SULLIVAN & CROMWELL LLP
A LIMITED LIABILITY PARTNERSHIP

TELEPHONE: +44 (0)20-7959-8900
FACSIMILE: +44 (0)20-7959-8950
WWW.SULLCROM.COM

One New Fetter Lane
London EC4A 1AN, England

FRANKFURT • PARIS
LOS ANGELES • NEW YORK • PALO ALTO • WASHINGTON, D.C.
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February 12, 2007

Via email: rule-comments@sec.gov

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

Re: Re-Proposed Rule Permitting Foreign Private Issuers to Deregister and Terminate Their Reporting Obligations under the Securities Exchange Act of 1934 (File No. S7-12-05)

Dear Ms. Morris:

We are pleased to respond to Release No. 34-53020, International Series Release No. 1295 (the "Release"), in which the Securities and Exchange Commission (the "Commission") has solicited comments on its re-proposal (the "Proposal") of an amendment to the rules that govern termination of a foreign private issuer's registration of a class of securities under Section 12(g) and the duty to file reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act").

We strongly support the Proposal and believe that it represents a sensible and timely improvement on the existing rules. We believe that the Proposal is based on an appropriate measure of relative U.S. market interest that will remove unnecessary obstacles to deregistration, while still providing for meaningful protection of U.S. investors. We applaud this outcome, the process of international dialogue that has led to it, and the Commission's stated intent of rationalizing the deregistration rules as part of a broader program for removing disincentives to foreign private issuers accessing the U.S. capital markets.

We endorse the Commission's decision to modify the threshold for deregistration and termination of a foreign private issuer's reporting obligations with respect to its equity securities from a pure numerical test (300 beneficial holders resident in the United States) to a test primarily based on a quantitative benchmark which does not

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depend on a headcount of the issuer's U.S. security holders. We agree with the Commission's objective to create a simple and easy-to-use test for foreign private issuer deregistration, and we endorse the Commission's adoption of a benchmark based on the comparison of the average daily trading volume of a foreign private issuer's equity securities in the United States with that in its primary trading market.

As was suggested more than three years ago by our partner David Morrison in one of the leading articles on this topic, we believe that the adoption of a deregistration test based primarily on the percentage of the registrant's trading occurring in the U.S. market is the right response to the increased internationalization of the securities markets and the emergence of book-entry clearance and settlement. We do offer below in this letter suggestions with regard to the methodology for measuring trading volumes under the Proposal.

With respect to the other conditions to deregistration, we have suggestions for clarifying and improving certain aspects of the Proposal.

We also endorse the re-proposed amendments to Rule 12g3-2. We agree with the Commission that, subsequent to deregistration, foreign private issuers should be able to avail themselves of the exemption under Rule 12g3-2(b) immediately, and with the Commission's policy objective to encourage continued maintenance of American Depositary Receipt facilities after deregistration.

We have set forth below our comments on a few specific aspects of the Proposal that we believe can be improved or clarified in a manner consistent with the goals articulated by the Commission.

## I. Comments on the primary quantitative benchmark

### 1. Trading volumes test calculation

Under re-proposed Rule 12h-6, a foreign private issuer would have the option of deregistering a class of equity securities if the average daily trading volume ("ADTV") of the subject class in the United States has been five per cent or less of the ADTV of that class of securities in the issuer's primary trading market (the "Primary Trading Market"). The re-proposed rules define Primary Trading Market to mean that at least 55 per cent of the trading in the foreign private issuer's subject class of securities took place in, on or through the facilities of a securities market or markets in no more than two foreign jurisdictions during a recent 12-month period.

We agree with the Commission's suggestion set forth in the Release that, for purposes of comparing the ADTV of a foreign private issuer in the United States with the ADTV in the issuer's Primary Trading Market, it is not necessary or appropriate to make distinctions based on the type of market in which a security is traded. We also believe that the Commission should not mandate or specify acceptable information sources for determining the ADTV of a foreign private issuer in its Primary Trading

Market, but should allow the issuer to rely on the volume data as they are reported in the foreign jurisdictions.

We note that, for the purposes of the calculation, the trading volume in the Primary Trading Market, *i.e.,* the "denominator" of the trading volume benchmark, is intended to include trading in, on or "through the facilities of" the Primary Trading Market, and appears to exclude off-market trading. The concept of "trading through the facilities" of a market is not clearly defined in the re-proposed rules or in the Release and does not, to our knowledge, have a uniformly understood meaning in international market practice. This may give rise to uncertainty in identifying which measure of trading volume to use. We suggest that the Commission indicate clearly in the final rules or in the adopting release that a registrant may use the most inclusive measure of trading volume reported by or through all regulated trading markets recognized by the appropriate securities regulatory authority or authorities in the Primary Trading Market. This could include, in addition to floor trading, trades executed through block-trade facilities and electronic trading networks, as well as over-the-counter trades reported through a transaction reporting system administered by a regulated trading market.

We also believe that in certain circumstances, the proposed measurement of relative U.S. market interest in a foreign private issuer's equity securities should take into account off-market trading in the Primary Trading Markets, even if that off-market trading is not reported by or through a regulated trading market. In our experience, certain foreign jurisdictions, such as Australia, are characterized by significant off-market trading. As a result, we expect that for certain foreign private issuers the volume based measurement that relies solely on trading reported by or through a regulated trading market may underestimate the level of trading in the Primary Trading Market. We recommend that the final rules or the adopting release clarify that foreign private issuers are permitted to include off-market trading in the calculation of the issuer's ADTV in the Primary Trading Market whenever credible support (such as by reference to share registry records or regulatory reports by broker dealers, intermediaries or other market participants) is available to verify the quantum of such trading.

### 2. One-year ineligibility period after termination of ADR facility

We endorse the Commission's policy objective of encouraging foreign private issuers to maintain their American Depositary Receipt facilities, even when they delist from a U.S. exchange or automated inter-dealer quotation system and terminate their Exchange Act reporting obligations. For this reason, we agree that issuers planning to exit the Exchange Act's reporting system should be discouraged from seeking to terminate their sponsored ADR facilities for the purpose of limiting the ability of U.S. investors to hold or purchase their securities and, consequently, reducing the issuer's U.S. ADTV.

However, there is no similar justification for applying the one-year ineligibility period to foreign private issuers that meet the trading volume benchmark of proposed Rule 12h-6 at the date of termination of the sponsored ADR program.

Accordingly, we believe that the Commission should revise the one year ineligibility condition in the final rules to make it applicable only to a foreign private issuer that terminates its sponsored ADR facility at a time when the ADTV of such issuer's U.S. trading exceeds 5% of the ADTV in its Primary Trading Market over a recent 12-month period.

We share the Commission's hope that the new ability to perfect a 12g3-2(b) exemption and the eased conditions for maintaining it (particularly if the suggestions we make below are implemented), combined with the desirability of preserving over-the-counter trading in the United States and a wish to foster good shareholder relations will be sufficient reason for most issuers to decide to maintain their ADR programs even if they wish to exit the reporting system.

## II. Comments on other conditions

### 1. Exemption from the dormancy and prior reporting requirement for certain business combinations

We welcome the proposed amendments to the dormancy requirement set forth in Rule 12h-6(a)(2). We believe, however, that the scope of the exemption from the one-year dormancy requirement for registered offerings should be expanded to encompass certain business combinations between foreign private issuers subject to shareholders' approval for which U.S. registration is required. A foreign issuer that engages with another foreign issuer in a business combination of the type contemplated by Rule 145 under the Securities Act of 1933 (the "Securities Act") is required to file a registration statement under the Securities Act even if U.S. interest in the target company is limited unless an exemption, such as the one provided by Rule 802, is available. In such circumstances, the nexus of the transaction with the United States may be marginal and the acquiring foreign issuer typically files a registration statement only reluctantly and solely to comply with a legal obligation. In our view, such an issuer can hardly be deemed to have voluntarily accessed the U.S. market. A registration in the context of a business combination between two foreign private issuers is clearly distinguishable from a capital raising, which is the type of transaction that the Commission appears to have specifically contemplated when designing the dormancy requirements. We suggest that delaying the availability of Rule 12h-6 for one year in such cases is not justified and we believe that the dormancy requirement should be revised to exclude such transactions.

We also do not believe that the prior reporting requirement set forth in proposed Rule 12h-6(a)(1) should apply to an issuer that first registers with the Commission solely in connection with a business combination in the circumstances described above, if the issuer clearly states in the registration statement its intention to terminate its reporting obligations after the transaction. The Commission has indicated that the prior reporting condition serves the purpose of providing U.S. investors with a minimum period of time to make an investment decision based on Exchange Act reports. The registration statement should provide sufficient information regarding the issuer and

the transaction, as well as the issuer's intention to deregister, for a U.S. investor to make an informed investment decision in the context of a business combination.

**2. Suggested clarification with respect to special financial reports under Rule 15d-2 for purposes of the prior reporting requirement**

Under certain circumstances, if a registration statement under the Securities Act did not include year-end audited financial statements for the year prior to its effectiveness, such financial statements are required to be filed later in a special financial report under Rule 15d-2. We note that the Release is silent on how special financial reports filed under Rule 15d-2 should be considered for purposes of meeting the one-year prior reporting condition set forth in the Proposal. We believe that the Commission should clarify in the adopting release that special financial reports filed by foreign private issuers under Rule 15d-2 will be deemed to be annual reports that satisfy that element of the one-year reporting condition. This suggested clarification would be consistent with the position that the Commission has adopted in connection with the recent implementation rules for Section 404 of the Sarbanes-Oxley Act of 2002. In the adopting release, the Commission indicated[1] that special financial reports filed under Rule 15d-2 will be treated as annual reports for purposes of defining the transition period for newly public companies. We see no technical or policy reason why special financial reports should be considered as annual reports for purposes of Section 404 of Sarbanes-Oxley Act and not for the purposes of the prior reporting condition under Rule 12h-6.

## III. Permanent termination by companies that suspended reporting under the prior rules

Under the Proposal, foreign private issuers that suspended or terminated their reporting obligations under the prior rules would be permitted to terminate permanently their reporting obligations under the new rules and avail themselves of the exemption from registration under Rule 12g3-2, provided that they are able to certify at the time of such permanent termination that they would not be required to register under the Exchange Act because they have fewer than 300 holders in the United States. Accordingly, foreign private issuers would be required to perform at that time a similar shareholder count as that which they had performed under the old rules. We do not believe it is necessary to impose on companies that have deregistered in the past the burden and uncertainty of a shareholder count, particularly when companies that intend to deregister after the new rules become effective will not be required to do so. We suggest that companies that have deregistered in the past be eligible to terminate their obligations permanently under Rule 12h-6 on the same basis as companies that have not previously deregistered.

[1] *See* Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies Release No. 33-8760, 71 Fed. Reg. 270 (Dec 15, 2006), at n. 82.

## IV. Exemption from registration requirements under Rule 12g3-2(b)

The Proposal would permit a foreign private issuer that qualifies for deregistration under Rule 12h-6 to avail itself of the exemption from the registration requirements of Section 12(g) of the Exchange Act provided by Rule 12g3-2(b) immediately upon termination of its registration under proposed Rule 12h-6. As with the filing of Form 15 under the Commission's current rules, the filing of proposed Form 15F by a foreign private issuer seeking to terminate its registration and reporting obligations would immediately suspend that issuer's obligation to file periodic reports with the Commission. If the relevant deregistration conditions are met, the suspension would become a permanent termination 90 days after the filing of the Form 15F, or earlier if the Commission so orders.

As we have previously indicated, we welcome the Commission's proposed new Rule 12g3-2(e) and fully agree that a foreign private issuer seeking to terminate its reporting obligations with respect to a class of equity securities should be eligible to rely on the Rule 12g3-2(b) exemption immediately upon deregistration.

We believe, however, that a technical issue arises from the fact that, under the Proposal, the Rule 12g3-2(b) exemption would only become effective when Form 15F becomes effective. Accordingly, there would be a time lag between (i) the time when an issuer ceases to report under Section 13(a) or 15(d) of the Exchange Act, which is immediately upon filing Form 15F, and (ii) the effectiveness of the exemption under Rule 12g3-2(b), which may occur up to 90 days thereafter. This time lag will be problematic for those foreign issuers that wish to continue to maintain a sponsored ADR program following Exchange Act deregistration because General Instruction I.A.3 of Form F-6 requires that an issuer be either an Exchange Act reporting issuer or exempt from such reporting obligations pursuant to Rule 12g3-2(b). Arguably, in the interim period between filing and effectiveness of Form 15F, a foreign private issuer with a sponsored ADR program will not be able to satisfy either test.

We suggest that the Commission, consistent with its declared objective to encourage foreign private issuers to maintain their ADR facilities, address this technical issue by revising Form 15F to include a specific item allowing issuers to elect for immediate application of the exemption from registration of Rule 12g3-2(b). If an issuer so elects, the Rule 12g3-2(b) exemption would become effective immediately upon filing the application, subject to expiration if the Form 15F is subsequently withdrawn or deregistration denied. Electing issuers would be required to begin furnishing Rule 12g3-2(b) information to the Commission immediately after the filing of the Form 15F.

In addition to the foregoing, we continue to believe that certain additional amendments to proposed Rule 12g3-2(e) would be appropriate.

Exception to website publication requirement if unlawful. We agree with the principle that foreign private issuers relying on Rule 12g3-2(e) should be required to publish home country materials on their corporate website and that annual and interim

reports, press releases, communications and other documents distributed directly to shareholders should be published in English. However, we believe that the website publication requirement should contain an exception for situations in which the posting of materials on an issuer's website is prohibited by the laws of the issuer's home jurisdiction. For example, it may be that home country securities laws would prohibit or restrict the publication of certain materials in connection with a securities offering.

Translation exception for non-U.S. offerings. Consistent with Section D of Form 6-K, we further believe that the translation requirement should not apply to offering circulars and prospectuses relating to securities offerings conducted outside the United States. This limitation would enable a foreign private issuer to, for example, conduct a rights offering in its home country that excludes U.S. shareholders without having to translate the offering documents into English.

Limitation of website postings to three years. We also suggest that the requirement that foreign private issuers post home country materials on their website be modified to apply on a rolling three-year basis so that a foreign private issuer would be permitted to remove materials that are more than three years old. The three-year limitation would correspond to the number of years for which foreign private issuers are required to provide information about their businesses in their Annual Reports on Form 20-F. There is no need to require non-reporting foreign private issuers to make disclosure materials available for a longer period of time than the time period applicable to reporting issuers.

Rule 12g3-2(b) should not apply in all cases. Finally, we suggest it be made clear that not all foreign private issuers that have filed a Form 15F with the Commission automatically fall within the scope of Rule 12g3-2(b). A foreign private issuer that, at the time it files its Form 15F with the Commission, satisfies not only the conditions for deregistration under proposed Rule 12h-6, but also has fewer than 300 U.S. resident shareholders, should be permitted to deregister and rely immediately on the exemption provided by Rule 12g3-2(a). Similarly, a foreign private issuer that initially has more than the requisite number of U.S. resident shareholders should be required to comply with the requirements of Rule 12g3-2(b) only until such time as it qualifies for the exemption provided by Rule 12g3-2(a). This clarification would be consistent with the Commission's objective of not inadvertently making deregistration for foreign private issuers more difficult than it is currently. Again, we note that in practice the newly granted ability to withdraw from the reporting system but maintain a sponsored ADR program may lead many issuers to voluntarily perfect and maintain their 12g3-2(b) exemption.

## V. Employee offerings following Exchange Act deregistration - Comment on information requirements of Rule 701

Following termination of its Exchange Act registration, a foreign private issuer will no longer be eligible to use Form S-8 to register securities for offerings to the issuer's employees in the United States. Accordingly, those issuers that currently offer securities to their U.S. employees under Form S-8 and choose to deregister in accordance with the new rules will need to ensure that, going forward, any employee offerings in the United States comply with an available exemption from registration.

We expect that Rule 701 under the Securities Act will provide a useful exemption for many foreign private issuers in the situation described above. However, if the securities sold to U.S. employees exceed the yearly $5 million threshold contemplated by Rule 701(e), the issuer is currently required to provide U.S. employee participants with financial statements that are either prepared in accordance with U.S. GAAP or reconciled to U.S. GAAP. The reconciliation to U.S. GAAP is a burdensome, costly and time-consuming process. An issuer that is no longer reporting under the Exchange Act would not otherwise have reason to prepare such reconciliation, and is likely to find it impractical to prepare the reconciliation solely in order to extend its employee benefit plans to the U.S. employees.

Accordingly, we are concerned that the requirement of Rule 701(e) will prevent issuers that currently offer securities for compensatory purposes to their U.S. employees to continue doing so after deregistration under the Exchange Act. Other exemptions, such as those of Regulation D under the Securities Act, may not be available if, for example, U.S. plan participants are not accredited investors. As a consequence, an issuer could be forced to restructure its employee compensation arrangements to the potential detriment of its U.S. employees following deregistration.

In many cases, such hardship has little countervailing benefit for U.S. employee investors. If the issuer's financial statements are prepared under International Financial Reporting Standards, the value to a U.S. participant in an employee benefit plan of a U.S. GAAP reconciliation is arguably limited. In this regard, we note the Commission's stated objective to eliminate, as a result of the continuing convergence among those sets of accounting standards, the requirement for U.S. GAAP reconciliation for Exchange Act reporting issuers before the end of this decade.

In light of the above, we suggest that Rule 701(e) be amended to eliminate, for IFRS reporting issuers, the requirement to provide a U.S. GAAP reconciliation of their financial statements if the $5 million threshold is exceeded.

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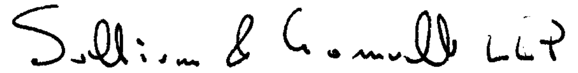
We appreciate the opportunity to comment on the proposed rules, and we would be pleased to discuss any questions the Commission or its staff may have about this letter. Any questions about this letter may be directed to George H. White or Oderisio de Vito-Piscicelli (+44 20 7959 8900) in our London office.

Very truly yours,



SULLIVAN & CROMWELL LLP

cc: Brian Cartwright (General Counsel)
John W. White (Director, Division of Corporation Finance)
Paul M. Dudek (Chief, Office of International Corporate Finance, Division of Corporation Finance)
Ethiopis Tafara (Director, Office of International Affairs)