Forum for | US Securities Lawyers | in London

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
United States

April 25, 2008

File No. S7-04-08 - Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers No. 34-57350.

Dear Ms. Morris,

We are submitting this letter in response to the request of the U.S. Securities and Exchange Commission (the "**Commission**") for comments in respect of the Commission's proposal (the "**Proposal**") to amend Rule 12g3-2(b) under the U.S. Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). The Forum for U.S. Securities Lawyers in London (the "**Forum**") is a trade association representing a large number of U.S.-qualified lawyers practicing at a number of law firms and financial institutions in the London capital markets, as well as market participants including securities exchanges, settlement systems and registrars. Founded in 2006, the Forum is an independent, self-funded organization dedicated to addressing issues of, application of and compliance with U.S. securities laws in the London and international capital markets. We are submitting this letter on behalf of certain members of the Forum who are signatories of this letter.

We strongly support the Commission's efforts to rationalize and streamline the law applicable to offerings that are not registered under the Exchange Act. We believe that the market and technological developments over the past few years warrant reconsidering the Commission rules that determine when a foreign private issuer must enter the Section 12(g) regime. As the Commission recognizes, as evidenced by the multiple questions posed in the Proposal, there are many areas that lend themselves to public comment in the Proposal. We are limiting our comments to those points that we perceive as being of the most direct relevance to foreign private issuers in the European and London capital markets.

We wish to comment in respect of the following issues:

(a) <u>ADTV Test Combined with Affirmative Act by Issuer</u>

We wish to comment, more generally, that we are concerned that certain elements of the Proposal, notably the reliance on an annual test of U.S. average daily trading volume (the "**ADTV Test**") as a measure for maintenance of the revised Rule 12g3-2(b) exemption, irrespective of any affirmative act by the issuer, represent a departure from the previous principles and market realities underpinning the current Rule 12g3-2(b) exemption regime. While for certain large foreign private issuers with deep trading markets outside of the United States reliance on the ADTV Test alone could be a straightforward analysis, for other foreign private issuers with less liquid securities such changes carry potential risks, in that an issuer may lose its exemption from registration through events over

which it has no control and find itself subject to U.S. registration and reporting obligations without any affirmative act on its part (*i.e.*, accessing the U.S. capital markets in a public transaction or listing on a U.S. exchange). This may occur, for example, in the context of unsponsored American Depositary Receipts ("**ADR**") facilities or block trades that settle in the United States. It may better serve the overall purpose of the Proposal if the quantitative measure that the Commission introduced was linked to affirmative acts on the part of the issuer to access the US capital markets in a public manner before such issuer were to become subject to the Section 12(g) regime.

(b) Permanence of Exemption or Cure Period

Further to the issues raised in the paragraph above, we are also concerned that the Proposals are a departure from the approach previously taken, in which a foreign private issuer availing itself of the Rule 12g3-2(b) exemption and not otherwise participating in the U.S. capital markets in a public manner, whether through a securities offering or by having its securities listed on a U.S. exchange or admitted to a U.S. trading market, could rely on the permanence of the exemption for so long as it continued to furnish reports pursuant to Rule 12g3-2(b) and did not access the U.S. capital markets in a public manner. Such permanence is central to the activities undertaken by market participants in respect of foreign private issuers, including in respect of block trades that settle in the United States and in respect of sponsored and unsponsored ADR facilities, which are discussed in paragraph (c), below. A lack of permanence to the exemption provided by Rule 12g3-2(b) may have a chilling effect on the U.S. capital markets as foreign private issuers may seek to limit or avoid trades in the United States in order to keep their U.S. ADTV low and thus avoid becoming registrants under the Exchange Act. We therefore urge the Commission to consider allowing a permanent exemption from registration, akin to the current rule, in cases in which a foreign private issuer: (i) has fewer than 300 holders of a class of securities resident in the United States; and (ii) satisfies the ADTV Test.

Alternatively, should the Commission choose not to adopt a permanent exemption, we would recommend that the Commission consider providing for a "cure period" during which an issuer would seek to address those circumstances that led to such issuer becoming subject to the registration requirements solely by virtue of having surpassed the 20 percent threshold in the ADTV Test. Since the ADTV Test applies annually and since deregistration under Rule 12h-6 under the Exchange Act is possible only when their U.S. based average daily trading volume drops below the five percent threshold of global average daily trading volume, it would seem equitable to allow for such a cure period in the case where such foreign private issuer surpasses or is close to the threshold of the ADTV Test. We would suggest that such foreign private issuer be provided with a six month "cure period" at the end of which they would be able to re-calculate the ADTV Test to ensure the accuracy of such test.

(c) Impact on ADR Facilities

We believe that the Proposal may pose challenges to both foreign private issuers with sponsored or unsponsored ADR facilities and to depositaries who participate in such programs. We believe the proposed annual ADTV Test will introduce uncertainty for both foreign private issuers and depositaries as compared to the current rule, and may cause foreign private issuers to forego establishing new ADR facilities (or suspend current programs) lest they (or the depositary) inadvertently breach the ADTV Test, thereby subjecting the issuer to mandatory registration under the Exchange Act. Furthermore, depositaries have historically treated the Rule 12g3-2(b) exemption in its current form as a prerequisite to establishing an ADR facility for a foreign private issuer precisely because of the permanent nature of such exemption. Any change to the permanence of the Rule 12g3-2(b) exemption will fundamentally alter this calculus, and is likely to have a chilling effect upon market participants, especially where the ADTV Test may be breached even through the issuer has not sought a U.S. primary offering or listing on a U.S. exchange.

(d) Calculation of Average Daily Trading Volume and Off-Market Trades

Under the Proposal, calculation of average U.S. daily trading volume requires the inclusion of both on-market and off-market trades in the United States. We wish to note that, in some European markets, off-market trading can be difficult to access. In some cases, this information is not available from either the local exchange or the relevant registrar, but must be acquired from the applicable regulator. As a result, we believe that accurate and complete trading data (particularly off-market trading data) for foreign private issuers in many of these jurisdictions may be difficult to obtain. Given these difficulties, the calculation of U.S. trading volume to global trading volume may be skewed in a manner that suggests that the U.S. trading volume is higher than it actually may be. This could cause an issuer to fail the ADTV Test even though, if its non-U.S. trading data were available and incorporated into the ADTV Test, a different result would occur.

Accordingly, we request that the Commission consider allowing issuers to exclude all off-market trades (both inside and outside the United States) from the calculation of the ADTV Test if such data is unavailable or incomplete, or, allowing for the optional inclusion of such data if it is available. This would also be useful for issuers with low liquidity.

(e) Safe Harbor Status in Tender Offer/ Exchange Offer/ Follow-on Public Offering Context

The Commission solicited comments on its proposed condition requiring an issuer to publish its non-U.S. disclosure electronically. When finalising the proposed rules, we recommend that the Commission keep in mind its previous guidance with respect to foreign issuers placing offering-related material on their websites.

In the context of a public offering in a foreign jurisdiction and a concurrent private placement the Commission has recommended that the issuer ensure that access to the posted offering materials is limited[1]. If an issuer were to implement these procedures it would potentially prevent U.S. persons from accessing the information, which could be in potential conflict with the rationale behind Rule 12g3-2(b). With this in mind, we recommend that the Commission explicitly state in the new rules that the posting of offering related materials on an issuer's website in compliance with Rule 12g3-2(b) will not be deemed a public offering for the purposes of Section 4(2) of the Securities Act of 1933, as amended (the "**Securities Act**"), directed selling efforts for the purposes of Regulation S under the Securities Act or general solicitation or general advertising for the purposes of Regulation D under the Securities Act provided that: (i) the issuer's website includes a prominent disclaimer making it clear that the offer is directed only to countries other than the United States and that persons in the United States are being permitted to view the information so that the issuer can comply with Rule 12g3-2(b); and (ii) the issuer implements other adequate measures to prevent participation in the offshore offer by persons in the United States.

(f) Obligation to Retain Documents on Website

We recommend that the Commission set forth time requirements for maintaining the posting of particular documents on an issuer's website. We believe issuers would benefit from guidance as to when a particular document will automatically no longer be deemed to be material to an investor and

---

[1] *See International Series Release No. 1125 ("Statement of the Commission regarding use of internet web sites to offer securities, solicit securities transactions or advertise investment services offshore").*

may be removed from a website without breaching Rule 12g3-2(b). We recommend that annual reports be required to be posted for three years and all other required documents (including interim reports, current reports and press releases) for 12 months.

(g) Consider Requirement of Public Statement of Use of Exemption for Market Clarity

In the Proposal, the Commission proposes to permit a foreign private issuer to claim the Rule 12g3-2(b) exemption without having to submit an application to the Commission as long as the eligibility criteria are met.

We would suggest that the Commission provide guidance to issuers regarding actively and publicly claiming the exemption for the purpose of greater market clarity by, for example, suggesting that the issuer make a declarative statement on the issuer's website.

(h) Mutual Recognition

We refer to the mutual recognition initiatives that the Commission is currently pursuing with a number of local regulators. Guidance would be necessary with respect to certain elements of the Proposal in light of mutual recognition; for example, trades made in the United States through foreign exchanges by U.S. broker-dealers operating under an exemption granted by mutual recognition may complicate the calculation of trades for purposes of the ADTV Test. We therefore respectfully request that the Commission bear in mind the Proposal when adopting mutual recognition.

We would be pleased to respond to any enquiries regarding this letter or our views on the Proposal generally. Please contact Sarah Cebik at DLA Piper (Tel: +44 (0) 8700 111 111); Jamie Benson at Dorsey & Whitney LLP (Tel: +44 (0) 20 7826 4513); Jeffrey Hendrickson at Herbert Smith LLP (Tel: +44 (0) 20 7466 2766); Jim Wickenden at Herbert Smith LLP (Tel: +44 (0) 20 7466 2188); Alan J. Berkeley at Kirkpatrick & Lockhart Preston Gates Ellis LLP (Tel: +44 (0) 20 7360 6344); Katherine Mulhern at Lovells LLP (Tel: +44 (0) 20 7296 2000); Daniel Winterfeldt at Simmons & Simmons (Tel: +44 (0) 20 7628 2020); or Sven Krogius or Angus Tarpley at White & Case LLP (Tel: +44 (0)20 7532 1000) if you have any enquiries in relation to this letter.

Respectfully submitted,

DLA Piper

Dorsey & Whitney LLP

Herbert Smith LLP

Kirkpatrick & Lockhart Preston Gates Ellis LLP

Lovells LLP

Simmons & Simmons

White & Case LLP