FRESHFIELDS BRUCKHAUS DERINGER

FRANKFURT AM MAIN
Bockenheimer Anlage 44
60322 Frankfurt am Main
T+ 49 69 27 30 80
Direct T+ 49 69 27 30 86 55
F+ 49 69 23 26 64
Direct F+ 49 69 27 30 85 8686
E mark.strauch@freshfields.com
W freshfieldsbruckhausderinger.com
DOC ID DAC3157800/3+
OUR REF MGS/DJG
CM No. 121990-0055

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street , NE
Washington, DC 20549-1090
USA

VIA E-MAIL

25 April 2008

Re: File No. S7-04-08 – Proposed Amendments to Rule 12g3-2(b) under Section 12(g) of the U.S. Securities and Exchange Act of 1934

This letter is in response to Release No. 34-57350 (the ***Release***), in which the U.S. Securities and Exchange Commission solicits comments on proposed amendments to Rule 12g3-2(b) under Section 12(g) of the Exchange Act. We strongly support the Commission's recent efforts to update its rules to provide U.S. investors with easier access to a foreign private issuer's material non-U.S. disclosure documents and eliminate unduly burdensome rules relating to foreign private issuers, and we believe that the following comments address some of the main concerns regarding the proposed amendments.

1. *The proposed 20% limit on annual U.S. trading volume is unduly burdensome and is not necessary to ensure that the United States is not and does not become the primary trading market for issuers relying on the Rule 12g3-2(b) exemption.*

We respectfully submit that the proposed 20% limit on annual U.S. trading volume is unduly burdensome and not necessary to serve the stated purposes of the proposed rule and should therefore not become part of the final rule. Instead, we believe that a primary market test (as discussed in Section 2 below), rather than an annual U.S. trading volume test based on a fixed percentage, should provide the basis of eligibility for the Rule 12g3-2(b) exemption.

To comply with the proposed rule, a foreign private issuer relying on the Rule 12g3-2(b) exemption would be required annually to ascertain and compare the U.S. and worldwide trading volumes of its securities. As a practical matter, a 20% average annual trading volume limit in the United States would require many foreign private issuers to determine these volumes on a yearly basis to a degree of exactitude that may be prohibitively expensive, or even impossible. The prospect of an expensive annual assessment of an

issuer's U.S. trading volume would present a new burden for foreign private issuers that is not present under the current Rule 12g3-2(b) and would likely chill interest in raising capital in the United States through private placements, including those conducted in accordance with Rule 144A of the U.S. Securities Act of 1933, for fear that such a placement could at some later stage lead to trading in the United States which through no fault of the issuer could oblige the issuer to register pursuant to the Exchange Act.

In addition, the question of whether an issuer's U.S. trading volume is 20% or greater is only indirectly related to the ultimate issue of whether the United States is the primary market for trading in that issuer's securities. The 20% threshold could prevent many issuers whose securities are not primarily traded in the United States from relying on the Rule 12g3-2(b) exemption, effectively requiring such issuers to register pursuant to the Exchange Act. The 20% test could compel the registration under the Exchange Act of an issuer whose securities are traded by sophisticated investors as part of an ADR program or on the U.S. over-the-counter markets, for example, even if that issuer has never made a public offering in the United States or otherwise affirmatively availed itself of the instrumentalities of U.S. commerce. Under the current rules such issuers can avoid the need for such registration by obtaining the Rule 12g3-2(b) exemption prior to surpassing the 300 U.S. holder threshold, but the proposed amendments would foreclose that approach with respect to the 20% U.S. trading volume limit.

Thus, while the proposed amendments seek to reduce undue burdens on foreign private issuers relying on a Rule 12g3-2(b) exemption, the proposed 20% limit could in many cases prove more burdensome than the current rule, due to new monitoring costs and/or the increased likelihood that the exemption would be unavailable. We therefore urge the Commission to omit this 20% limit from the final rule.

Alternatively, if the Commission determines that a percentage limit on the U.S. trading volume of a foreign private issuer's securities is an indispensable element of the revised rule, we suggest that this limit be a onetime requirement rather than an annual test, so that the issuer would have no continuing or annual obligation to monitor its U.S. trading volume in relation to any percentage limit. Eliminating this annual re-qualification standard would significantly reduce the risk that foreign private issuers that have never affirmatively made a public or private offering of securities in the United States or availed themselves of the instrumentalities of U.S. commerce could be obligated to register under the Exchange Act. In addition, in lieu of an annual test, the Commission should require a foreign private issuer to submit a brief statement of its intent to rely on the Rule 12g3-2(b) exemption (as discussed in Section 4 below) in order to set a date certain for compliance with any percentage limit the Commission might establish. Although less burdensome to both the

Commission and the issuer, this procedure would be analogous to the procedure currently required under Rule 12g3-2(b) with respect to the 300 U.S. shareholder limit.

2. *The primary trading market test should be simplified to require that an issuer maintain a listing on an exchange in a single foreign jurisdiction where the trading volume for the issuer's securities is larger than the trading volume of the issuer's securities in the United States, that is, to require that a single foreign jurisdiction be the primary trading market for the issuer's securities.*

Under the amendments proposed in the Release, an issuer seeking to rely on the Rule 12g3-2(b) exemption would be required to ensure, on an annual basis, that (1) at least 55% of the average annual trading volume in its securities occurs in one or two foreign jurisdictions and (2) if the issuer aggregates trading volumes from two jurisdictions to meet the 55% average annual trading volume test, the trading volume in its securities in one of those jurisdictions is greater than the U.S. trading volume in its securities. Our suggestion is just to make this foreign primary trading market principle — that there must be at least one non-U.S. jurisdiction where the average annual trading volume in the issuer's securities is greater than the average annual trading volume in its securities in the United States — the core test for eligibility for the Rule 12g3-2(b) exemption.

While we agree with the Commission on the need for a primary market test to establish eligibility for the Rule 12g3-2(b) exemption, we are concerned that the proposed requirement — that at least 55% of trading in the issuer's securities take place on exchanges in no more than two non-U.S. jurisdictions — could prevent issuers whose securities are listed in more than two non-U.S. jurisdictions from qualifying for the exemption. This is of particular concern in Europe, where the European Union Prospectus Directive is designed to permit the "passporting" of prospectuses from one European Union jurisdiction into other European Union jurisdictions. The result is that once an issuer has successfully applied to list its securities in one European Union country, it is relatively simple and inexpensive for the issuer to list its securities on exchanges in additional countries in the European Union. A company listed in multiple European jurisdictions might find, for example, that although the largest market for trading in its securities is a European Union country and the majority of its trading occurs in European Union jurisdictions, no two of these jurisdictions' trading volumes aggregate to at least 55% of the annual worldwide trading volume in its securities. As long as one of these non-U.S. jurisdictions is the largest single trading market for the issuer's securities worldwide, however, one need not look to the volumes of trading in other non-U.S. jurisdictions or the number of jurisdictions in which the issuer's securities are traded in order to show that the primary market for the issuer's securities is outside the United States. Provided that the United States cannot become the primary trading market for

the issuer's securities without requiring the issuer to register under the Exchange Act (which is the case both under the proposed amendments in the Release and under our proposal), the requirement that 55% of worldwide trading volume occur in one or two non-U.S. jurisdictions is not necessary to achieve the purposes of the rule.

The proposed test should therefore be amended to require that a single, non-U.S. jurisdiction be the largest trading market for the securities of a foreign private issuer relying on the Rule 12g3-2(b) exemption. This simplified primary market test would better serve the purposes of the rule while reducing its complexity and regulatory burdens and increasing the rule's flexibility to accommodate the continued globalization of financial markets. Under this rule, only a foreign private issuer whose securities are trading in the United States at volumes approaching those in its largest (primary) trading market would be forced to monitor those trading volumes closely and on an ongoing basis. Such a standard would require monitoring and action by only a very few issuers (compared to the proposed rule, which could require annual, affirmative action by many issuers), and the affected issuers would, as a result of their high U.S. trading volume, be realistic candidates for registration under the Exchange Act in any event.

In view of the reasons stated above and the underlying purpose of ensuring that the United States does not become the primary trading market for the securities of a company not registered under the Exchange Act, the 55% requirement should be restated as a requirement that the volume of trading in the issuer's securities be greater in at least one non-U.S. jurisdiction where the issuer's securities are listed than in the United States.

3. *If a foreign private issuer exceeds the 20% trading volume threshold, the issuer should be allowed a reasonable cure period.*

If the 20% trading volume threshold is adopted as proposed in the Release, a foreign private issuer should be allowed a reasonable opportunity to cure any breach of the threshold, since a foreign private issuer whose primary market is not the United States could be subject to registration under Section 12(g) without having taken any affirmative act in the United States. One way to allow for an effective cure period would be to suspend any registration requirement for the current fiscal year if the average daily trading volume over the six months immediately prior to the first day on which the issuer would be required to register is below the 20% threshold. This approach would allow issuers that are nearing the 20% threshold in any given fiscal year to implement measures, to the extent possible, to rectify any breach of the 20% threshold.

4. *The proposed elimination of the written application requirement should be amended to require a limited affirmative notification by the issuer of its intent to rely on the exemption, so long as any annual U.S. trading volume limit is a onetime requirement rather than an annual test.*

Although we agree that an initial paper submission of annual reports and other disclosure documents to the Commission is unwarranted given disclosure on an issuer's website, we believe the Commission should continue to require a foreign private issuer to submit only a brief statement of its intent to rely on the Rule 12g3-2(b) exemption, so long as any annual U.S. trading volume limit is a onetime requirement rather than an annual test.

Market participants, including ADR trustees and over-the-counter facilities, have come to rely on the Commission's acknowledgment of issuers that have requested that their names be placed on a list of those companies relying on Rule 12g3-2(b). A simple affirmation letter submitted by the issuer stating its intent to rely on Rule 12g3-2(b) would satisfy the notification requirements of such market participants and further the objective of generally informing the market regarding the issuer and its intentions, without the burdensome and unwarranted submissions that are currently required under Rule 12g3-2(b).

Furthermore, the Commission would not need to reply formally to such submissions as it has historically done. Rather, where an issuer requires the Commission's acknowledgement or receipt, the issuer could request that a stamped copy of its submission be returned by courier or in a postage pre-paid envelope provided by the issuer. Alternatively, the Commission's posting of the issuer's 12g3-2(b) submission on EDGAR would also provide proof of the submission, as well as notice to market participants of the issuer's reliance on the exemption.

Yours faithfully,

Freshfields Bruckhaus Deringer