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File No. S7-12-05 - 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, Release No. 34-55005; International Series Release No. 1300

Ladies and Gentlemen:

We are submitting this letter in response to the request of the U.S. Securities and Exchange Commission (the "**Commission**" or "**SEC**") for comments in respect of the Commission's re-proposal (the "**Re-Proposal**") to amend the rules allowing a foreign private issuer to terminate the registration of a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 (the "**Exchange Act**"), and thereby to no longer file reports required as a result of registration, and to cease its reporting obligations regarding a class of equity or debt securities under Section 15(d) of the Exchange Act. We represent foreign private issuers that may be eligible to avail themselves of the final rules enacted by the Commission (the "**Final Rules**"), as well as 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 U.S. 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 registration and reporting regime under the Exchange Act.

We strongly support the Commissions' efforts over the past two years to rationalize and liberalize the current deregistration regime, without compromising the protection of U.S. investors. In particular, we strongly support the inclusion in the Re-Proposal of a pure trading volume test as a measure of U.S. market interest which, we believe, guarantees a strong measure of U.S. investor protection while providing the option of deregistration for a greater number of foreign private issuers.

However, we believe that the Re-Proposal should be revised in two respects: (a) the trading volume test should compare U.S. average daily trading volume ("**ADTV**") to worldwide, rather than primary market, trading volume in order to provide a more consistent measure of the importance of the U.S. trading market; and (b) the one-year "speed bump" which is applied to the closure of American Depositary Receipt ("**ADR**") facilities should be deleted as it unnecessarily penalizes foreign private issuers that have taken the decision to exit the U.S. registration and reporting regime. We have also made certain technical comments on the Re-Proposal which we believe the Commission should consider.

(a) **The Commission should modify the Re-Proposal to use worldwide trading volume rather than primary market trading volume in the trading volume test.**

Re-proposed Rule 12h-6 provides that the 5% trading volume test should be calculated by comparing United States trading volume to primary market trading volume. Pursuant to that rule, a foreign private issuer's primary trading market could constitute an exchange in a single foreign jurisdiction or two foreign jurisdictions. If two foreign jurisdictions, then the issuer must aggregate the trading in the two foreign jurisdictions to determine its U.S. ADTV (and its ability to meet the trading volume test) and the trading market for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the issuer's U.S. trading market.

We strongly agree with the Commission that it is critical that a foreign private issuer have a primary trading market and that the foreign listing condition (as re-proposed) is necessary for the protection of investors. This is because there should be a non-U.S. jurisdiction that principally regulates and oversees the issuance and trading of a foreign private issuer's securities and the issuer's disclosure obligations.

However, this does not mean that the 5% trading volume test should be expressed as a percentage of trading in the primary trading market. There are three reasons that we believe that the trading volume test should be expressed as a percentage of worldwide trading volume.

First, it is commendable that the Re-Proposal uses trading volume as a measure of U.S. market interest in part because trading volume data is easier to obtain than ownership by residency. Correspondingly, we believe that the measurement of trading volume should be as simple and as practical as possible to be applied in a commercial setting. By eliminating the extra step of determining what an issuer's primary trading market is, a worldwide volume test offers a simpler and easier alternative to the primary market approach.

Second, to express U.S. ADTV as a percentage of trading in the primary trading market would discriminate among foreign private issuers without a corresponding investor protection reason. For example, a company with a U.S. ADTV of 4 with a home country listing with an ADTV of 95 would be in a better position than a company also with a U.S. ADTV of 4, but with three listings outside the United States where the two largest markets together had a U.S. ADTV of 75. Thus, the Re-Proposal would treat two companies with the same U.S. ADTV and worldwide ADTV very differently. We are not convinced that protection of U.S. investors requires such a discriminatory differentiation as long as the foreign listing condition is met.

Third, we worry that under the proposal as drafted, some foreign private issuers will still find the deregistration criteria too restrictive – i.e., they will still lack confidence that, once registered, they will be able to deregister should the U.S. market interest in their securities prove too low to justify their investment in a U.S. market presence. If that were to be the case, a primary motive for enacting these reforms will have been frustrated. Although we have not reviewed data as to the additional number of foreign private issuers that would be eligible to exit the U.S. registration and reporting regime if worldwide, rather than primary market, trading were used in the trading volume test, it is logical that more foreign private issuers would be eligible under the trading volume test if worldwide trading volume were used as part of the ratio as the threshold would effectively be slightly higher (i.e., in the example above if a company had an ADTV of 95 in its home market but a U.S. ADTV of 5 it would be not eligible under re-proposed Rule 12h-6 as 5% of 95 is 4.75). In view of these comments, if the Commission declined to adopt worldwide trading volume as part of the ratio for the trading volume test, we would recommend that the threshold be increased to, for example, 10%.

Using a worldwide trading volume standard would also be consistent with the definition of "substantial U.S. market interest" ("**SUSMI**") in Regulation S ("**Regulation S**") under the Securities Act of 1933 (the "**Securities Act**") (providing that there cannot be SUSMI for equity securities if U.S. trading markets do not constitute the largest market for the issuer's equity securities and less than 20% of trading in the issuer's equity securities takes place on U.S. markets) as well as the use of ADTV under Regulation M under the Exchange Act.

(b) **The Commission should modify the Re-Proposal to dispense with the one-year ineligibility period which applies after the termination of an ADR facility.**

We do not believe that the requirement in the Re-Proposal that an issuer that terminates an ADR facility must wait 12 months before seeking deregistration under re-proposed Rule 12h-6 in reliance on the trading volume test serves a significant investor protection purpose. Requiring companies to maintain an ADR facility ensures neither that ADR holders are provided with sufficient information about the issuer nor a facility on which to efficiently trade the security; it simply determines which security is traded. This requirement only imposes another burden on foreign private issuers that is disproportionate for a foreign private issuer that wishes to exit the U.S. registration and reporting regime.

Generally, a deposit agreement will provide that an ADR facility can only be terminated after a 90-day notice period and an additional period for the exchange of underlying shares for ADRs (often 60 days). Given the frequency with which this clause appears in deposit agreements, we believe this period has been accepted by the market as giving ADR holders sufficient time to redeem their ADRs for the underlying shares. We see no reason why a regulatory mandate increasing this period to one year provides ADR holders with any further significant protection. To the extent ADR holders have to pay fees in connection with the termination of the ADR facility, the one-year ineligibility period simply delays that process by nine months. It is also noted that as either the issuer or the depositary can terminate the deposit agreement, under the Re-Proposal if a depositary terminated a deposit agreement during the one-year ineligibility period, an issuer would be under an obligation to find another depositary and incur the expense of setting up another ADR facility for a short period before it could deregister.

Further, unlike the "speed bump" that applies to delisting from a U.S. exchange, the rule as re-proposed is not conditioned on the issuer exceeding the trading volume test prior to termination of the ADR facility. If the ADR "speed bump" is not removed altogether, we would recommend that at the very least it is tied to the same condition as the delisting "speed bump" - namely that only issuers who do not satisfy the trading volume test as of the date of the termination of the ADR program are subject to the one-year waiting period. This would remove the incentive to terminate an ADR program as a means of decreasing trading volume while ensuring that issuers with ADR facilities are as able as other issuers to benefit from re-proposed Rule 12h-6.

For the same reasons, we would urge against adoption of a requirement that issuers maintain a sponsored ADR facility for a period of time following deregistration.

(c) **We would additionally request that the Commission consider the following points.**

(1) <u>Rule 12h-6</u>

We suggest that the note to Paragraph (a)(2) of re-proposed Rule 12h-6 be clarified to provide that the exceptions do not apply to securities *issued and sold in the United States pursuant to an effective registration statement* relating to a standby underwritten offering or other similar arrangement in the United States.

A common structure in European rights offerings is for securities to be offered by the issuer pro rata to its own shareholders with a standby underwriting agreement which relates only to shares offered outside of the United States pursuant to Regulation S. As currently drafted, re-proposed Rule 12h-6 could be read to disapply the exception provided by paragraph (a)(2)(iii) of Rule 12h-6 to this structure. We believe such a reading could have the unintended effect of encouraging foreign private issuers to exclude U.S. shareholders from rights offerings in their entirety. Clarifying that paragraph (a)(2)(iii) remains available under circumstances where the standby underwriting arrangement relates to securities offered and sold in an unregistered offering (including, without limitation, an offering in accordance with Regulation S) may increase the likelihood that issuers would extend their rights offerings to U.S. retail shareholders in registered public offerings. It is also consistent with the Commission's re-proposal of the one-year dormancy condition to permit the unregistered sale of securities that are exempted under the Securities Act.

We therefore request the Commission to include the clarifying language suggested above

(3) Rule 12g3-2(b)

We support the provision in re-proposed Rule 12g3-2(e) for the electronic delivery, via an issuer's Internet Web site or through an electronic delivery system generally available to the public in its primary trading market, of the home country documents required under paragraph (1)(iii) of Rule 12g3-2(b). Similarly, we agree that all issuers should have the option, under proposed Rule 12g3-2(f), to provide the home country documents required under Rule 12g3-2(b) in electronic form.

We appreciate that the Commission will on another occasion consider whether initial applications under Rule 12g3-2(b) can be made electronically. Until that issue is addressed, we would propose an interim solution that would substantively reduce the burden and cost of the initial application. Specifically, we urge the Commission to extend the ability to provide Rule 12g3-2(b) home country documents in electronic form to issuers making their original 12g3-2(b) application, even if the application letter itself must be delivered in paper form. The current procedure, whereby issuers must send a (usually) voluminous set of papers to the Commission as part of the Rule 12g3-2(b) application process, presents a burden for foreign private issuers without, in our view, a corresponding benefit for U.S. investors. By changing the reference in the third line of the re-proposed Rule 12g3-2(e)(2) from *paragraph (b)(1)(iii)* to *paragraphs (b)(1)(i) and (b)(1)(iii)*, this initial application burden would be substantially reduced.

We have seen issuers decline to make "cautionary" applications under Rule 12g3-2(b) following the initial listing and public offering of their securities in Europe because of concerns about the time and expense associated with the initial application. Providing for an initial application process that requires a paper list of documents that includes the Internet address of the referenced documents, but without requiring the provision of those documents in paper form, should substantially minimize the disincentive for foreign private issuers of making application under Rule 12g3-2(b) in situations where it cannot be proven that registration under Section 12(g) or qualification under Rule 12g3-2(b) is required.

(4) Notice of Delisting

We support the revised public notice requirement in re-proposed Rule 12h-6, whereby an issuer is required to publish, either before or on the date that the Form 15F is filed, a notice in the United States disclosing its intent to terminate its section 13(a) or 15(d) reporting obligations. The Re-Proposing Release queried whether the final rule should require an issuer to mail a copy of the notice to each of its U.S. shareholders. We would not support the addition of this requirement given the difficulty and expense of locating each and every U.S. shareholder. Indeed, such a requirement would for many companies render unfeasible the deregistration procedure purported to be made available by re-proposed Rule 12h-

6. Rather, we believe the rule as currently proposed provides for a sufficient means of notifying U.S. shareholders.

We would be pleased to respond to any enquiries regarding this letter or our views on the Re-Proposal generally. Please contact Edward Fleischman (212 903 9011), Lawrence Vranka, Jr. (212 903 9211), or Jeffrey C. Cohen (212 903 9014) in our New York office, Thomas N. O'Neill, III (+33 1 5643 5882) in our Paris office or Raymond J. Fisher (+49 69 7100 3186) in our Frankfurt office.

Very truly yours,

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