ORGANIZATION FOR INTERNATIONAL INVESTMENT
INTERNATIONAL BUSINESS INVESTING IN AMERICA

April 23, 2008

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

FILE NO. S7-04-08; COMMISSION RELEASE NO. 34-57350; EXEMPTION FROM REGISTRATION UNDER SECTION 12(G) OF THE SECURITIES EXCHANGE ACT OF 1934 FOR FOREIGN PRIVATE ISSUERS

Ladies and Gentlemen:

This letter is submitted on behalf of the Organization for International Investment ("*OFII*") and comments on a proposal by the Securities and Exchange Commission (the "*Commission*") to amend Rule 12g3-2(b) (the "*Proposed Rule*") under the Securities Exchange Act of 1934 (the "*Exchange Act*"). Because OFII believes the proposed rule changes will, on balance, make it easier for foreign private issuers ("*FPIs*") to claim the exemption and thereby access the U.S. capital markets, OFII strongly supports the proposal. OFII also believes the Proposed Rule will expand the investment choices available to U.S. investors and allow them to diversify their investment portfolio in an increasingly global market. However, OFII does have some concerns with certain elements of the Proposed Rule, as set forth herein.

About OFII

OFII is an association representing the interests of over 150 U.S. subsidiaries of companies based abroad. Most of our members' parent companies are publicly traded companies, some of which are FPIs under Commission rules. These parent company FPIs file annual reports on Form 20-F, as well as other reports with, and make submissions to, the Commission. A list of the members of OFII is attached as Annex A to this letter.

OFII's Comments on the Proposed Rule

We strongly support the Proposed Rule as we believe it will help facilitate greater access to the U.S. capital markets by FPIs and expand investment choices available to U.S. investors and thereby allow investors to diversify their investment portfolio in an increasingly global market. We concur in the Commission's view that these rule changes will expand the universe of FPIs eligible to claim the Rule 12g3-2(b) exemption, thereby creating additional capital-raising opportunities for such companies. In particular, we strongly support both the move away

from an application-based process to a self-operating exemption, as well as the availability of the Rule 12g3-2(b) exemption for those companies that have recently exited the reporting regime pursuant to Rule 12h-6 or another method. At the same time, OFII has a number of comments on certain aspects of the Proposed Rule where we believe greater clarity and/or further flexibility would be desirable.

Our comments are set forth below. The first set of comments express our support for a number of elements of the Proposed Rule. The second set of comments articulate certain concerns and suggested clarifications and refinements with respect to a number of aspects of the Proposed Rule.

OFII Strongly Supports a Number of Aspects of the Proposed Rule

A. Timing of Eligibility for the Exemption

Under the Proposed Rule, a FPI would be permitted to claim an exemption under Rule 12g3-2(b) whenever the applicable eligibility criteria are satisfied. In addition, a FPI that has suspended its Exchange Act reporting obligations upon the filing of Form 15 or Form 15F would satisfy the non-reporting requirement immediately upon the effectiveness of the deregistration, without regard to whether the issuer had had Exchange Act reporting obligations over the previous 18 months. Finally, under the Proposed Rule a FPI that suspended its reporting obligations pursuant to Section 15(d) would satisfy the non-reporting condition immediately upon its determination that it had fewer than 300 shareholders as of the beginning of its most recent fiscal year.

OFII strongly supports each of these elements of the Proposed Rule and believes they will help facilitate greater use of the Rule 12g3-2(b) exemption by FPIs by making it easier to satisfy the eligibility criteria. These changes also loosen the somewhat artificial constraints of the current rule. Once a company has satisfied the Commission's current requirements to deregister, for example, there is no compelling reason to make it wait to take advantage of the exemption. We also believe that these proposals will promote the continued participation in the U.S. capital markets by non-reporting FPIs.

B. Transition Relief

We believe that three years is an adequate transition period for issuers that currently claim the Rule 12g3-2(b) exemption to become eligible under the revised criteria. We also believe that three months is an adequate transition period for the Commission to continue to process paper submissions following the effectiveness of the rule amendments.

OFII's Comments on Other Aspects of the Proposed Rule

C. Duration of Exemption

Under the Proposed Rule, the Rule 12g3-2(b) exemption would remain in effect for as long as the FPI continues to satisfy the four eligibility criteria set forth in the Proposed Rule, *i.e.*,(i) the FPI must satisfy the electronic publication condition, (ii) the subject class of securities must continue to be listed on one or more exchanges in the FPI's primary market, (iii) the

average daily trading volume of the subject class of securities in the U.S. must be less than 20% of its worldwide trading volume, and (iv) the issuer shall not register a class of securities under Section 12 of the Exchange Act or incur reporting obligations under Section 15(d) of the Exchange Act. We believe these criteria strike a reasonable balance between providing investors with access to non-U.S. disclosure documents and not imposing too heavy a burden upon FPIs. Therefore, we generally support the Commission's approach.

However, we have significant concerns that a FPI relying on Rule 12g3-2(b) could unexpectedly find itself out of compliance with the rule's conditions, possibly due to events outside of its control. A FPI that falls out of compliance could, absent a transition period or other explicit relief in the rule, immediately become subject to the registration requirements of the Exchange Act, which could give rise to very substantial costs, burdens, legal exposure, and operational disruptions. Therefore, we strongly urge the Commission to incorporate some relief into the rule to address such circumstances.

Specifically, we suggest that the rule provide that whenever a company fails to meet one of the four conditions of the rule, it should have at least 12 months to either re-establish compliance with the applicable condition or register under Section 12 of the Exchange Act. The length of this transition period should allow sufficient time to the FPI to alter its operational processes and absorb the costs associated with becoming an SEC registrant, and should properly recognize the substantial burdens of registration with the Commission that will be incurred by a FPI that had not planned or expected to become an SEC registrant. The Commission has recognized the significance of these burdens by proposing a three-year transition period for companies currently relying on the Rule 12g3-2(b) exemption and that would not be eligible for the exemption under the Proposed Rule. Compared with such a three-year transition period, a 12-month transition period would appear to be a reasonable and appropriate accommodation for FPIs that find themselves out of compliance with the rule's conditions. Such companies should be given a substantial period of time to take the necessary actions and prepare itself to become an SEC registrant.

In addition, we would suggest that where a FPI's stock is de-listed on a foreign exchange, the company should be allowed to continue to rely on the exemption during the period it is seeking to be re-listed, as long as it is making such efforts in good faith, has a reasonable basis for believing it will be re-listed, and continues to comply with the other criteria for claiming the Rule 12g3-2(b) exemption.

D. The 20% Trading Volume Threshold

Under the Proposed Rule, a FPI would be eligible to claim the Rule 12g3-2(b) exemption regardless of the number of its U.S. holders if the average daily trading volume of the subject class of securities in the United States for the issuer's most recently completed fiscal year was no greater than 20% of the average daily trading volume of that class of securities on a worldwide basis for the same period. In addition, under the Proposed Rule a FPI that has satisfied the more stringent 5% trading volume test under Rule 12h-6 need not recalculate its relative U.S. trading volume for the previous 12 months for the purpose of determining whether it may claim the Rule 12g3-2(b) exemption.

OFII endorses the general approach set forth in the Proposed Rule and believes it is appropriate to use trading volume as a criteria for determining whether a non-U.S. company has an insufficient enough presence in the United States to claim the Rule 12g3-2(b) exemption. Further, OFII believes a test that considers U.S. trading volume (set at 20% or a higher level if appropriate) should provide more flexibility to FPIs seeking to satisfy the Rule 12g3-2(b) exemption criteria than the existing test based on number of shareholders. This will, in turn, promote greater access to U.S. capital markets by non-U.S. companies and expand investment choices available to U.S. investors in an increasingly global market. We also believe that one year is an appropriate time period for calculating trading volume.

However, OFII urges the Commission to give further consideration and study to the appropriate threshold for the trading volume test. It does not appear from the proposing release that the proposed 20% threshold was chosen based on an analysis of the number of additional FPIs likely to be able to claim the Rule 12g3-2(b) exemption. While the trading volume approach is an improvement over the existing rule, it is not clear to us why the trading volume threshold shouldn't be set higher than 20%, such as, for example, at 25% or 30% of worldwide volume. To ensure that the rule provides maximum flexibility and benefits to FPIs to access the U.S. capital markets, without unduly exempting companies having a meaningful shareholder presence in the United States from SEC registration, OFII urges the Commission to conduct a thorough analysis of the number of additional FPIs likely to be able to claim the exemption at different trading volume thresholds above 20%, with a view toward setting the threshold at the optimal level to maximize access by FPIs to the U.S. capital markets.

Further, OFII believes that if the trading volume threshold is set too low, it may discourage successful foreign companies that have smaller or less liquid home trading markets from considering the U.S. capital markets for their securities. In setting the trading volume at the appropriate level, OFII urges the Commission to take adequate account of successful foreign companies with securities that may be thinly traded in their home country markets, as may be the case in countries such as Brazil, South Africa or India, where the history of securities exchanges and trading markets is not as rich as in the United States, Europe and other countries with highly developed trading markets. The trading volume threshold should not unduly exclude companies from countries that may lack robust securities markets. OFII urges the Commission to carefully weigh the circumstances of such companies in setting the trading volume threshold at the appropriate level to promote greater access to U.S. capital markets by non-U.S. companies and expand investment choices available to U.S. investors.

E. Criteria Demonstrating Lack of U.S. Market Presence

OFII believes sub-clause (3) of the Proposed Rule (i.e. Rule 12g3-2(b)(3)) should have one additional, alternative criteria. In order to claim the Rule 12g3-2(b) exemption, we believe it would be appropriate to allow companies to satisfy one of three alternative criteria that demonstrate a lack of U.S. market presence, i.e.:

(i) the trading volume test (as proposed, whether at 20% or a higher appropriate threshold),

(ii) termination of registration under Rule 12h-6 (as proposed), or

(iii) having fewer than 300 shareholders in the United States (not proposed by the Commission, but suggested by OFII as a third alternative criteria).

We believe the third alternative criteria (fewer than 300 holders in the United States) will provide added flexibility and allow more companies to claim the Rule 12g3-2(b) exemption, without harming investors. This added flexibility is necessary, we believe, to address a situation where a foreign company with fewer than 300 U.S. shareholders wishes to establish an ADR facility for its shares. ADRs must be registered on Form F-6, which requires that an issuer of deposited securities either be an SEC registrant or eligible for the Rule 12g3-2(b) exemption. If a company has fewer than 300 shareholders in the United States, but its U.S. trading volume exceeds 20% of its worldwide trading volume, as might be the case for smaller or newly formed companies or companies from countries with less developed or less robust trading markets, we believe Rule 12g3-2(b) should be available to such company. This would be consistent with Rule 12g3-2(a), of course, and would maximize the opportunity for foreign companies to make use of the Rule 12g3-2(b) exemption in a manner consistent with the policy behind the exemption.

F. Use of Rule 12g3-2(b) for Equity Securities by Issuers With Registered Debt

Under the Proposed Rule (as under the current rule), a FPI with an effective registration statement filed with the Commission relating to a class of its debt securities would be ineligible to claim an exemption under Rule 12g3-2(b) for a class of its equity securities. OFII urges the Commission to reconsider this provision and to allow a FPI that has a registered class of debt securities to claim an exemption under Rule 12g3-2(b) for a class of its equity securities, provided that the other criteria set forth in the Proposed Rule are satisfied.

We believe that such action would provide FPIs with greater flexibility to raise capital in different forms in the United States. Specifically, a FPI could undertake a registered debt offering in the United States (or a private debt offering with contractual obligations to effect a registered exchange offer) while at the same time maintaining a Rule 12g3-2(b) exemption for its equity securities. By affording such flexibility to FPIs in their capital raising efforts, this would make the United States a more attractive destination for FPIs seeking to place their debt.

In addition, allowing use of the Rule 12g3-2(b) exemption by FPIs with registered debt securities would give U.S. investors a broader range of potential investment opportunities without any appreciable increase in exposure to risks. Holders of a FPI's registered debt securities would suffer no injury if the FPI were to rely on the Rule 12g3-2(b) exemption with respect to a separate class of its equity securities. And holders of an FPI's equity securities would arguably be better off if a class of debt securities were registered because they would then have access to both the electronic disclosures published online with respect to the equity securities, and the periodic reports filed with the Commission with respect to the debt securities.

Additionally, because their registered debt is typically held by fewer than 300 persons, FPIs are often eligible to suspend their reporting obligations for such registered debt after one year. Under the Proposed Rule, an issuer becomes eligible to claim the Rule 12g3-2(b) exemption upon the suspension of its reporting obligations. Thus, under the Proposed Rule, a FPI that registers a class of its debt securities would incur the expense of registering a class of its

equity securities otherwise covered by the Rule 12g3-2(b) exemption for a single year, during which time the holders of these equity securities are least in need of additional disclosure, *i.e.* when the company has concurrent reporting obligations arising out of its registered debt. Faced with the prospect of registering, and then deregistering, its equity securities as a cost of registering a class of debt securities, a FPI may choose simply to place its debt outside the United States.

G. Definition of "Primary Trading Market"

Under the Proposed Rule, an issuer would be required to maintain a listing of its securities on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the "primary trading market" for these securities. The "primary trading market" is defined in the Proposed Rule to mean that at least 55% of the trading in the issuer's subject class of securities took place in, on or through the facilities of a securities market or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year.

While OFII endorses the spirit of flexibility reflected in the Proposed Rule to permit a FPI to satisfy the "primary market" requirement through stock trading activity in more than one market, we believe this aspect of the Proposed Rule should be made even more flexible to accommodate a larger number of FPIs. This requirement should be further relaxed so that it more fully reflects the growing globalization of capital markets and the increasing prevalence of dual- and multiple-listings. These trends are likely to continue, and as companies conduct their capital-raising activities in multiple global markets, we strongly urge greater flexibility in defining the "primary market."

There are a number of approaches the Commission could consider to further relax the "primary market" definition in the Proposed Rule. We would suggest, as one example, that companies with dual- or multiple-listings that do not meet the 55% test could be permitted to "declare" their primary market, as long as such market meets specified conditions, such as, for example, (i) specified market or legal characteristics intended to ensure that the market is a bona fide, regulated securities market, (ii) trading volume in the company's stock of at least 25% of worldwide volume, and/or (iii) trading volume that exceeds the trading volume of the stock in any other market in the world. Such an approach would provide FPIs with greater flexibility to raise capital abroad without appreciable impact on holders of their securities in the United States.

H. Requirements Relating to Electronic Publication

Although OFII is generally supportive of the Proposed Rule as it relates to electronic publication of specified information, OFII believes that FPIs should have maximum flexibility to fulfill their disclosure obligations under the Proposed Rule, as long as there is a reasonable basis for concluding that U.S. investors will have easy access to the information. Thus, we support the suggestion in the Commission's proposing release that would permit a FPI to publish its non-U.S. disclosure documents on an electronic delivery system located outside of the FPI's primary trading market and, on the other hand, oppose a rule that would require all documents to be published exclusively on a FPI's website rather than on an electronic information delivery system. Alternatively, we could support a rule that requires a FPI to post a notice on its website

directing readers to the relevant electronic delivery system. This is not an onerous requirement and would facilitate access by investors to the relevant documents.

OFII strongly opposes any element of the Proposed Rule that would mandate that the jurisdictional scope of the required non-U.S. disclosure documents be expanded to include all documents that the issuer has made or is required to make public under the law of any jurisdiction in its primary trading market. This would go beyond the current requirements under Rule 12g3-2(b) and there does not appear to be any rational basis, rooted in investor protection concerns, for such an expansion. We believe that the scope of disclosures under the Proposed Rule are sufficient to provide the necessary level of protection to U.S. investors.

OFII believes that FPIs should retain discretion to publish the required information on their websites or on other electronic information delivery systems. OFII, however, is not in favor of permitting FPIs to publish their non-U.S. disclosure documents on the Commission's EDGAR system, as there is a significant risk that investors could be confused and believe that the FPI is actually subject to the SEC's reporting requirements and disclosure regime. If, however, the final rule provides that electronic publication on EDGAR is permitted, then we urge the Commission to revise the Proposed Rule to incorporate some variation on the disclaimer set forth in current Rule 12g3-2(b)(5) stating that the furnishing of any information or document on EDGAR shall not constitute an admission for any purpose that the publishing FPI is subject to the Exchange Act.

Finally, the Commission solicited comment on the question of whether, as a condition of claiming or maintaining the Rule 12g3-2(b) exemption, a FPI should be required to publish electronically, and to update as necessary, (i) a list of its non-U.S. disclosure requirements, or (ii) information with respect to its eligibility for the exemption (e.g., its U.S. trading volume). OFII opposes this proposal and believes that, if adopted, it would impose a burden on FPIs that significantly outweighs any benefits that would accrue to investors. The information that should be relayed to investors is the actual financial and other information about the company, not information about foreign regulatory requirements or U.S. trading volume.

I. English-Language Translation Requirement

The Commission's proposing release asked whether the Proposed Rule should contain guidance from the Commission as to whether and when an issuer may provide an English summary instead of a line-by-line English translation of a required non-U.S. disclosure document. OFII supports this suggestion and believes FPIs would welcome such guidance. We note that current Rule 12g3-2(b)(4) offers some limited guidance as to when FPIs may provide English language summaries in place of full English translations. Using this language as a starting point, we would encourage the Commission to provide additional guidance as to (i) when it is appropriate for FPIs to provide English-language summaries instead of full English translations, (ii) whether there are certain documents for which full English translations should always be provided, and (iii) whether there are certain documents for which summaries may typically be appropriate. Where the disclosure document in question is lengthy and the cost of preparing an English language translation would be significant, we believe greater flexibility should be afforded to FPIs to provide a summary in place of a full translation.

Conclusion

As explained above, because OFII believes the Proposed Rule will, on balance, make it easier for FPIs to claim the exemption and thereby access the U.S. capital markets, OFII strongly supports the Proposed Rule. However, OFII does have some concerns with certain elements of the Proposed Rule, as set forth herein.

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We would be pleased to answer any questions you might have regarding our comments.

Respectfully submitted,

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cc: Securities and Exchange Commission
Hon. Christopher Cox, Chairman
Hon. Paul S. Atkins, Commissioner
Hon. Kathleen L. Casey, Commissioner

Securities and Exchange Commission – Division of Corporation Finance
Mr. John W. White

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