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February 16, 2006

Via email: rule-comments@sec.gov

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

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) (the "Deregistration Proposal")

Dear Ms. Morris:

We applaud the Securities and Exchange Commission (the "Commission") for issuing the Deregistration Proposal, as set forth in Release No. 34-53020, International Series Release No. 1295 (the "Release"), and are pleased to provide the following comments.

We agree with the Commission that the current rules governing the conditions under which a foreign private issuer may exit the registration and reporting regime of the Securities Exchange Act of 1934 (the "Exchange Act") are outdated and should be revised. The Exchange Act and the rules and regulations thereunder should provide a clear and efficient mechanism for issuers (1) that have not made a public offering of securities in the United States in the recent past and (2) for whose securities there is minimal U.S. investor interest to deregister and terminate their Exchange Act reporting obligations.

We also endorse the Commission's two-pronged approach to defining the conditions for deregistration and termination of a foreign private issuer's reporting obligations with respect to its equity securities – we agree that a combination of issuer-

oriented conditions and market-oriented conditions is an appropriate framework for crafting a fair and effective deregistration mechanism.

We are generally in agreement with the issuer-oriented conditions proposed in the Release (that is, the notice of intent to deregister, the two-year reporting requirement, the one-year dormancy requirement and the home country listing requirement), although we have suggestions for clarifying and improving certain aspects of these conditions. With respect to the market-oriented conditions, we agree with the Commission's general approach and the notion that a foreign private issuer's ability to deregister should be conditioned on U.S. investor interest in the issuer's securities falling below one or more objective benchmarks. However, we are concerned that the benchmarks proposed by the Commission are not sufficiently flexible to permit issuers that have no significant market following in the United States to deregister.

We discuss in Part I below why we believe the proposed benchmarks for measuring U.S. investor interest in a foreign private issuer's securities are too tight. In sum, we believe that the benchmarks (1) may be based on statistics that understate U.S. institutional investor interest and, accordingly, are set too low, (2) protect investors who do not really need virtually permanent access to Exchange Act reporting and (3) are unnecessarily biased against smaller issuers. In Part II, we propose several modifications to these benchmarks as well as a possible additional test that we believe would better achieve the Commission's policy objective to permit foreign private issuers that have not recently made a public offering in the United States and that have only minimal U.S. retail investor interest to exit the Exchange Act reporting regime. In Part III, we comment on the Commission's proposed changes to Rule 12g3-2 and the conditions under which Rule 12g3-2(b) should be available to foreign private issuers generally. Finally, in Annex A, we provide more technical suggestions as well as drafting comments.

I. Analysis of the U.S. Investor Interest Benchmarks of Proposed Rule 12h-6

1. The Release may overestimate of the number of issuers that would be eligible to deregister under the proposal

The Release states that, based on an analysis prepared by the staff of the Commission's Division of Corporation Finance and the Office of Economic Analysis, the Commission expects that, if the new rules are adopted as proposed, approximately 26% of the foreign private issuers currently required to file reports with the Commission will be eligible to deregister and terminate their reporting obligations. We believe that the staff's analysis may significantly underestimate the percentage of securities of foreign private issuers held by U.S. investors and, to a lesser degree, the number of such investors. Consequently, the staff may be overestimating the number of issuers likely to be able to deregister under the proposed rules.

We emphasize our concerns regarding the statistics cited in the Release *not* because we view the absolute number or percentage of foreign private issuers eligible to deregister under the Commission's proposal as the key consideration in determining what the appropriate test for deregistration should be. Any such test should be principles-based, and as noted above, we believe that the analytical framework proposed by the Commission is based on the right principles. We also recognize the difficulties and practical problems inherent in formulating a suitable test. The universe of foreign private issuers is diverse, and it is difficult to define benchmarks that capture key characteristics such as the number of an issuer's U.S. retail shareholders. Accordingly, we think it is entirely appropriate for the Commission to exercise a degree of caution in setting these benchmarks. However, we believe that the benchmarks proposed by the Commission are based on statistics that significantly understate U.S. investor interest in foreign private issuers and that in fact only a very small number of such issuers would be eligible for the proposed relief.

We have three principal reasons for questioning the Commission's expectation that more than 25% of the foreign private issuers currently having an Exchange Act reporting obligation would be eligible to deregister under the proposed benchmarks.

Our first two reasons are anecdotal and the third is based on the observation that the statistics relied on by the Commission's staff may have resulted in an "apples to oranges" comparison.

First, our firm has numerous foreign private issuers among its clients. These issuers are diverse in size, capital structure, jurisdiction of incorporation, location of primary listing, industry focus and other key attributes. Our discussions with many of these issuers have led us to believe that very few of them (significantly fewer than 25%) expect to be eligible to deregister under the proposed rules. While this informal survey represents a relatively small sampling and may not be fully representative of the universe of foreign private issuers, we believe the results are telling. In addition, discussions with foreign private issuers that are not clients, with industry groups and with other international law firms support our belief that the number of companies that actually would be eligible to deregister under proposed Rule 12h-6 is significantly lower than estimated.

Second, our experience with cross-border merger and acquisition transactions and rights offerings suggests that many foreign private issuers, including issuers that do not have their shares listed on a U.S. exchange and have not offered their shares publicly in the United States, nevertheless have more than 10% of their shareholders in the United States. In many cross-border merger and acquisition transactions and rights offerings, foreign private issuers find that the percentage of the relevant class of their securities (or those of the target) held in the United States exceeds the 10% threshold of

Rule 802(a) under the Securities Act of 1933 (the "Securities Act") and/or Rule 14d-1(c) under the Exchange Act (collectively, the "Tier I Exemption"). If it were indeed the case that 26% of all foreign private issuers with a reporting obligation in the United States are eligible to deregister under a 5% public float test or a 10% public float test combined with a 5% trading volume test, we would have expected far greater use of the Tier I Exemption, particularly among companies whose shares are not listed on a U.S. exchange, than we have observed in fact.

Third, we query whether the data underlying the staff's analysis is suitable for estimating the effects of the Commission's proposal. Based on remarks by representatives of the Commission at the press conference at which the proposal was announced, we understand that one of the sources used by the staff in performing its analysis is the information foreign private issuers provide in their Annual Reports on Form 20-F in response to Item 7.A.2 of Form 20-F.[1] For the reasons discussed below, we believe that these figures may understate the number of a foreign private issuer's security holders located, and the percentage of securities held, in the United States for purposes of the proposal.

Many foreign private issuers issue their equity securities in the form of dematerialized or bearer securities, which are traded as "ordinary shares" in the relevant principal market. While American Depositary Receipt ("ADR") facilities enable investors to exchange shares in ordinary form for registered ADRs to facilitate trading in the United States and the receipt of dividends in U.S. dollars, in our experience, the equity securities of most foreign private issuers are primarily held by U.S. persons, directly or indirectly, in the form of ordinary shares, not ADRs. Accordingly, the only practical way these issuers can determine the percentage of their shares beneficially held in the United States or the number of their U.S. shareholders is by conducting an expensive and time-consuming survey of custodial banks and other intermediaries.

Form 20-F is silent on the method by which foreign private issuers should count the number of their security holders in the United States. In our experience, few foreign private issuers undertake the kind of investigation that would be necessary to permit them to "look through" custodians and other nominees and intermediaries in counting their U.S. security holders for purposes of their Annual Reports on Form 20-F. Instead, they generally base their reports on the number of outstanding ADRs as supplemented by other sources available to them, such as reports on Schedules 13D and 13G filed with the Commission, similar reports submitted to home country regulators and self-identification by large institutional investors. We expect that in many cases this

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[1] Item 7.A.2 of Form 20-F requires disclosure of "the portion of each class of securities held in the [United States] and the number of record holders in the [United States]".

method captures only a portion of a foreign private issuer's shares held in the United States.

As a result, we believe that the disclosure provided by issuers in response to Item 7.A.2 of Form 20-F may significantly understate the number of their U.S. shareholders or the percentage of their U.S. shareholdings. This in turn may cause the Release to significantly overstate the number of foreign registrants likely to qualify for deregistration under the proposed benchmarks.

2. The benchmarks proposed by the Commission are too tight because they protect investors who do not need to rely on Exchange Act registration and reporting

We agree with the Commission that metrics such as the percentage of an issuer's securities held in the United States or the number of its U.S. security holders are appropriate bases for measuring U.S investors' interest in the securities of a foreign private issuer. However, in setting the appropriate benchmarks, we believe it is important to recognize that these metrics include a substantial number of investors who, although based in the United States, do not require the protections provided by Exchange Act registration and reporting.

Section 4(2) of the Securities Act and Rule 144A under the Securities Act permit a foreign private issuer to offer and sell an unlimited amount of securities to an unlimited number of U.S. investors without registering the offer and sale of these securities under the Securities Act, provided that offers and sales are made to qualified institutional buyers ("QIBs"), as defined in Rule 144A(a)(1). Subparagraph (d)(4) of Rule 144A states that an issuer may satisfy the information delivery requirements of that rule by obtaining an exemption pursuant to Rule 12g3-2(b) under the Exchange Act. Rule 144A therefore embodies the principle that QIBs do not need the protections provided by Exchange Act registration and reporting for investment decisions in both primary offerings and secondary trading. In other words, access to home country information of the type specified in Rule 12g3-2(b) provides sufficient protection for the largest, most sophisticated U.S. investors.

Under proposed Rule 12h-6, a foreign private issuer that has filed a Form 15F which has become effective would be required to provide the same Rule 12g3-2(b) information to investors. It follows that, because the ability of an issuer to rely on Rule 12g3-2(b) in the context of Rule 144A does not depend on the number of QIBs to which it has offered and sold securities, the number of QIBs holding the issuer's securities (and the percentage of securities held by QIBs) should be equally irrelevant as a condition for deregistration pursuant to Rule 12h-6. We therefore believe that the relevant

benchmarks for deregistration should be based on the number of non-QIB U.S. investors (and the percentage of securities held by such non-QIB U.S. investors).

It is also important to recognize two other factors in considering whether the deregistration benchmarks should be measured solely with reference to non-QIB U.S. investors. First, in a significant number of cases, the holdings of one or two or, at most, a handful of QIBs would be determinative of whether a foreign private issuer could satisfy the proposed benchmarks. In our experience, it is common for the aggregate holdings of a handful of U.S. QIBs to exceed the benchmarks proposed by the Commission. An examination of Schedules 13D and 13G (and similar home country reports) filed in respect of various foreign private issuers reveals that this is more than a theoretical possibility. Our proposed alternative benchmark would address this concern.

Second, since the time the Commission's rules governing deregistration were last revised in 1996, the face of the international securities markets and the rules and regulations applicable to them has changed in important respects. Regulators around the world have taken important initiatives that have contributed to the creation of more transparent and liquid securities markets outside the United States. IFRS has become the near-universal accounting standard outside the United States and IFRS and U.S. GAAP are rapidly converging. In general, U.S. institutional investors invest in foreign private issuers' shares directly, rather than through ADRs. When U.S. institutional investors decide to buy or sell the securities of foreign private issuers that maintain a primary listing in a non-U.S. jurisdiction, they generally do so in reliance on the disclosure documents published by these issuers in those jurisdictions (which are often posted on the issuer's website simultaneously with publication in the home market), not on the basis of their Annual Reports on Form 20-F, which are typically filed with the Commission weeks or months after the publication of the corresponding home country disclosure document at a point when most of the information has already been absorbed by the market.

In the absence of our proposed alternative benchmark (or a similar alternative), foreign private issuers (and their home country regulators) would be left with the ironic result that, as the protection provided by their home country disclosure and the regulation of the international securities markets improves and, at least partly as a result thereof, direct investment by U.S. institutional investors in the securities of foreign private issuers grows, it would become increasingly difficult for such issuers to escape the double regulatory burden of compliance with home country requirements and Exchange Act registration and reporting.

The Commission has asked in the Release whether the benchmarks proposed by the Commission for measuring U.S. investor interest in the equity securities of a foreign private issuer should exclude QIBs. For the reasons set forth above, we believe

that they should, and one of the proposals we make in Part II suggests a way in which this might be accomplished.

3. Smaller issuers should be tested based on the same benchmarks as well-known seasoned issuers

Under proposed Rule 12h-6, foreign private issuers that are well-known seasoned issuers ("WKSIs") would have the option of deregistering under a separate benchmark that is more liberal than the benchmarks applicable to all foreign private issuers. The Release states that WKSIs should be afforded this regulatory advantage because they are frequently included in indices and therefore more likely to be covered by U.S. index funds and as a result have a larger shareholder base in the United States. In addition, according to the Release, the market has more information about WKSIs than about smaller issuers because of their extensive following by investors, members of the financial press and numerous sell-side and buy-side analysts.[2]

Regulatory initiatives of the Commission have for some time appropriately included mechanisms that provide greater flexibility for larger and more well-known issuers. Since the creation of the integrated disclosure system and the adoption of Forms S-1, S-2 and S-3 (and their counterparts for foreign issuers) in the 1980s, for example, the benefits of full incorporation by reference for primary offerings has been available to registrants with a public float of $75 million or more. The benefits extended to WKSIs through the Securities Offering Reform reflect a similar perspective.

On the other hand, the principle that, in some circumstances, particularly where fixed costs are high, it is appropriate to treat smaller issuers more liberally than larger ones is also well-established in a number of areas of the U.S. securities laws.[3] As the Commission has recognized, "the cost of compliance with Exchange Act reporting requirements is relatively greater for smaller companies than for larger ones".[4] It seems

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[2] *See, e.g.,* the relief granted WKSIs in Releases No. 33-8591; 34-52056; IC-26993; FR-75; Securities Offering Reform.

[3] *See, e.g.,* Securities Act Section 4(6), 15 U.S.C. 77d(6) (exempting certain small offerings to accredited investors from Securities Act registration); Regulation A, 17 CFR 230.251-263, and Rules 504 and 505 under Regulation D, 17 CFR 230.504, 505 (exempting certain small and limited offerings from Securities Act registration); Regulation E, 17 CFR 230.601-610a (exempting securities of small business investment companies from Securities Act registration); Regulation S-B, 17 CFR 228 (establishing simplified disclosure requirements for small business issuers); and Rules 4a-1, 4a-2 and 4a-3 under the Trust Indenture Act, 17 CFR 260.4a-1-4a-3 (exempting certain small debt offerings from the provisions of the Trust Indenture Act of 1939).

[4] SEC Release No. 34-37157; File No. S7-16-95; Relief from Reporting by Small Issuers.

particularly appropriate to take the smaller size of an issuer into account when considering whether that issuer should become subject to a regulatory regime. Indeed, in the deregistration context the Commission has long had rules in place that contemplate a more liberal deregistration regime for smaller issuers.[5]

In our view, the distinction between WKSIs and non-WKSIs is perfectly appropriate in determining whether certain advantages of the Securities Offering Reform, such as automatic shelf registration, should be available only to larger issuers. It is another matter entirely to conclude that the conditions under which a foreign private issuer should be required to enter, or eligible to exit, the Exchange Act registration and reporting regime should be more favorable to larger issuers than to smaller ones.

The distinction drawn by the Commission in the Release seems unnecessary and perhaps unfair, as smaller foreign private issuers are the ones for which the regulatory and compliance costs of Exchange Act registration and reporting are likely to be the most burdensome.

Larger and smaller issuers should benefit equally from the Commission's liberalized proposals. At a minimum, even if the Commission does not adopt any of our suggested modifications, it should make all the benchmarks of Rule 12h-6 as proposed (that is, including the 10% shareholding, 5% trading volume test) available to all issuers, whether they are WKSIs or not.

II. Suggested Modifications of the Commission's Proposals

In light of the foregoing, we propose that the Commission adjust the benchmarks for deregistration set forth in the Release. In addition, we would suggest that the Commission also adopt an alternative test based on non-QIB U.S. investor interest, reflecting the principle that QIBs do not need the protections of Exchange Act registration and reporting. We outline each of our proposals in detail below.

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[5] In 1996, the Commission adopted amendments to Rules 12g-1, 12g-4 and 12h-3 under the Exchange Act, which raised the asset threshold that an issuer must exceed in order to be required to register a class of equity securities, and, conversely, the conditions for deregistration once its securities are held of record by 300 or more but less than 500 holders from $5 million to $10 million. In the release adopting the amendments, the Commission stated that these amendments were "consistent with investor protection".

1. Suggested modifications to the Commission's proposed benchmarks

(i) Equity securities

Except for the modifications we propose below with respect to the number of a foreign private issuer's U.S. security holders and the percentage of its securities held in the United States, our proposed benchmarks are identical to the benchmarks proposed by the Commission. Based on our experience, we believe that our proposed modifications would better achieve the Commission's objective of striking an appropriate balance between permitting foreign private issuers with a limited market following in the United States to exit the Exchange Act reporting system and ensuring adequate protection of U.S. investors.

We believe that a foreign private issuer should be eligible to deregister if, in addition to the issuer-oriented conditions proposed by the Commission, it satisfies any of the following three market-oriented benchmarks (these benchmarks should be available to all issuers, irrespective of whether they are WKSIs or not):

- **10% or less U.S. shareholding (Benchmark 1).** Benchmark 1 would require that, irrespective of an issuer's U.S. trading volume and the number of its U.S. resident shareholders, U.S. residents hold no more than 10 percent of the issuer's outstanding voting and non-voting equity securities held by the issuer's non-affiliates on a worldwide basis at a date within 120 days prior to the date on which the issuer files its Form 15F with the SEC.

- **15% or less U.S shareholding and 5% or less U.S. trading volume (Benchmark 2).** Benchmark 2 would require that (1) the U.S. average daily trading volume of the subject class of an issuer's shares is no greater than 5 percent of the average daily trading volume of that class of shares in its primary trading market during a recent 12-month period ending no more than 60 days prior to the filing date of the Form 15F, and (2) U.S. residents hold no more than 15 percent of the issuer's outstanding voting and non-voting equity securities held by the issuer's non-affiliates on a worldwide basis at a date within 60 days prior to the end of that period.

- **Fewer than 500 U.S. shareholders worldwide or fewer than 500 U.S. shareholders resident in the United States (Benchmark 3).** Benchmark 3 would require that the subject class of an issuer's shares is held of record by fewer than 500 persons on a worldwide basis or fewer than 500 persons resident in the United States at a date within 120 days before the filing date of the Form 15F.

Benchmark 1. Under our proposed Benchmark 1, the maximum percentage of an issuer's shareholders that may be resident in the United States without jeopardizing the issuer's ability to rely on proposed Rule 12h-6, would be 10%, rather than 5%, as proposed in the Release. In today's global securities markets, our experience is that a holding by U.S. investors of less than 10% of a foreign private issuer's securities is indicative of a very low level of U.S. investors' interest in the issuer. If we are correct that the Commission's estimates significantly overstate the number of foreign private issuers eligible to deregister under the proposed benchmarks, our suggested change would bring the number of issuers that are in fact able to do so more in line with the expectations of the Commission. Moreover, it would align the threshold used in Rule 12h-6 with the thresholds used in Rule 802(a) under the Securities Act and Rule 14d-1(c) under the Exchange Act. Both sets of rules exempt foreign private issuers that have no significant shareholder base in the United States from certain aspects of the U.S. securities laws. We believe there is no reason why different thresholds should be used in these analogous contexts.

Benchmark 2. Our proposed change to Benchmark 2 would allow those issuers that cannot satisfy Benchmark 1 but still have a relatively low U.S. market following (as demonstrated by the fact that virtually all of the trading in their shares takes place in their home market) to take advantage of proposed Rule 12h-6. We agree with the Commission that 5% is an appropriate upper limit for the amount of trading that should be permitted to take place in the United States. The addition of a trading volume test as an additional safeguard would thus justify permitting issuers with a slightly higher percentage of U.S. shareholders (15% as opposed to 10%) to deregister under this benchmark.[6]

Benchmark 3. Proposed Benchmark 3 would in effect liberalize the corresponding benchmark proposed by the Commission (by preserving the current rule as a fall-back option) so that all issuers could benefit from the 500 record holders threshold currently available only to small issuers. We believe that our proposed change is appropriate in light of the fact that the size of the global investing community, both retail and institutional, has increased substantially since the Commission's deregistration rules were last amended.

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[6] If the Commission is concerned that the 15% shareholding test combined with the 5% trading volume test is too liberal, however, we think that there still might be a benefit to maintaining the 15% shareholding test. In that case, the trading volume test could be lowered to, for example, 3% or less.

(ii) Debt securities

For the reasons outlined above and for consistency with our proposed Benchmark 3 for equity securities, we suggest raising the maximum number of U.S. debt security holders that a foreign private issuer may have from 300 to 500.

2. Alternative Benchmarks – Exclusion of Qualified Institutional Buyers

In addition, we suggest that the Commission add an alternative benchmark that would permit a foreign private issuer to deregister if its shares held in the United States, excluding shares held by QIBs, account for 5% or less of the issuer's total public float. In this case, we would also suggest that our proposed Benchmark 3, which is based on the number U.S. security holders, be modified to exclude QIBs. Accordingly, we would propose that the alternative benchmarks be drafted substantially as follows:

- **5% or less U.S. shareholding (New Benchmark 3).** Benchmark 3 would require that, irrespective of an issuer's U.S. trading volume and the number of its U.S. resident shareholders, U.S. residents, *excluding QIBs*, hold no more than 5 percent of the issuer's outstanding voting and non-voting equity securities held by the issuer's non-affiliates on a worldwide basis at a date within 120 days prior to the date on which the issuer files its Form 15F with the SEC.

- **Fewer than 500 U.S. shareholders worldwide or fewer than 500 U.S. shareholders resident in the United States (New Benchmark 4, superseding Old Benchmark 3).** Benchmark 4 would require that the subject class of an issuer's shares is held of record by fewer than 500 persons on a worldwide basis or fewer than 500 persons resident in the United States, *in each case excluding QIBs*, at a date within 120 days before the filing date of the Form 15F.

Excluding QIBs from the above benchmarks would focus the inquiry of the level of U.S. investor interest in a foreign private issuer's shares where it should be – on smaller institutional and retail investors. If a foreign private issuer, by conducting a public offering in the United States or listing its shares on a U.S. securities exchange or quoting them on the NASDAQ inter-dealer quotation system, has established a U.S. retail and small institutional shareholder base that exceeds both of these thresholds, it seems fair to subject the issuer to Exchange Act registration and reporting. Conversely, if the issuer does not exceed these thresholds and it satisfies the issuer-oriented criteria, it should be permitted to exit the Exchange Act reporting regime.

We believe that the non-QIB benchmarks we propose are fair market-oriented measures of what constitutes minimal U.S. retail/small institutional investor interest in a foreign private issuer's securities and, in circumstances where the proposed issuer-oriented criteria also are met, deregistration should be permitted. However, as discussed above, we recognize that, in setting these benchmarks, the Commission may desire to err on the side of caution. If the Commission were concerned that the interests of retail and small institutional investors in a foreign private issuer's securities might be too high to be properly characterized as insignificant under these proposed benchmarks, a possible alternative would be to combine our suggested new Benchmark 3 and our new Benchmark 4 and require that a foreign private issuer, in order to be able to deregister, have (1) a non-QIB U.S. shareholding of 5% or less *and* (2) fewer than 500 non-QIB U.S. shareholders.[7]

The determination whether an investor is a QIB should be made after applying the "look-through" rules proposed by the Commission so that a non-QIB beneficial owner that holds its securities through a custodian which is a QIB would not be excluded. Moreover, QIBs would be excluded only from the numerator, but not the denominator, of the percentage interest test because the purpose of the exclusion would be to determine the percentage of a foreign private issuer's total investors accounted for by U.S. retail and small institutional investors.

As discussed above, excluding QIBs would be consistent with the principles underlying the Commission's general approach to investor protection as reflected in Rule 144A. Aligning the conditions for exiting the Exchange Act reporting system with the requirements of Rule 144A would put foreign private issuers that no longer have a U.S. retail and small institutional investor base (although at some previous point they conducted a public offering in the United States or for other reasons had a significant number of U.S. retail and small institutional investors) on the same footing as issuers that initially offered and sold their securities in the United States only to QIBs.

III. Comments Regarding the Operation of Rule 12g3-2

In this section, we comment on proposed new Rule 12g3-2(e) and also respond to the Commission's request for comments on the operation of Rule 12g3-2 more generally.

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[7] In that event, the fourth benchmark requiring fewer than 500 U.S. shareholders worldwide or fewer than 500 U.S. shareholders resident in the United States could be retained but without excluding QIBs.

1. Comments on proposed Rule 12g3-2(e)

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 receive the Rule 12g3-2(b) exemption immediately upon effectiveness of its Form 15F.

Exception to Website Publication Requirement If Unlawful. We also 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, and 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 where the posting of materials on an issuer's website is prohibited by the securities laws of the issuer's home jurisdiction. For example, it may be that these laws 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 foreign private issuers to, for example, conduct a rights offering in their 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 older than three years. The three-year limitation would correspond to the number of years for which foreign private issuers are required to provide information about their business 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 of 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 currently is. It would also be consistent with comity principles.

2. Additional comments on Rule 12g3-2

To ensure consistency between the exemption from the Exchange Act registration and reporting requirements provided by Rule 12g3-2(a) and proposed Rule 12h-6, we would suggest that the Commission conform Rule 12g3-2(a) to the final version of Rule 12h-6.

In addition, we would suggest that all foreign private issuers, not just those deregistering under proposed Rule 12h-6, should be permitted to publish their home country materials on their corporate website as an alternative to furnishing those materials to the Commission in paper format. Because materials furnished to the Commission under Rule 12g3-2(b) are currently available only through the Commission's public reference facilities but are not published via the EDGAR system, the current regime is significantly less effective in conveying information about foreign private issuers to U.S. investors than a rule providing for the posting of this information on an Internet website.

We do not share the Commission's concern that requiring issuers to publish home country materials electronically instead of furnishing them to the Commission in paper format would make it more difficult for the Commission to police compliance with this requirement. As an additional safeguard the Commission could require issuers to notify it of the location on the issuer's website where these materials are posted.

For the avoidance of doubt, we believe that foreign private issuers not subject to proposed Rule 12g3-2(e) should not be required to comply with the translation requirements associated with that rule. Instead, they should continue to be permitted to furnish English summaries of press releases and all other communications or materials distributed directly to holders of securities and also should not be required to furnish other documents, unless they have prepared English translations, versions, or summaries of these documents.

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We appreciate the opportunity to comment to the Commission on the proposed rule, and would be pleased to discuss any questions the Commission may have with respect to this letter. Any questions about this letter may be directed to John T. Bostelman (212-558-3840) or Jay Clayton (212-558-3445) in our New York office and David F. Morrison (+49 69 4272-5551) in our Frankfurt office.

Very truly yours,

Sullivan & Cromwell LLP

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(General Counsel)

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Annex A

I. Rule 12g3-2

1. Rule 12g3-2(d)(1) Rule 12g3-2(d)(2)

- The scope of Rule 12g3-2(d)(2) should be aligned with that of Rule 12g3-2(d)(1). Rule 12g3-2(d)(2) makes the exemption of Rule 12g3-2(b) unavailable for securities of a foreign private issuer issued in connection with the acquisition of a reporting issuer. Whereas the restrictions of Rule 12g3-2(d)(1) cease to apply 18 months after a foreign private issuer has ceased to be a reporting company, Rule 12g3-2(d)(2) contains no such limitation. Similarly, as currently proposed, only Rule 12g3-2(d)(1), but not Rule 12g3-2(d)(2), would be subject to the carve-out of Rule 12g3-2(e). We believe that Rule 12g3-2(d)(1) and Rule 12g3-2(d)(2) should be consistent. In other words, a foreign private issuer's ability to rely on Rule 12g3-2(b) should not depend on whether it became a reporting company because it succeeded to an issuer that had a reporting obligation or whether it became subject to the Exchange Act reporting system for some other reason. Therefore, we suggest that Rule 12g3-2(d)(2) should be made subject to the same 18-month limitation that applies in the context of Rule 12g3-2(d)(1). In addition, we propose that the final rules should include the Rule 12g3-2(e) carve-out in both Rule 12g3-2(d)(1) and Rule 12g3-2(d)(2) so that all foreign private issuers that have filed a Form 15F, including successor issuers, are able to rely on the Rule 12g3-2(b) exemption immediately upon effectiveness of the Form 15F.

2. Rule 12g3-2(e)

- Rule 12g3-2(e) appears to apply only if the Form 15F has been filed in respect of *equity* securities. Thus, an issuer that has a duty to file reports under Section 15(d) of the Exchange Act with respect to *debt* securities and terminates that reporting obligation would not be able to avail itself of the Rule 12g3-2(b) exemption immediately upon effectiveness of its Form 15F but would have to wait for a period of 18 months before it could take advantage of this exemption. If, at the end of a fiscal year falling within that 18-month period, the issuer determined that there were more than 300 U.S. resident holders of its equity securities, it could find itself forced to re-register under Section 12(g). We believe the Rule 12g3-2(b) exemption should be available immediately, regardless of whether the securities regarding which the Form 15F has been filed are equity or debt.

II. Proposed Rule 12h-6

1. Rule 12h-6(a)(2)(i)

- Rule 12h-6 should include a definition of the term "employee". Form S-8 defines the term "employee" as "any employee, director, general partner, trustee (where the registrant is a business trust), officer, or consultant or advisor". We would suggest that the same definition be adopted for Rule 12h-6.

- The exemption from the one-year dormancy requirement for securities offered and sold to an issuer's employees should also cover reoffers and resales of such securities pursuant to an effective registration statement on Form S-8.

- Where a foreign private issuer has offered securities to employees pursuant to a registration statement on Form S-8, and that issuer subsequently deregisters pursuant to proposed Rule 12h-6, we believe Rule 701 under the Securities Act should be freely available to exempt (i) continuous offerings of securities pursuant to options, warrants or subscription rights issued prior to deregistration and (ii) sales of securities offered to employees prior to deregistration. As it currently stands, Rule 701 would require a foreign private issuer to provide U.S. GAAP-reconciled financials if it wishes to sell more than $5 million of securities in any 12-month period in reliance on the rule. We do not believe that the requirement to provide U.S. GAAP-reconciled financials contributes meaningfully to investor protection where a foreign private issuer has previously issued options, warrants or subscription rights, or otherwise offered securities, to employees pursuant to a registration statement on Form S-8. We believe the exemption provided by Rule 701 should be available in such circumstances without restriction as to amount, even if the foreign private issuer ceases to provide U.S. GAAP-reconciled financials.

2. Rule 12h-6(a)(2)(ii)

- Given the international nature of the debt markets, unregistered offerings of debt securities should generally be exempt from the one-year dormancy requirement.

- If the Commission is unwilling to exempt all unregistered debt offerings from the one-year dormancy requirement, the final rules should at least exempt "long-dated" commercial paper, as many foreign private issuers have established commercial paper programs under Section 4(2) of the

Securities Act that permit the issuance of debt securities with a maturity of up to 18 months.

3. Rule 12h-6(a)(4)(i)(B)

- If the Commission were to retain the proposed distinction between WKSIs and non-WKSIs, the final rules should permit Canadian issuers filing periodic reports with the Commission under the Multijurisdictional Disclosure System ("MJDS") to deregister under the WKSI test. We believe MJDS issuers should be treated the same way as other foreign private issuers.

4. Rule 12h-6(a)(4)(i)(B)
Rule 12h-6(a)(4)(ii)
Rule 12h-6(a)(5)

- The final rules should define the term "voting and non-voting equity securities" so that issuers know exactly which securities should be taken into account in calculating the relevant percentages. The reference in Rule 12h-6(d)(3) to Rule 3a11-11 under the Exchange Act does not provide sufficient clarity. For example, it is unclear how convertible securities, options and warrants should be treated for purposes of the calculation.

- In addition, Rule 12h-6(a) appears to contemplate that all of an issuer's voting and non-voting equity securities will be aggregated as a single class for purposes of calculating the relevant percentages. If this is the intention, we recommend that this be made explicit.

5. Rule 12h-6(a)(6)

- The benchmark imposing a limit on the number of a foreign private issuer's security holders should be amended to omit the phrase "If the foreign private issuer does not meet the requirements of paragraph (a)(4) or (a)(5) of this section". We believe that a foreign private issuer seeking to rely on this benchmark should be able to do without first having to establish that it does not meet the requirements of the benchmarks set forth in Rule 12h-6(a)(4) and Rule 12h-6(a)(5).

6. Rule 12h-6(d)(1)

- Under Rule 12h-6, a foreign private issuer's U.S. shareholding percentages can vary significantly, depending on whether one or more of its shareholders are considered be affiliates and therefore excluded from the

calculations. In addition, in various non-U.S. jurisdictions, it is common for institutional investors and sovereigns to hold significant minority stakes in public companies. Accordingly, it is important for an issuer to be able to determine with a high degree of certainty which of its shareholders should be counted as affiliates and the threshold for affiliate status should not be set too low. Given the uncertainty in this area and the differences in ownership structures of issuers in many non-U.S. jurisdictions, we urge the Commission to provide additional guidance. Specifically, we would suggest that the Commission clarify that, *for purposes of Rule 12h-6 only*, a shareholder that owns 20% or less of an issuer's outstanding voting equity securities and that does not otherwise have the right to control the election or appointment of 50% or more of the issuer's board of directors (or equivalent governance body) should not be considered an affiliate.

7. Rule 12h-6(d)(6)

- The interplay between the definitions of the term "home country", which under Form 20-F can include more than one country,[8] and the term "primary trading market", which refers to a "single foreign country", should be clarified. We suggest that where the jurisdiction in which a foreign private issuer is organized is different from the jurisdiction where it has its principal listing, the issuer's "home country" should be the listing jurisdiction.

- The definition of the term "primary trading market" should be revised to deal with situations where a foreign private issuer's securities are traded on or through the facilities of securities markets of more than one country. In our view, it should be possible for an issuer to satisfy the home-country listing requirement where the trading of more than 55% of its securities is spread among no more than two different countries other than the United States.

8. Rule 12h-6(d)(9)

- If the Commission were to retain the proposed distinction between WKSIs and non-WKSIs, the final rules should clarify how the definition of the term "well-known seasoned issuers" works with respect to a foreign private issuer that satisfies the conditions for well-known seasoned issuer status and

[8] Section F of Form 20-F defines the term "home country" as "the jurisdiction in which the company is legally organized, incorporated or established and, if different, the jurisdiction where it has its principal listing".

the associated criteria for deregistration as of the determination date but subsequently loses that status – while Item 4 of Form 15F refers to the determination date provided in Rule 12h-6(d)(9), it also requires a statement as to "whether [the foreign private issuer *is*] a well-known seasoned issuer", suggesting that an issuer would have to maintain well-known seasoned issuer status between the determination date and the effective date of the Form 15F.

9. Section D of Form 15F

- A foreign private issuer whose Form 15F is withdrawn or denied should have 90 days after the withdrawal or denial to file or furnish all outstanding periodic reports with the Commission. The 60-day period proposed by the Commission may not be sufficient in all cases to permit an issuer that has determined in good faith that it satisfies the conditions for deregistration as of the relevant determination date to prepare and file the required reports.