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March 31, 2006

Via email: rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: File No. S7-12-05 (Release No. 34-53020) (December 23, 2005)
Proposed Rule Regarding Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 15(d) of Securities Exchange Act of 1934 ("1934 Act")

Dear Ms. Morris:

The Commission proposes in the above release (the "Release") to relax the conditions under which foreign private issuers may terminate the registration of their securities under Section 12(g) of the 1934 Act as well as their duty to file reports under Section 15(d) of the 1934 Act.[1]

As already noted in a number of comment letters, the proposed relief will likely fall far short of the Commission's estimate that it will benefit 26% of SEC-reporting foreign private issuers. Many of these comment letters suggest that the Commission should expand the proposed relief, e.g., by means of an exclusion of QIBs' holdings from the relevant float calculations. Such an expansion is urgently needed if the Commission's efforts in this area are to be regarded as credible.

[1] This letter represents the personal views of the undersigned and not necessarily those of Sidley Austin LLP or any of its partners or clients.

The purpose of this letter is to propose a simpler and more direct test for permitting a sub-group of foreign private issuers to deregister. This sub-group would consist of those foreign private issuers (**"Large Listed-Only FPIs"**) that:

- have their common stock listed on a U.S. exchange but have not publicly offered common stock registered under the 1933 Act (other than to employees),

- have maintained a worldwide market float of at least $1 billion since their listing; and

- have maintained a listing of their common stock on a designated offshore securities market since at least 12 months prior to listing in the United States.

I. Unsubstantiated Premises in the Release

At least for the Large Listed-Only FPIs identified above, I do not believe that the Release realistically describes the relevance of these issuers' 1934 Act reports to investors' decisions. For example:

- the Release suggests that, following a foreign private issuer's listing in the United States, investors in U.S. markets make investment decisions based on the information provided in the foreign private issuer's 1934 Act annual reports and the interim home country materials that it furnishes, "in English," under cover of Form 6-K (Release at 77693),

- the Release suggests that, following a foreign private issuer's listing in the United States, investors rely on the issuer's 1934 Act reports "to discern trends about and to otherwise evaluate their investment in the issuer" (Release at 77693),

- after noting correctly that many U.S. investors are likely to buy foreign private issuers' securities in foreign markets, the Release states that "[t]hese U.S. investors may look to the information contained in a foreign private issuer's Exchange Act reports when investing in the foreign private issuer's home market" (Release at 77696),

- the Release justifies the requirement that foreign private issuers give notice of an intended deregistration as a means of alerting U.S. market participants that, "in the future, they will have to look to the issuer's home country documents, and not Exchange Act reports, for information regarding the issuer" (Release at 77701).

By the time a large foreign issuer seeks a U.S. listing, it usually already has a substantial U.S. shareholder base. Particularly in the case of those large foreign issuers whose securities are listed on foreign exchanges and/or included in widely-followed indexes, their U.S. shareholders are likely to be institutions that have purchased the foreign issuer's shares in the primary market

in reliance on their own research or that of sell side analysts employed by the major securities firms. This research is necessarily based on the home country disclosure provided by the foreign issuer in its primary market.[2]

For the sub-group of Large Listed-Only FPIs identified above, however, 1934 Act reports play a distinctly subordinate role relative to the information available in the home country. Before these companies listed on a U.S. exchange, they had already made information available to the public for many years in their home countries. Analysts based in the home country and in third countries such as the United Kingdom and even the United States relied on the home country information in order to make recommendations to investors on a worldwide basis. Indeed, a significant percentage of the common stock of many of these issuers was already owned at the time of their initial listing by U.S. institutional investors. It is unreasonable to think that analysts and investors would suddenly shift their reliance from the home country information to these issuers' 1934 Act reports for the purpose of making recommendations and investment decisions,[3] particularly where the vast majority of trading continues to take place in the primary market. To do so would mean relying on information on which the vast majority of traders in the primary trading market were *not* relying, an investment strategy not likely to succeed. It would also mean waiting for the Form 20-F or reports under cover of Form 6-K to be filed with the SEC when the information in these reports is already available at an earlier date in the home country (often on the issuer's website) in that country's native language.

The Release also places an undue emphasis on "sales" by foreign private issuers in the U.S. securities markets. For example, the Release refers to an increased use of ADRs "by foreign companies to sell their securities in the United States." Release at 77689. As the Commission well knows, a listing of ADRs in the absence of a registration statement on Form F-1 or Form F-3 does not result in a dollar's worth of proceeds to the foreign private issuer. Also, the Release refers to issuers that "may have engaged in very little recent selling activity in the United States." Again, most foreign private issuers engage in *no* selling activity while they are listed, since the principal benefits of a listing are prestige, an expanded ability to offer securities to U.S. employees and the possibility that a U.S. acquisition will come along that can be made

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[2] There are undoubtedly some foreign private issuers whose 1934 Act reports are relied upon by U.S. investors. These might include issuers that conducted their IPO on a global basis, where the disclosure required by the U.S. securities laws influenced the disclosure in the global offering as well as the pricing of the securities. They might also include IPO issuers located in emerging markets, where disclosure practices and analyst coverage are perceived as less than optimum. Because these issuers will have registered securities under the 1933 Act, they are not included in the proposed definition of Large Listed-Only FPI.

[3] A foreign private issuer's 1934 Act reports are converging in any event with its home country disclosure because of the SEC's having amended Form 20-F to conform to international standards, the more frequent use of IFRS by foreign private issuers and because all 1934 Act reports other than those under cover of Form 6-K are triggered by prior reports or reporting requirements in the home country.

for listed shares. The distinction is an important one, because references to "sales" by foreign private issuers in the United States suggest that foreign private issuers derive financial benefits from a U.S. listing that in fact do not exist.

Finally, it goes without saying that the degree of "interest in the [foreign private] issuer's securities among United States investors" is relevant to the Commission's objectives only to the extent that such investors in fact rely on these issuers' 1934 Act reports. The Commission should focus less on the degree of "interest" by U.S. investors in securities of a given foreign private issuer than on whether investors need whatever protection is offered by 1934 Act reports, lest it disable itself from considering alternatives that would be consistent with the protection of U.S. investors even where they have a high degree of such interest.

II. Proposed Alternative Test

Assuming that the key question is the protection of U.S. investors, then the conditions under which a foreign private issuer may deregister should be driven by the degree to which deregistration will adversely affect U.S. investors. If 1934 Act reports do not drive the issuer's stock price, they should be irrelevant. Conversely, if analysts provide coverage and investors make decisions based on an issuer's home country reports, then deregistration should be permitted under less onerous conditions than those proposed in the Release.

One possible approach would be to permit deregistration based on objective criteria such as the number of analysts who cover a foreign private issuer in the United States and in the primary market (or a third country such as the United Kingdom), relative trading volume in the United States and in other markets and statistical data showing how market prices respond to the foreign private issuer's dissemination of information in 1934 Act reports as compared to its home country reports. Such an exercise should not be necessary. In related contexts, the Commission been willing to assume for many years that informational efficiency is assured by a large public float and a history of trading on established markets. For example, Rule 139(a) permits research on *non-reporting* foreign private issuers engaged in an offering registered under the 1933 Act where the companies have a public float of as little as $75 million, and where their securities have traded for a year on offshore securities markets, on the theory that these issuers "would appear likely to have a market following of the type that justifies safe harbor protection ... [b]ecause of the steady stream of corporate information available in the marketplace with respect to such companies." SEC Release No. 33-7029 (November 3, 1993).

More recently, the Commission has concluded that "the largest issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis. Unlike smaller or less mature issuers, large seasoned public issuers tend to have a more regular dialogue with investors and market participants through the press and other media. The communications of these well-known seasoned issuers are subject to scrutiny by investors, the financial press,

analysts, and others who evaluate disclosure when it is made." SEC Release No. 33-8591 (July 19, 2005) (text following note 40).

Given the Commission's past statements, the fundamental question not addressed in the Release is why a Large Listed-Only FPI's decision to list in the United States should have immediate and, for all practical purposes, permanent consequences in terms of the issuer's obligation to file 1934 Act reports when there is no evidence that the act of listing leads U.S. investors to transfer their reliance from the issuer's home country disclosures to the issuer's 1934 Act reports.

I believe the Commission should be willing to assume that U.S. investors in the common stock of Large Listed-Only FPIs are primarily relying on home country disclosures. It would then follow that such issuers should be able to deregister without regard to U.S. investors' contribution to the issuers' float or trading volume.

The Commission might consider the addition of a requirement that a Large Listed-Only FPI be required to undertake to file 1934 Act reports for a transition period – perhaps one year – as a condition to deregistration. Conversely, if the Commission adheres to its proposal that a deregistering issuer maintain an English-language website as a condition to deregistration – despite the fact that all of the 30 German DAX issuers, whether or not listed in the United States, already maintain such a website – then this should also be for a transition period of no more than two years.

III. Competing in a Global Marketplace

The Commission has previously expressed its views on the anti-competitive effects of a rule that limited issuers' choices on where their securities were traded. Prior to 1997, the NYSE's Rule 500 created "nearly insurmountable obstacles" to voluntary delisting, and the Commission and its staff "repeatedly" expressed to the NYSE their concerns regarding the rule's "potentially anti-competitive effects." SEC Release No. 34-41634 (July 21, 1999). Securities markets other than the NYSE also objected to the rule as unfair and as tending to stifle innovation.

There are differences between Rule 500 and the current SEC deregistration scheme, but barriers to leaving a market inevitably create the perception of unfairness, anti-competitive conduct and an unwillingness to let the marketplace decide on the merits.

IV. Conclusion

The Commission is to be commended for initiating a debate on the conditions under which foreign private issuers should be able to deregister under Section 12(g) and terminate their

reporting obligations under Section 15(d). Additional flexibility is necessary in order to continue to attract large world-class issuers to the U.S. securities markets, and it is clear from the experience of recent years that foreign private issuers who would otherwise be interested in becoming SEC-reporting companies are reluctant to do so if the conditions for exiting the SEC reporting system are onerous or unpredictable. I urge the Commission to consider the comments that would expand the proposed relief, including the alternative proposal set forth in this letter.

Very truly yours,

Joseph McLaughlin

cc: Christopher Cox, Chairman
Paul S. Atkins, Commissioner
Roel C. Campos, Commissioner
Cynthia A. Glassman, Commissioner
Annette L. Nazareth, Commissioner
John W. White, Director, Division of Corporation Finance
Martin P. Dunn, Deputy Director, Division of Corporation Finance
Brian G. Cartwright, General Counsel
Paul M. Dudek, Chief, Office of International Corporate Finance
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