the purpose of capital raising and are not undertaken primarily for the benefit of the issuer. (We also note that the proposed rule would not limit non-registered secondary sales, whether or not underwritten.) In addition, we note that issuers would still be required in any case to comply with the "Public Float and Trading Volume Benchmarks" set forth in the Proposing Release,

[1] Pages 25 and 26 of the Proposing Release.

which will gauge U.S. investor interest in an issuer's securities (including securities sold via secondary offerings).

Ownership and Trading Benchmarks (Rules 12h-6(a)(4) and (5))

In the Proposing Release, the Commission states its belief that approximately 26% of its selected database of 510 foreign private issuers would be eligible to deregister under the worldwide float benchmarks set forth in Rules 12h-6(a)(4) and (5). We assume that for this purpose the Commission has relied on the disclosures contained in Annual Reports on Form 20-F in response to Item 7.A.2. Based on our experience representing foreign private issuers, we do not believe that this information is today compiled (or required to be compiled) on the basis of the proposed counting method contained in proposed Rule 12h-6(e). We also believe that the application of the counting method contained in Rule 12h-6(e) would likely result in a significantly higher number of U.S. holders, primarily because it will include a number of U.S. institutions that hold underlying securities purchased in the home market, rather than American depositary receipts ("ADRs") purchased in the United States. Today, ordinary shares purchased in non-U.S. markets are generally only reported pursuant to Item 7.A.2 in cases where either there is an ownership report filed under Regulation 13D/G or the shares are otherwise taken into account by the registrant based on reports prepared by third party information service providers.

With this as background, we suggest the Commission implement one or more of the following modifications to the benchmark rules:

- Exclusion of Certain Securities. We note that others have suggested that the level of U.S. market interest should be determined without reference to the holdings of large institutional investors, measured either by reference to their eligibility as Qualified Institutional Buyers (as defined in Securities Act Rule 144A) ("QIBs") or with reference to their aggregate holdings. We support that change. As an alternative formulation, we recommend that securities held by QIBs or other U.S. investors who acquired such securities outside of the United States, be excluded in calculating the percentage of an issuer's outstanding securities held by U.S. investors under Rule 12h-6(a)(4) and Rule 12h-6(a)(5). Such investors, having purchased their securities outside the United States, should not be expecting the protection of U.S. securities laws and instead should be relying on the protections afforded to them in the jurisdiction in which they are trading. In cases where the foreign private issuer's shares trade in the United States through ADRs or shares of New York registry, shares acquired in offshore markets could be presumed to consist of (i) shares held in the form of the underlying ordinary shares less (ii) the amount of shares withdrawn from the ADR facility over some recent period (which takes into account the possibility that some shareholders may

have purchased ADRs in the United States and converted them to the underlying shares)[2]; or

- Worldwide Public Float. We recommend that shares held by affiliates be included in the calculation of an issuer's worldwide public float under Rules 12h-6(a)(4)(i)(B) and (4)(ii) or that the exclusion be applied only to the largest affiliates, such as those holding more than 20% of the outstanding class. Given that the purpose of this test is to determine the relative proportion of U.S. holders, rather than overall market interest, we do not think it is logically appropriate to exclude affiliates; or

- Increase Benchmark Percentages and Extend Trading Volume Test. We would recommend increasing the relevant percentages in Rule 12h-6(a)(4)(i)(B) and (4)(ii) to 25% for both WKSIs and non-WKSIs. We believe that this higher threshold is necessary to account for the direct holdings by institutions in the underlying shares that have been acquired outside the United States (unless the first proposal above is adopted). If this higher float test benchmark is adopted, we would recommend that the Commission extend the trading volume test so that it applies both to WKSIs and non-WKSIs, as a required second prong for each type of issuer.

Definition of "Primary Trading Market" and Average Daily Trading Test

- Primary Trading Market. As proposed, the definition of "primary trading market" in Rule 12h-6(d)(6) would require "at least 55% of the trading in the foreign private issuer's securities to take place in, on or through the facilities of a securities market in a single foreign country" and Rule 12h-6(a)(3) would require that the foreign private issuer maintain a listing in its home country, which is also its "primary trading market". We believe that these requirements are needlessly restrictive, as they do not account for issuers that have securities that trade in multiple non-U.S. markets or that have different classes of registered securities for which there are different "primary" markets, one or both of which may be outside their "home" country (the Form 20-F definition of "home country", which potentially refers to two jurisdictions, does not solve this problem). We believe that it should be sufficient for the foreign private issuer to maintain one or more listings outside the United States, for the largest market to be outside the United States and for at least 55% of the trading to take place on those non-U.S. exchanges. Moreover, if the average daily trading volume test is satisfied, this requirement would be redundant (and almost certainly satisfied).

[2] The number of shares held in the form of ordinary shares could be based on reports prepared by a third party information service providers in accordance with the Counting Method set forth in the Proposing Release.

- Worldwide Public Trading. As proposed, the average daily trading volume test in Rule 12h-6(a)(4) limits the "denominator" to a single "primary trading market". As noted above, we believe that definition is too restrictive. We also believe that the average daily trading volume test should aggregate all trading on non-U.S. markets. Any other approach artificially increases the calculation of U.S. market interest by ignoring valid non-U.S. trading.

Availability of Rule 701 Following Deregistration

- Initial Registered Offers. We recommend that the Commission make clear, either in the final adopting release or in an amendment to Rule 701, that the exemption provided by the rule will be available to foreign private issuers that deregister under Rule 12h-6, regardless of whether the issuer had initially offered the securities covered by the relevant plan under a Form S-8 (or other) registration statement.

- U.S. GAAP Reconciliation. We recommend that Rule 701(e)(4) be modified to allow foreign private issuers that are eligible for the exemption provided under Rule 12g3-2(b) to satisfy their financial disclosure obligations through compliance with that rule, rather than the provision of financial statements reconciled to U.S. GAAP (if the amount sold exceeds $5 million in a given year). Without this change, one of the significant potential benefits of deregistration will be unavailable to many foreign private issuers.

- U.S.$5 Million Threshold. We recommend that the $5 million annual threshold in Rule 701(e) be increased to a level that reflects the continued growth in equity ownership by employees through employer-sponsored plans that has occurred since the current annual threshold was set.

Counting Method (Rule 12h-6(e), Rule 800(h) and Instructions to Rule 14d-1)

- Third Party Service Providers. We note that proposed Rule 12h-6(e)(4) would permit, but not require, foreign private issuers to rely in good faith on the assistance of an independent information services provider in collecting information concerning U.S. ownership. If this "safe harbor" is to be retained in the final rule, we believe that it is important that the Commission make clear that parties are not required to take account of this information if it is not found by them to be reliable. It should not be read as imposing a requirement beyond the provisions of Rule 12h-6(e)(3), which already requires parties to take account of "information that is otherwise provided to you".

- Modifications to Rule 800(h) and Instructions to Rule 14d-1(c) and (d). We support the Commission's proposal to harmonize the counting method by which a foreign private issuer will determine whether U.S. residents meet or exceed the applicable thresholds set forth in proposed Rule 12h-6 with the existing provisions of Securities Act Rule 800(h) and the instructions to Exchange Act Rules 14d-1(c) and (d) applicable to cross-border rights

offerings, tender and exchange offers and other business combinations. We also believe, however, that the Commission should take this rulemaking as an opportunity to revisit the requirements of Rule 800(h) and the instructions to Rules 14d-1(c) and (d) in two respects.

- 30-Day Look-Back Requirement. First, we believe that the requirement to calculate the percentage of outstanding securities held by U.S. holders as of the date 30 days before the commencement of a transaction has proved unworkable in many cases because the date of commencement, and hence the 30th prior date, is not known (or knowable) until shortly before commencement actually occurs, either because of transaction uncertainties or regulatory uncertainties or both. Because basic transaction structures must be settled upon before commencement, many transactions will simply exclude U.S. holders, rather than deal with the uncertainty of the availability of a U.S. exemption.

  We believe that the point of the 30-day "look-back" provision is to test U.S. ownership at a time when the market is not affected by the knowledge of the existence of the offer or other transaction. We believe that this objective can be met, while still allowing for certainty of application, by permitting the relevant party to select *any date* up to 30 days prior to the *first public announcement* of the transaction.

- Requirement for Broker Searches. Second, we believe that the requirement of 12g3-2(a) as modified by clause (3) of Rule 800(h) and instruction 2(iii) to Rule 14d-1(c) and (d) to conduct a broker inquiry imposes an unrealistic burden on parties to a transaction. In our experience, the likelihood of leaks of the possible existence of the transaction will often cause parties to choose to exclude U.S. holders, rather than comply with this requirement. Accordingly, we would propose that this requirement be eliminated. We note that the rules would still require parties to take into account all publicly filed ownership reports or other information provided to a party making a determination (See Rule 800(h)(5) and Instruction 2(v) to Rule 14d-1(c) and (d)).

We believe that these changes will make it practical for more parties to include U.S. holders in their transactions, without sacrificing investor protection.

Treatment of Successor Registrants Under Rule 12g3-2

As proposed, the exemption from Section 12(g) registration provided by Rule 12g3-2(b) would be available to eligible foreign private issuers that have filed a Securities Act registration statement (Rule 12g3-2(d)(1)), but not those that have become subject to Section 12(g) by virtue of the issuance of securities in a merger, consolidation, exchange of securities or acquisition of assets. This anomaly is noted but not discussed in the Proposing Release (see Note 38). We propose the following change:

- Exception to Rule 12g3-2(d)(2). We propose that Rule 12g3-2(d)(2) be amended in the same fashion as Rule 12g3-2(d)(1) is proposed to be amended. We do not see any logical reason for treating the issuance of shares in a capital raising transaction (registered under the Securities Act) fundamentally differently from the issuance of shares in a business combination for purposes of the deregistration rules. At a minimum, we believe this proposal should apply where the target is a foreign private issuer (although we do not believe there is a strong legal basis to draw a distinction between domestic and foreign private issuers in this context).

* * *

We would be happy to discuss any of the above issues further with the Commission. Please feel free to direct any inquiries to Philip J. Boeckman or William P. Rogers, Jr. in London or Mark I. Greene, Richard Hall, Timothy G. Massad, Paul Michalski or Peter S. Wilson in New York.

Sincerely,

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