



THE BANK OF NEW YORK MELLON

Christopher R. Sturdy Executive Vice President

April 25, 2008

Ms. Nancy M. Morris,
Secretary,
Securities and Exchange Commission,
100 F Street, N.E.,
Washington, DC 20549-0609.

Re: File Number S7-04-08

Dear Ms. Morris:

The Bank of New York (“BNY”) is very pleased to have the opportunity to comment on the proposal by the Securities and Exchange Commission (the “Commission”) to amend Rule 12g3-2(b), which exempts a foreign private issuer 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.¹

BNY is the world’s largest depository for American and global depository receipts and currently issues depository receipts for more than 1,300 programs representing 63 countries, accounting for 64% of all public sponsored depository receipt programs. BNY believes that the proposed amendments, in particular the availability of an automatic exemption from registration and the electronic submission of information

¹ The SEC Proposal is contained in Release No. 34-57350; International Series Release No. 1307 (February 19, 2008).



required by Rule 12g3-2(b), provide a sound means by which U.S. investors can have access to the market for equity securities of non-U.S. issuers while ensuring that U.S. investors receive the protection of adequate disclosure that has always been the premise of securities regulation in the United States.

The proposed amendments accurately identify an area of U.S. market activity that has changed dramatically in response to recent political, regulatory and technological changes. For a number of reasons, non-U.S. issuers have become reluctant, if not unwilling, to subject themselves to any level of U.S. securities regulation, including taking action to obtain an exemption pursuant to Rule 12g3-2(b) or signing a registration statement on Form F-6. As a result, the number of sponsored American Depositary Receipt (“ADR”) programs is declining while U.S. investors have become increasingly active in investing in non-U.S. equity securities and, based on our experience, interested specifically in sponsored ADRs. The inadequate supply of sponsored ADR programs does not serve the objective of investor protection, since sponsored ADR programs allow U.S. investors to more fully participate in the benefits of owning equity securities of non-U.S. issuers while affording them numerous protections.

Simultaneous with the decreasing number of U.S. ADR programs, U.S. investors have gained access to non-U.S. markets through their brokers and now possess the ability to acquire equity securities of non-U.S. issuers on foreign exchanges without any of the protections traditionally provided by ADR programs. The proposed amendment of Rule 12g3-2(b) addresses the most basic protection – i.e., disclosure – that may be lacking when U.S. investors acquire securities directly in foreign markets. However, U.S. investors who acquire such securities in such foreign markets will not have the same protections as investors who acquire sponsored or unsponsored ADRs even if Rule 12g3-2(b) is amended as proposed.

Unsponsored ADRs offer a layer of protection for U.S. investors that ordinary shares acquired outside the United States do not provide. If the proposed amendments were adopted as they are currently proposed, it would become feasible to establish unsponsored ADR programs with respect to equity securities of additional non-

U.S. issuers for the first time since Form F-6 was adopted in 1983. However, since unsponsored ADR programs historically have been permitted to be duplicated by multiple depositaries, the result is likely to be the creation of multiple unsponsored ADR programs with respect to any given non-U.S. equity security. Although unsponsored ADRs offer investors more protections than holding ordinary shares directly (some of these benefits are listed in the table below), unsponsored ADR programs do not provide U.S. investors all of the protections offered by sponsored ADR programs.

The trading market for a non-U.S. issuer's ordinary shares is fungible, regardless of the form in which the shares are trading. Investors' rights, however, differ depending on whether an investor is holding an ordinary share, an unsponsored ADR or a sponsored ADR. Where ordinary non-U.S. shares and duplicated unsponsored ADRs are trading at the same time, investors may be confused as to what their rights are and may not even be sure of the form in which his or her investment is held. In recent years, investors holding ordinary shares have thought they were holding sponsored ADRs. Investors holding unsponsored ADRs issued by multiple depositaries have at times not been treated equally. Both cases have resulted in market confusion.

As the SEC acknowledged in 1991², sponsored ADR programs offer a number of advantages to investors; these advantages are significant even as compared to unsponsored ADR facilities. Following is a non-exhaustive list comparing some features of sponsored and unsponsored ADRs.

<i>Sponsored ADRs</i>	<i>Unsponsored ADRs</i>
<u>Non-Cash Distributions:</u> The depositary commits, to the extent lawful and feasible, to distribute non-cash distributions to ADR holders.	<u>Non-Cash Distributions:</u> Non-cash distributions are typically cashed out rather than extended to ADR holders.
<u>Voting Rights:</u> The depositary commits to pass through voting rights, and if instructed by ADR holders, will vote the shares.	<u>Voting Rights:</u> Typically, the depositary does not (and is not required to) give notification to ADR holders of meetings nor make any distribution of materials or solicitation of votes for meetings.
<u>Rights:</u> The depositary undertakes to offer rights where possible and, in other cases, to resell rights,	<u>Rights:</u> The depositary typically cashes out rights offers without ADR holders having the opportunity to

²

Release No. 33-6894; 34-29226; International Series Release No. 274 (May 23, 1991).

if possible, before expiration.	exercise or subscribe for additional shares.
<u>Tax Reclamation:</u> Depositaries have, in certain jurisdictions, established withholding tax reclamation procedures with local tax authorities under applicable tax treaties, enabling ADR holders to obtain the benefits of reduced withholding rates under the treaties.	<u>Tax Reclamation:</u> No special tax reclamation services are provided to ADR holders.
Have full FAST eligibility at DTCC. ADRs are safekept as book entry securities. ADRs are eligible for DRS Programs	Physical certificates must be issued to be safekept at DTCC. Security is not DRS eligible
	<i>Significant Disadvantage:</i>
	Market confusion where multiple unsponsored ADR programs co-exist.

BNY believes that a level of protection for investors equivalent to the protection afforded by sponsored ADRs can and should be achieved by making minor adjustments to build on the Commission's proposal. What distinguishes the protections afforded by sponsored and unsponsored ADRs and that minimizes market confusion where sponsored ADRs are trading is the fact that sponsored ADRs may not be duplicated by even a single additional depositary. BNY thinks it is both feasible and desirable for the Commission to make it possible for a depositary to establish an ADR program which is not sponsored by the issuer of the underlying ordinary shares, but which can not be duplicated. BNY recognizes that a depositary which takes responsibility for an ADR that may not be duplicated assumes responsibilities toward investors, the issuer and the Commission. BNY believes it would be appropriate in such a case for the depositary to make specific and definitive undertakings in connection with filing a registration statement on Form F-6 relating to the issuer's exemption pursuant to Rule 12g3-2(b) and the protections, principally those listed above, to be offered to ADR holders.

BNY is not advocating any change in the proposal with respect to unsponsored ADR programs that may be duplicated. Unsponsored ADRs offer greater protections to investors than a direct investment in non-U.S. ordinary shares and should be available to depositaries that do not wish to make the necessary undertakings.

BNY believes that unsponsored ADR programs that may not be duplicated and that have many of the characteristics of sponsored ADRs could facilitate the investment by U.S. investors in non-U.S. equity securities, enhance the protections offered to U.S. investors by the proposed rule changes and allow investors to more fully participate in the benefits of owning non-U.S. equity securities, all while operating in the most efficient clearance, settlement and safe-keeping environment. Because the proposed amendments eliminate the need for participation by the non-U.S. issuer, such a program could be established for any non-U.S. issuer that meets the requirements of amended Rule 12g3-2(b). This would greatly expand U.S. investors' access to the equity securities of non-U.S. issuers while ensuring that investors are afforded the most basic protections expected of the U.S. federal securities laws.

Please feel free to contact Michael Finck at (212) 815-2190 or Cristina Cobb at (212) 635-1507 with any questions you may have regarding the comments expressed in this letter.

Very truly yours,

A handwritten signature in black ink, appearing to be "Cristina Cobb", written over a horizontal line.

The Bank of New York