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April 30, 2008

Re: **Comments on Proposed Rules Relating to Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") for Foreign Private Issuers**

Release No. 34-57350; International Series Release No. 1307; File No. S7-04-08 (the "Release")

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

Dear Ms. Morris:

Davis Polk & Wardwell is an international law firm which regularly advises foreign private issuers and global financial institutions. We have sought the views of such clients and others with an interest in the topics covered by the Release. Based on this feedback and our accumulated experience, we are pleased to submit our comments on the Release.

We welcome and encourage the Commission's recent initiatives, including this Release, to modernize some of the outdated elements of U.S. securities laws, including recently adopted rules that relax the deregistration requirements for foreign private issuers and eliminate the U.S. GAAP reconciliation requirement for those foreign private issuers that report in IFRS and meet certain conditions, the proposed rule to update the reporting system for foreign private issuers and the Commission's efforts to explore systems of mutual recognition for exchanges and broker-dealers. We understand that the Commission also has a possible update of the cross-border tender offer rules on its agenda, and we strongly encourage the Commission to make progress in that area as well. Each of these discrete efforts is tied to a common theme, which is that securities regulation in the United States and other developed economies stands at a crossroads. An era in which the principles and concepts of securities law were shaped purely by domestic policy goals has been displaced by one of international cooperation and convergence. We therefore believe that it is critically important that the

principles put into place at this crossroads be based upon the new reality of international interaction. (For a recent discussion of this historic moment confronting regulation of the global securities markets, see "Draft Report of the Securities Law Subcommittee of the Task Force on Extraterritorial Jurisdiction of the International Bar Association" (January 18, 2008). Available at: http://www.ibanet.org/legalpractice/Issues_and_Trading_in_Securities.cfm#Pro.)

We respectfully submit, therefore, that the Commission should carefully consider the appropriateness of imposing, under current circumstances in which a regime of mutual recognition for exchanges and broker-dealers is being discussed, expanded registration requirements on a foreign private issuer that does not publicly offer, or otherwise take voluntary steps to facilitate a market for, its shares in the United States. We believe the costs to such foreign private issuers who might trip the proposed 20% U.S. average daily trading volume are not warranted, particularly in light of such discussions. We encourage the Commission to wait until a mutual recognition framework has been established to design a rule that strikes the right balance between costs to foreign listed issuers and benefits to U.S. investors. We elaborate or this comment, and discuss a number of more technical comments, in Annex A.

We appreciate the opportunity to participate in this process, and we look forward to its successful conclusion.

Very truly yours,

Theodore A. Paradise
Margaret E. Tahyar

cc: The Honorable Christopher Cox, *Chairman*
The Honorable Paul S. Atkins, *Commissioner*
The Honorable Kathleen L. Casey, *Commissioner*

John W. White, *Director, Division of Corporation Finance*
Brian Breheny, *Deputy Director, Division of Corporation Finance (Legal and Regulatory)*
Brian Cartwright, *General Counsel*
Paul M. Dudek, *Chief of the Office of International Corporate Finance*
Ethiopis Tafara, *Director, Office of International Affairs*

ANNEX A

Through the participation of various Davis Polk & Wardwell partners in the American Bar Association and the International Bar Association, we have had access to and reviewed the comment letters expected to be submitted by these organizations. We generally support the principles set out in those letters and have added below certain additional points that we would also like to bring to the Commission's attention. We strongly support the Commission's current proposals to eliminate paper submissions and, subject to our comments below, the application process under Rule 12g3-2(b). We believe such changes will improve efficiency and U.S. investor access to information.

I. The Need to Balance the Costs and Benefits of Registration in Light of the Expected Regime of Mutual Recognition for Exchanges

As currently drafted, the proposed amendments to Rule 12g3-2(b) would create a new basis for requiring a foreign private issuer to register with the Commission. Under the proposed amendments, a foreign private issuer currently able to claim an exemption under Rule 12g3-2(b) would be required to register a class of equity securities under Section 12(g) of the Exchange Act if the average daily trading volume of the class in the United States exceeds 20% of worldwide trading volume for the most recently completed fiscal year.

The burdens of imposing Section 12(g) registration on a foreign private issuer are substantial. Under current rules, such burdens include the preparation of financial statements in accordance with accounting principles generally accepted in the United States or International Financial Reporting Standards, compliance with Section 404 of the Sarbanes-Oxley Act of 2002 and preparation of disclosure in accordance with other U.S. standards. Many foreign companies have not sought to access U.S. capital markets through a U.S. public offering because they wish to avoid these burdens and the perceived risks of U.S. litigation. We believe a compelling need should be articulated to justify the imposition of the burdens associated with registration, particularly where an issuer has not publicly offered its securities in the United States.

We also believe that the investor protection benefits of such registration will be limited for those stocks most likely to attract a wide following in the United States – stocks listed on foreign exchanges that will qualify for mutual recognition in the future. Section 12(g) aims to protect U.S. investors by requiring registrants to provide adequate disclosure about their business, management and finances. We understand, however, that the SEC is engaging in discussions about the mutual recognition of exchanges and certain broker-dealer activities. Mutual recognition by the SEC of a foreign exchange would presumably entail a determination that the exchange's disclosure requirements are adequate. We accordingly believe that for foreign private issuers listed on a qualified foreign exchange, the only benefit to U.S. investors of imposing Section

12(g) registration requirements will be the theoretical benefit of incremental disclosure, beyond that required by the qualified foreign exchange. Such incremental disclosure may be of little significance to U.S. investors.

We note, moreover, that in a world in which off-exchange trading systems are being developed and where over-the-counter trading is moving to electronic systems, a 20% volume requirement may quickly become outdated. In any event, companies are not in a position to control trading volumes in the United States, as such trading may be initiated by U.S. broker-dealers or off-exchange trading systems rather than by the companies themselves.

We respectfully submit, therefore, that the SEC should refrain from expanding mandatory Section 12(g) registration obligations until the time it considers mutual recognition rulemaking, so that such obligations are not imposed where they are not needed. We strongly agree with the concerns raised by the Committee on Federal Regulation of the Securities of the American Bar Association that the imposition of the listing condition could have significant and detrimental consequences to U.S. investors, leading some foreign private issuers to take measures actively to reduce the number of their U.S. shareholders and others to ignore compliance with the Exchange Act registration and reporting requirements, based upon a view that the Commission does not have a valid legal basis for extending its jurisdiction over such issuers.[1]

II. English Language Translation Requirements

Under the proposed amendments, a foreign private issuer claiming the Rule 12g3-2(b) exemption would be required to publish in English certain information that it makes public, files with a stock exchange or otherwise distributes to security holders in its home country. It must also, at a minimum, publish English translations of the following documents if they are written in a foreign language and are material to an investment decision regarding the relevant securities:

- the issuer's annual report, including or accompanied by annual financial statements;
- interim reports that include financial statements;
- press releases; and
- all other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

As drafted, the proposed amendments would no longer permit a foreign private issuer to furnish English versions or adequate English summaries of press

[1] Draft letter from the American Bar Association dated April 2008.

releases and other communications or materials distributed directly to security holders in lieu of English language translations. Nor would they allow a foreign private issuer to submit brief descriptions in English of other documents that must be submitted but for which no English translation, version or summary has been prepared.

We believe that this proposed amendment will significantly increase the burden to many foreign private companies, particularly Japanese and other issuers outside of the European language groups. Many issuers have established their reliance upon the Rule 12g3-2(b) exemption based on the understanding that they would be able to provide English versions, adequate summaries and brief descriptions in English in lieu of full English translations.

Japanese issuers, like many others, are subject to multiple sets of disclosure rules and obligations even within their own country, and the documents required to be made public under these different disclosure regimes often contain the same or similar information. For example, a Japanese public company listed on the Tokyo Stock Exchange is required to publish full- and half-year financial statements under each of the Company Law and the Financial Instruments and Exchange Law of Japan, as well as summary financial statements under Tokyo Stock Exchange rules. The proposed amendments would require a Japanese issuer to publish a full English translation of each set of financial statements in order to satisfy its Rule 12g3-2(b) disclosure obligation, unless the issuer could confidently determine that later sets of financial statements were not material. We expect that not all issuers can confidently make that determination.

Disclosure documents frequently combine information that is material to an investment decision with other information that is not material. For example, convocation notices for shareholder meetings in Japan, which are distributed directly by Japanese issuers to their security holders, are often lengthy and may include a significant amount of information that is not material to an investment decision, or that has already been made public in another format. In this situation, the proposed amendments would nevertheless require an issuer to prepare a full English translation, even if only a portion of the document is material to an investment decision.

We note that, in this connection, the proposed amendments would retain the requirement that relevant information be published promptly. The preparation of English language translations can require significant time and resources. In our experience, certain issuers, particularly Japanese and other issuers outside of the common European language groups, have been concerned about the appropriate interpretation of the term "promptly". We strongly encourage the Commission to provide guidance to the effect that the term "promptly" should be interpreted reasonably taking into account the type, language and volume of the relevant disclosure and the translation requirements relating thereto.

We strongly encourage the Commission to retain the option for issuers to publish English versions or adequate summaries in English in lieu of original

English translations, and to omit publication in English of information that has previously been published in English in another format.

III. Obligation to Publish Intent to Rely on Rule 12g3-2(b)

As currently proposed, the amendments would not require an issuer to notify the SEC or the public when it chooses to rely on the exemption provided by Rule 12g3-2(b). As a result, third parties may be unable to determine whether an issuer is relying on the exemption.

We believe that affirmative publication on an issuer's website of the issuer's intention to rely on Rule 12g3-2(b) should be mandatory. We believe that such a requirement would benefit depositary banks that wish to establish unsponsored American depository receipt facilities by eliminating uncertainty as to the intent of the issuers. Conversely, such a requirement would avoid the situation in which an issuer that posts English-language investor relations materials on its website without an intention of claiming the exemption is unilaterally deemed by depositary banks to be eligible for the exemption.