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April 24, 2008

File No. S7-04-08
SEC Release No. 34-57350

Ladies and Gentlemen:

We write with respect to the proposal by the Securities and Exchange Commission (the "Commission") set forth in Release No. 34-57350 (the "Release") to amend Rule 12g3-2(b), which exempts a foreign private issuer (an "FPI") from having to register a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") based on the submission to the Commission of certain information published outside the United States.

We support the Commission's decision to modernize Rule 12g3-2(b), and agree with the Commission's proposal to eliminate paper submission requirements and to grant the exemption automatically. However, we disagree with the proposed requirement for a foreign listing and the proposed limit on U.S. average daily trading volume ("ADTV") in relation to worldwide ADTV, and we respectfully suggest that adoption of these proposals would be a significant step backward in the Commission's otherwise laudable efforts to embrace the globalization of securities markets, acknowledge the increasingly global perspective of U.S. investors and recognize the improvement of foreign disclosure requirements and standards. We believe that, because these proposals would subject FPIs that have not sought a public market for their securities in the U.S. to registration under Section 12(g) of the Exchange Act, they are inconsistent with the policy rationale underlying the current Rule 12g3-2(b) and would create unacceptable uncertainty for FPIs, potentially leading them to erect barriers to U.S. ownership of, or trading in, their securities. Moreover, given recent and continuing improvement of disclosure requirements under the laws and regulations of many foreign jurisdictions, we believe that the proposed requirements are unnecessary for the protection of U.S. investors and are contrary to recent Commission initiatives aimed at implementing mutual recognition and encouraging FPIs to participate in the U.S. markets. In our view,

the Commission should continue to allow FPIs that have not sought a public market for their securities in the U.S. to avoid Section 12(g) registration by making home country information available to investors.[1]

The policy rationale underlying current Rule 12g3-2(b) remains compelling.

At the time of its adoption in 1967, the Commission recognized that an FPI that had taken no action to avail itself of the U.S. public securities markets should not be subject to the rigors of Exchange Act registration and reporting.[2] At the time, the Commission noted that improved disclosure and reporting requirements in many of the countries whose issuers have securities traded in the U.S. warranted the adoption of the exemption. Since that time, Exchange Act reporting has evolved and become more complex, and the financial and non-financial reporting requirements of other jurisdictions have continued to improve. The European Union, for example, has adopted several Directives that enhance disclosure requirements for European issuers.[3] In addition, the use of International Financial Reporting Standards has become increasingly widespread, improving consistency of financial reporting; approximately 100 countries now require or allow the use of IFRS.[4]

In an era where the Commission is implementing mutual recognition for high-quality non-U.S. regulatory regimes,[5] we believe that the policy rationale underlying current Rule 12g3-2(b) is increasingly sound, and that the proposed revision of Rule 12g3-2(b) is a step in the wrong direction. The proposal also seems at odds with the

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[1] As further discussed below, in the event the Commission determines that home country information may be insufficient in certain cases, we suggest that the Commission specify a minimum information requirement, in lieu of Section 12(g) registration. This approach would ensure that FPIs that use the exemption will make available minimum and consistent disclosure for investors (which would not be the case with a foreign listing requirement) but would continue to allow them to avoid the burdens of Exchange Act registration, consistent with the underlying Rule 12g3-2(b) policy rationale.

[2] See Release No. 34-8066 (April 28, 1967): "The Commission has determined that the continuing improvement in the quality of the information now being made public by foreign issuers, together with the improvement which may reasonably be expected to result from recent changes and current proposals or change in relevant requirements, warrants the provision of an exemption from Section 12(g) for those foreign companies which have not sought a public market for their securities in the United States through public offering or stock exchange listing, and which furnish the Commission certain information which they publish abroad pursuant to law or stock exchange requirement or which they send to their security holders."

[3] See Directive 2004/109/EC (known as the "Transparency Directive", which establishes the general principles for transparency requirements) and Directive 2003/71/EC (known as the "Prospectus Directive", which sets out the initial disclosure obligations for issuers of securities that are offered to the public or admitted to trading on a regulated market in the European Union).

[4] See Release Nos. 33-8879 and 34-57026 (March 4, 2008).

[5] See the Commission's Press Release No. 2008-49 (March 24, 2008).

Commission's recent actions aimed at encouraging FPIs to participate in the U.S. capital markets. By creating a substantial incentive for FPIs to limit U.S. shareholding and trading in their equity securities, the proposed rule would undermine the Commission's initiatives with respect to termination of Exchange Act registration, inclusion of U.S. shareholders in rights offerings and inclusion of U.S. shareholders in cross-border business combinations.

It is also notable, in our view, that the added costs and burdens of Exchange Act registration are being proposed notwithstanding the absence of investor or other public demand for added regulation with regard to FPIs, and the absence of any indication, that we are aware of, that such additional regulation is necessary.

While foreign listing and ADTV requirements may be appropriate in the context of Rule 12h-6, they are not appropriate for Rule 12g3-2(b).

As noted in the Release, the Commission has based the proposed amendment of Rule 12g3-2(b) on the same underlying factors that led to the re-evaluation and revision of the rules governing termination by FPIs of Exchange Act registration and reporting obligations.[6] As a result, the Commission used the Rule 12h-6 foreign listing requirement and ADTV test as "a model" for the proposed amendment.[7] While we believe that such an approach is reasonable in the context of de-registration, where FPIs have previously sought access to the U.S. public markets, whether through a listing and Exchange Act registration or through an offering and registration under the Securities Act of 1933 (the "Securities Act"), we do not believe that this approach is reasonable for FPIs that have not taken any such action.

The costs and burdens that accompany Exchange Act registration are not insubstantial. They include the costs and burdens associated with satisfying the financial reporting and other disclosure and reporting requirements of the Exchange Act, compliance with the corporate governance and other requirements of the Sarbanes-Oxley Act, compliance with the Foreign Corrupt Practices Act, and exposure to potential liabilities under the civil liability and anti-fraud provisions of the Exchange Act, among other things. Today, issuers consider carefully their ability to satisfy these requirements, and the related costs and other burdens, and balance those considerations against the expected benefits of a U.S. listing or registered offering, before making the decision to enter the U.S. public markets. Under the Commission's proposal, however, these costs and burdens would be imposed on FPIs primarily on the basis of an element outside their control: the U.S. trading volume of their securities. They would also be imposed upon FPIs that today are private companies and do not maintain any listing, if their share ownership exceeds the Section 12(g) thresholds.

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[6] See page 13 of the Release.

[7] See J. W. White, "Corporation Finance in 2008 – International Initiatives", Remarks Before PLI's Seventh Annual Institute on Securities Regulation in Europe (January 14, 2008).

This is an entirely different proposition from imposing a foreign listing or ADTV requirement on an FPI that has already elected to enter the U.S. public markets and the U.S. public reporting regime, and is now seeking to exit. That FPI has, for at least twelve months, incurred the costs associated with Exchange Act registration and its ongoing requirements. U.S. investors have, in many cases, relied upon its publicly available Exchange Act reports in making investment decisions, and may have expected such reporting to continue. Therefore, it is reasonable for the Commission to adopt rules (such as Rule 12h-6) that ensure that there is a suitable substitute disclosure regime and no substantial relative U.S. ADTV for those FPIs that seek to exit Exchange Act registration. None of the foregoing, however, is true with respect to FPIs that the Commission now proposes to force to register under the Exchange Act solely as a result of their U.S. ADTV or absence of a foreign listing, and we do not believe that this is a fair or necessary result.

Adoption of the proposed Rule could have a number of unintended, detrimental effects.

The Commission should recognize that adoption of the proposed rule will likely be viewed by many FPIs as yet another example of the U.S. "changing the rules after the game has begun". Over the last 40 years, many FPIs have sponsored ADR programs, made efforts to meet with and educate U.S. investors or issued equity securities to U.S. persons in transactions that were exempt from Securities Act registration, in each case with the understanding that the exemption from Exchange Act registration provided by Rule 12g3-2(b) would continue to be available. These FPIs have used, among other exemptions, Sections 3(a)(10) and 4(2) of the Securities Act, Rules 701, 801 and 802 under the Securities Act and Forms F-8, F-9, F-10 and F-80 under the Securities Act to issue equity securities to U.S. persons without any reason to believe that U.S. trading activity alone could result in required registration under the Exchange Act. The Commission's new Rule 12h-6 was adopted in part in response to concern that the Sarbanes-Oxley Act had "changed the rules" for FPIs that were Exchange Act registrants prior to its adoption. It would be peculiar for the Commission so quickly to adopt an amendment to Rule 12g3-2(b) that would profoundly "change the rules" for FPIs that previously had sought to make investing in their securities easier for U.S. investors or had taken advantage of Commission exemptions to issue equity securities to U.S. persons without triggering Exchange Act registration requirements.

The proposed limit on U.S. ADTV is also troublesome in that it imposes a yearly monitoring obligation on FPIs that rely on the amended Rule 12g3-2(b), and subjects them to significant annual uncertainty as to their status under the Exchange Act. If an FPI fails the ADTV test, it will then be subject to Section 12(g) obligations based upon circumstances that are inherently outside of its control, and could find its status under Section 12(g) to be different from year to year. We believe that many FPIs will find this level of uncertainty, and potential volatility in their Exchange Act status, to be unacceptable. For this reason, we would expect many FPIs to consider the adoption of charter provisions or other strategies that would allow them to eliminate U.S. resident shareholders if necessary in order to maintain U.S. resident ownership below the Rule

12g3-2(a) threshold of 300 holders. Some companies have already adopted such provisions in response to the adoption of the Sarbanes-Oxley Act.[8] These provisions may require U.S. holders to sell their securities on terms that the holders may not view as favorable, and therefore would likely have the intended effect of promoting discrimination against U.S. investors and dissuading U.S. investors from purchasing the relevant FPI's securities. Alternatively, FPIs could take steps to minimize U.S. trading volume in their securities, such as terminating sponsored ADR programs or ceasing to hold meetings with U.S. investors. We do not believe it is in the interests of U.S. investors for the Commission to adopt a rule that will likely have such effects.[9]

The Commission also should give careful consideration to the impact of the proposed amendment on U.S. investment banks. Because many FPIs will likely want to discourage or limit U.S. over-the-counter trading volume in order to maintain the exemption, we expect that an ADTV test will diminish the attractiveness of using U.S.-based investment banks to underwrite or trade an FPI's securities. We believe the Commission should be slow to adopt a proposal that would give FPIs an incentive to direct underwriting to non-U.S. financial institutions (who have a greater capacity to conduct market-making outside the U.S.).

If the Commission nevertheless determines that home country information may be insufficient in certain cases, or that an ADTV limit is required, there are better alternatives than those contemplated by the Release.

We recognize that, if an FPI has not sought a public market for its securities in the U.S. but nevertheless triggers the Section 12(g) shareholder thresholds, the Commission has an interest in ensuring that investors have adequate disclosure concerning that company. Today, that interest is met through the submission of the information prescribed by Rule 12g3-2(b)(1)(i). As described above, the overall quality of non-U.S. disclosure requirements has improved significantly, and we believe the current Rule adequately protects investors and potential investors in these companies. However, if the Commission nevertheless determines that, despite such improvements, home country disclosure is somehow no longer adequate for some or all FPIs that do not maintain a foreign listing or that exceed the proposed ADTV limit, we believe that the Commission should address this perceived shortcoming through means other than Exchange Act registration. Specifically, we recommend that the Commission adopt a specified minimum information requirement for these FPIs but maintain the availability of the exemption.

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[8] See, for example, Reports on Form 6-K submitted to the Commission by ITV plc on March 10, 2005, by O2 plc on September 30, 2005 and by Premier Farnell on February 9, 2005.

[9] While we note that large institutional investors may be able to avoid being affected by these types of provisions by investing through offshore vehicles or affiliates, such approaches will not be as readily available to smaller investors. We also note that, by definition, investments made through foreign broker-dealers are not subject to the protections provided by U.S. broker-dealer regulation.

In addition to preserving the availability of the exemption for these FPIs, the adoption of a specified minimum information requirement would ensure the availability of minimum and consistent information with respect to these FPIs, which would not be the case with a foreign listing requirement. The information requirements of Rule 144 and Rule 144A under the Securities Act, or of Rule 15c2-11 under the Exchange Act, provide examples of disclosure that the Commission has determined are adequate for investor protection in certain circumstances.[10] In our view, a better approach would be to impose any such specified minimum information requirement solely on those FPIs with substantial U.S. investor interest in their securities, as determined by ADTV.[11] However, we believe that the imposition of a minimum information requirement based solely upon a 20% U.S. ADTV test would be too strict. In our view, the Commission should not be exercising jurisdiction over FPIs in this manner based solely on an element that is outside the FPI's control, unless the U.S. market is in fact one of the most significant markets for the FPI's securities. Therefore, we suggest that a minimum information requirement, if adopted based on ADTV, should only be imposed if an FPI's U.S. ADTV exceeds 20% of worldwide ADTV *and* less than 55% of its worldwide ADTV takes place in any two non-U.S. jurisdictions. This approach would be consistent with the definition of "substantial U.S. market interest" contained in Regulation S under the Securities Act (where an FPI must fail both tests in order for there to be substantial U.S. market interest in its securities), and would ensure that the U.S. represents one of the most significant markets for the FPI's securities.

Any such minimum information requirement should be designed to ensure that U.S. investors have access to certain minimum material financial and other information, but should not be overly burdensome and should not be inconsistent with the disclosure required by high-quality non-U.S. disclosure regulations. For example, financial information should not be required more frequently than semi-annually, as is the case with most companies listed in the European Union. We believe that such a regime would preserve the policy rationale underlying the current Rule 12g3-2(b), provide additional disclosure for those FPIs that do not meet the proposed tests, and be highly preferable for the companies in question.

If the Commission determines to adopt an ADTV limit that results in Section 12(g) registration (rather than merely a minimum information requirement), we believe that the proposed limit of 20% of U.S. ADTV in relation to worldwide ADTV is much too low, especially when considered in light of the policy rationale considerations described above. Rather, we suggest that any such test be established at a U.S. ADTV of 50% of worldwide ADTV. We believe that 50% U.S. ADTV is the level at which it is

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[10] See Securities Act Rule 144(c)(2), Securities Act Rule 144A(d)(4) and Exchange Act Rule 15c2-11(a).

[11] In the event that the Commission does adopt a version of amended Rule 12g3-2(b) that includes an ADTV requirement, we support the proposal to require an FPI to test its trading volume once annually with respect to each completed fiscal year.

clear that the U.S. is in fact the most logical place for the FPI's primary disclosure regulation to be imposed.

* * *

We would be happy to discuss any of the above issues further with the Commission. Please feel free to direct any inquiries to Craig F. Arcella, William P. Rogers, Jr., Kris F. Heinzelman, Richard Hall, Timothy G. Massad, Paul Michalski or Andrew J. Pitts in New York or Philip J. Boeckman, George Stephanakis or Gregory M. Shaw in London.

Sincerely,

Cravath, Swaine & Moore LLP

Ms. Nancy M. Morris, Secretary
Securities and Exchange Commission

VIA E-MAIL

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