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By Electronic and United States Mail

April 30, 2008

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-9303

Re: File No. S7-04-08
Release No. 34-57350; International Series Release 1307
Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee") of the Section of Business Law of the American Bar Association ("ABA"), in response to the request by the Securities and Exchange Commission (the "Commission") for comments on the release described above dated February 19, 2008 (the "Proposing Release") relating to proposed amendments to Rule 12g3-2(b) under the Securities Exchange Act of 1934 (the "Exchange Act").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

We have circulated this letter to the leadership of the International Securities and Capital Markets Committee of the Section of International Law of the ABA, who have advised us that such committee concurs with and supports the comments set forth in this letter.

The Committee strongly supports certain of the proposed amendments (the "Proposed Amendments") set forth in the Proposing Release. Among other things, we support the elimination of the requirement that a company furnish the Commission with specified information in order to obtain an exemption from Exchange Act registration pursuant to Rule 12g3-2(b). We also support the proposed provisions regarding the electronic publishing of non-U.S. disclosure documents, and the elimination of the successor issuer prohibitions.

We do not support other of the Proposed Amendments. Specifically, we believe the Commission has not adequately demonstrated the need for imposing an average daily trading volume condition or a foreign listing condition on Rule 12g3-2(b). Indeed, these conditions could prove detrimental to U.S. investors if some foreign private issuers affected by these conditions take measures actively to reduce the number of their U.S. shareholders or the amount of their U.S. trading volume.

If the Proposed Amendments are intended by the Commission to anticipate certain implications of its recently announced mutual recognition initiatives[1], we respectfully suggest that the current proposal is untimely. There can be no assurance that a mutual recognition system will be implemented or, if it is, what the particular scope of the system will be.[2] We believe that any company-based standards that may be adopted in conjunction with a mutual recognition system should depend upon the specifics of any such system approved by the Commission.[3] In the absence of any specific mutual recognition proposal, we believe the imposition, *in vacuo*, of additional conditions to the Rule 12g3-2(b) exemption is unwarranted. We are not aware of any claim of abuse, or other basis, for imposing additional conditions on an exemption that appears to have operated efficiently and well for many decades.

In our comment letter to the Commission regarding the reproposed foreign private issuer deregistration rules[4], we expressed our view that the Commission had taken a significant step, both by communicating to the world its desire to encourage the entry of foreign private issuers into the U.S. markets and, perhaps more significantly, its responsiveness to concerns expressed by foreign private issuers and others that the Commission's rules be practical. We believe that any amendment to Rule 12g3-2(b) should further this initiative, and our comments are made in that spirit.

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[1] For example, by assuring that all foreign private issuer securities sold to U.S. investors pursuant to a mutual recognition framework meet certain minimum criteria.

[2] Among other things, a mutual recognition proposal may require foreign jurisdiction reciprocity, and it remains to be seen whether foreign markets will open themselves to U.S. brokers and exchanges.

[3] It is conceivable, for example, that compliance by a company with its home country disclosure, governance and internal control obligations, such as those imposed on public companies in the U.K., may serve as a substitute for U.S. Exchange Act registration and reporting in any such mutual recognition system.

[4] *Release No. 34-53020; International Series Release No. 1295; File No. S7-12-05.* Letter of February 23, 2007 from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association Section of Business Law.

Our specific comments to the Proposed Amendments are set forth in the order of their presentation in the "Discussion" section of the Proposing Release. In addition, at the end of this letter, we comment more generally on the Proposed Amendments.

1. Proposed Non-Reporting Condition

(a) We agree that, as a condition to the availability of the Rule 12g3-2(b) exemption, a foreign private issuer should have no reporting obligations under Exchange Act Sections 13(a) or 15(d) *with respect to the class of equity security to which the exemption under the Rule is claimed.* We believe, however, that it is neither necessary nor desirable to deny a foreign private issuer the ability to avail itself of the exemption by reason of the issuer's registration or reporting obligations relating to another class of securities. The Commission states that "the purpose of this provision is to prevent an issuer from claiming a Rule 12g3-2(b) exemption when it already has incurred active Exchange Act reporting obligations." Although we understand the Commission's purpose, we believe that in some cases, the interests of U.S. investors would be better served by making the exemption available to an issuer that has incurred (or that may incur) a reporting obligation with respect to another class of securities. As the Commission notes, this question arises when a foreign private issuer has an effective registration statement filed under Section 12(b) of the Exchange Act, for example, covering a class of debt securities, or under Section 12(g), covering a particular class of equity securities.

A continuation of the current requirement that foreign private issuers claiming Rule 12g3-2(b) status have no Exchange Act reporting obligations may discourage foreign private issuers from entering the U.S. markets. For example, a foreign private issuer with a class of equity securities exempt pursuant to Rule 12g3-2(b) may be unwilling to register and publicly offer a class of debt securities under the Securities Act, because a consequence of the registration and offering would be the loss of its existing Rule 12g3-2(b) status. Although the issuer may be willing to comply with the reporting and related obligations arising by reason if the public offering of its debt securities, it may be unwilling to accept the additional obligations imposed as a result of the registration of its equity securities under the Exchange Act.[5] Accordingly, the foreign issuer may determine not to pursue the U.S. public offering of its debt.

We see no valid basis for subjecting a foreign private issuer having a reporting obligation by reason of a class of debt securities to greater obligations and liabilities relating to a class of equity securities than would apply to a similarly situated foreign private issuer, without a reporting obligation relating to debt securities, claiming Rule 12g3-2(b) status. Similar considerations also apply to distinct classes of equity securities.[6] Moreover, were the Proposed

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[5] The obligations that apply to equity securities but not to debt securities include the following: (i) the class of equity securities would be subject to the beneficial ownership reporting requirements of Section 13(d) of the Exchange Act and the Commission's rules thereunder; (ii) the class of equity securities would be subject to the "going private" provisions of Section 13(e) of the Exchange Act and the Commission's rules thereunder; and (iii) the class of equity securities would be subject to the tender offer provisions of Section 14(d) of the Exchange Act and the Commission's rules thereunder.

[6] That is, we see no valid basis for subjecting a foreign private issuer having a reporting obligation with respect to a class of equity securities to greater obligations and liabilities relating to another class of equity securities (such as, for example, a class of preferred securities) than would apply to a

Amendments to be adopted, an issuer having one class of equity securities which becomes subject to Exchange Act registration would be required to register all other classes its equity securities held of record by more than 300 persons resident in the U.S., regardless of the foreign exchange listing status or U.S. trading volume of such other classes.[7]

(b) The Commission notes in the Proposing Release that Form F-6 is required to be filed in order to permit the establishment of an American Depositary Receipt ("ADR") program with respect to a foreign private issuer's securities. Form F-6 requires the issuer to either have a reporting obligation under the Exchange Act or to be exempt from Exchange Act registration pursuant to Rule 12g3-2(b). The Proposing Release further states that, even if the number of a foreign private issuer's securities holders (or the value of its assets) is less than the thresholds that would otherwise trigger the provisions of Section 12(g), the issuer must nonetheless be exempt under Rule 12g3-2(b) in order for it to establish a sponsored ADR program (or for a depositary bank to establish an unsponsored program). We see no reason to continue this requirement. As a technical matter, foreign private issuers fall into one of three categories: (i) those with Exchange Act reporting obligations, (ii) those exempt from Exchange Act reporting obligations by reason of the Rule 12g3-2(b) exemption, and (iii) those not subject to Exchange Act reporting obligations because they fall below the applicable 500 holder/300 holder/$10 million standards.

Instead of requiring a foreign private issuer to claim an exemption that may not technically apply to it, we respectfully suggest that the first sentence of paragraph (a) to Item 2 to Form F-6 be revised to provide as follows (changed language in italics):

"State that the foreign issuer publishes information in English required *(or that would be required)* to maintain the exemption from registration under Rule 12g3-2(b) of the Securities Exchange Act on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market."[8]

The addition of the parenthetical language would eliminate the need for an issuer to establish a Rule 12g3-2(b) exemption, but would still provide adequate information to investors.[9]

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similarly situated foreign private issuer entitled to rely on the Rule 12g3-2(b) exemption with respect to such other class of securities.

[7] The issuer would appear to be unable to deregister any of these other classes of equity securities so long as the issuer has a continuing Exchange Act reporting obligation regarding one class of its securities.

[8] The second sentence of paragraph (b) of Item 2 appears to differ from the manner in which disclosure is generally made by issuers. We suggest that the sentence read as follows: "Then disclose that these reports are available through the Commission's EDGAR system at www.sec.gov and for inspection and copying (at prescribed rates) at the public reference facilities maintained by the Commission in Washington, D.C."

[9] If the Proposed Amendments were to be adopted, a company below the applicable Section 12(g) thresholds would also be required to have a foreign exchange listing in order to establish an ADR program. If an issuer in this category agrees to provide the information it would be required to provide were it subject to the Rule 12g3-2(b) exemption, we see no reason to impose this (or any other) additional condition on the establishment of an ADR program.

(c) We support the other proposals set forth in this section, including the following:

(i) the elimination of the eighteen month "look-back" period for foreign private issuers that have terminated their Section 12(g) registration under the older Rule 12g-4 following the filing of a Form 15; and

(ii) the proposed elimination of the current Rule 12g3-2(b) general prohibition against making the exemption available to an issuer that has had active or suspended reporting obligations under Section 15(d) during a prescribed period, to permit an otherwise eligible issuer be able to claim the Rule 12g3-2(b) exemption immediately upon the effectiveness of the suspension of its reporting obligations under Section 15(d) or pursuant to Rule 12h-3 and following the filing a Form 15.

(d) As to certain of the questions raised by the Commission regarding to the non-Exchange Act reporting condition and not specifically discussed above:

(i) We believe the Commission should permit an issuer to claim the Rule 12g3-2(b) exemption if it meets the applicable requirements although the statutory 120-day period has lapsed. The elimination of the 120-day requirement will avoid the issues associated with an inadvertent failure by a foreign private issuer to have made a timely claim of exemption under Rule 12g3-2(b).[10] We believe that U.S. investors will benefit from rules that encourage foreign private issuers to comply with the disclosure obligations of Rule 12g3-2(b).

(ii) We believe the Commission should not require an issuer not to have had Exchange Act reporting obligations over a specified period of time before claiming the exemption.

2. Proposed Foreign Listing Condition

The Rule 12g3-2(b) exemption should not, in our view, be conditioned on a foreign private issuer maintaining a securities exchange listing in a foreign jurisdiction that, either singly, or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitutes the primary trading market for those securities. Although all or virtually all of the larger foreign private issuers that currently have Rule 12g3-2(b) status will likely satisfy this condition, our objection is based on the following observations:

(a) We are not aware of any abuses with the current provisions of Rule 12g3-2(b), which do not mandate a stock exchange listing, and thus do not understand the basis for imposing additional requirements on the availability of the Rule.

(b) Many foreign securities exchanges do not undertake significant regulatory oversight functions or impose significant disclosure obligations on listed companies. As a result,

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[10] We note that were the Rule 12g3-2(b) exemption to be based on status, as set forth in the Proposing Release, this point would appear to be moot.

the adoption of a listing condition to Rule 12g3-2(b) may not further the Commission's goal of providing additional investor protections. Instead, it could impose burdens on smaller foreign private issuers that do not have a foreign listing, and on foreign private issuers with foreign listings that do not meet the Commission's proposed primary trading market definition. Although one response to this comment may be for the Commission to suggest the imposition of qualitative standards regarding foreign exchanges, we would not encourage an initiative in this regard, both because of the difficulty of identifying and administering the qualitative standards regarding the world's many securities exchanges, and because of the predicament foreign private issuers would face if they were to be subjected to Exchange Act registration based not on their status, but on the qualitative standards adopted by an exchange on which they may be listed.

(c) The adoption of the foreign listing condition would likely affect smaller foreign private issuers more than larger issuers, and could have the effect of imposing the very costly and burdensome obligations of Section 12(g) registration on the smallest of foreign private issuers that have never accessed the U.S. public capital markets or had their securities listed on a national securities exchange, but which, for reasons which may be beyond their control, determine that they have more than 300 U.S. beneficial holders. If the Commission determines to impose this requirement, we suggest that the Commission also consider, by rule, increasing the number of U.S. holders a foreign private issuer must have in order to trigger Exchange Act registration. As many commenters noted in connection with the Commission's deregistration proposals, in the current global marketplace a test of 300 U.S. holders, using the look-through rules under the Exchange Act, represents a miniscule amount of market interest. We also note that under the Proposed Amendment, an issuer having over 300 U.S. holders and no or *de minimis* U.S. trading volume, but which does not satisfy the foreign listing condition, would not only be required to register under the Exchange Act, but would remain in such status forever, or at least until it has fewer than 300 U.S. holders (or 300 holders worldwide) or obtains a foreign exchange listing which satisfies the requirements of Rule 12h-6 under the Exchange Act. Should the Commission determine to proceed with the adoption of a foreign listing condition, we respectfully suggest that the Commission also adopt amendments to increase substantially the number of U.S. holders a foreign private issuer may have without being subject to Exchange Act registration pursuant to the Rule 12g3-2(a) exemption.[11]

(d) Were the Commission to adopt a foreign listing requirement, some foreign private issuers currently claiming the exemption under Rule 12g3-2(b) may cease to qualify for a continued exemption. These foreign private issuers may, in reliance on their exempt status, have created sponsored ADR programs and engaged in investor-related conduct in the U.S. not inconsistent with the provisions of current Rule 12g3-2(b). Such foreign private issuers could incur significant and unanticipated costs as a result of the registration and reporting requirements under the Exchange Act, and the directors and officers of such issuers could be exposed to

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[11] Some of the commenters on the Commission's deregistration proposals suggested that the threshold number of U.S. holders under Rule 12g3-2(a) be substantially increased. See, for example, the letter of this Committee dated February 23, 2007 (referred to in note 4 above) and note 23 to the Commission's adopting release relating to the deregistration rules (Release 33-55440 (March 27, 2007)). Although the Commission declined to adopt any change in connection with that proposal, in our view the current proposals underscore the need for such an increase.

significant liabilities.[12] In order to avoid these costs and liabilities, such issuers may take action to reduce the number of their U.S. shareholders in order to maintain their Exchange Act exemption, such as by terminating their sponsored ADR programs by attempting to persuade depositary banks or market-makers to cease supporting unsponsored programs, by reducing the amount of information made available to U.S. investors or analysts in English, and by refusing to make dividends and other payments to U.S. investors in U.S. dollars.[13] None of this would, in our view, be in the interests of U.S. investors in the issuer's securities. Accordingly, should the Commission determine to adopt the foreign listing condition, we believe it should also consider according current Rule 12g3-2(b) companies with indefinite "grandfathered" status. Although the Commission notes that the foreign listing condition is consistent with the Commission staff's past and current practice of administering the Rule 12g3-2(b) exemption, this condition does not appear in the Rule itself, and is generally disregarded (for example, when a foreign private issuer voluntarily seeks Rule 12g3-2(b) status to meet the requirement of Rule 144A(d)(4). We can see no basis for the Commission staff to impose, on an administrative basis, conditions or qualifications to Rule 12g3-2(b) eligibility that go beyond the scope of the current Rule.

(e) We are concerned that the definition of "primary trading market" set forth in the Proposing Release, and in other Commission rules, is increasingly antiquated, because the term is jurisdictionally-based. Increasing numbers of foreign securities exchanges do not have, or do not make significant use of, a physical trading floor. The physical trading floors in these markets are being replaced by electronic systems. With the increasing globalization of securities trading, and the continuing deployment of electronic systems, many of the concepts associated with trading markets in particular jurisdictions cease to be relevant. The imposition of a jurisdictionally-based trading condition to Rule 12g3-2(b) could result in many current Rule 12g3-2(b) companies, including larger issuers, ceasing to be eligible for the exemption should the nature of global securities markets continue to evolve. Prior to adopting the definition in the Rule 12g3-2(b) context, we believe that the Commission should review and reconsider the appropriateness of the definition in each of the other contexts, including foreign issuer deregistration, where the definition appears in Commission rules.

3. Proposed Quantitative Standard

We do not support the proposal to condition eligibility for the Rule 12g3-2(b) exemption on a trading volume benchmark. We believe the imposition of such a standard could have significant and adverse effects, for the following reasons:

(a) The proposed rule could impose substantial reporting and compliance burdens on foreign private issuers even if such issuers have never engaged in efforts to sell or

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[12] Among other things, directors and officers may be subject to liability under Sections 10(b), 13(b)(5) and 20(e) of the Exchange Act, and Rules 10b-5, 13a-14, 13b2-1, 13b2-2 thereunder, and certain officers would have liability with respect to their obligation to sign certifications relating to the issuer's annual reports. The burdens upon foreign private issuers may increase beyond those currently in effect if the Commission were to adopt the additional reporting obligations and shortened Form 20-F filing deadline proposed in "Foreign Issuer Reporting Enhancements", Rel. No. 33-8900, File No. S7-05-08 (February 29, 2008).

[13] See also note 15 below.

market their securities in the U.S. We question the wisdom of imposing these burdens on such issuers, and believe there are substantive policy issues that differentiate the standards applicable to U.S. domestic issuers from those applicable to foreign private issuers. Unlisted U.S. domestic issuers that have never engaged in a securities offering may become subject to U.S. registration and reporting because these companies have a substantial nexus to the U.S. They are incorporated in the U.S., and have likely raised capital and issued securities in the U.S., using U.S. jurisdictional means. Foreign private issuers, on the other hand, are incorporated outside the U.S., and are either principally owned or managed by persons outside the U.S.[14] Such issuers may not have any presence in the U.S., may never have raised capital within the U.S. or from U.S. investors, and may never have utilized U.S. jurisdictional means in connection with their capital raising activities. We believe these are substantial differences, which suggest different results from a policy standpoint. The proposed quantitative standard could impose significant burdens on foreign private issuers that have been entirely passive in the U.S. markets. This extension of U.S. extraterritoriality may cause certain issuers to take steps intended to discourage investments by U.S. investors.[15] These steps would be contrary to the interests of U.S investors,[16] and would be contrary to the basic principle of expanding global investment opportunities available to U.S. investors.

(b) An unlisted foreign private issuer may have no control over the level of U.S. trading activity of its equity securities. U.S. investors may acquire the securities of a nonreporting foreign private issuer either directly on a foreign securities exchange or in the U.S. over-the-counter market ("OTC").[17] In the OTC market, U.S. investors may acquire the foreign

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[14] Reference is made to Rule 3b-4 under the Exchange Act for the specific definition of the term "foreign private issuer."

[15] Such steps could include the termination of sponsored ADR programs, discouraging depositary banks from establishing new unsponsored programs, discouraging broker-dealers from trading the issuer's securities or following the issuers with research; the undertaking of tender or other offers to reduce the number of U.S. holders, the adoption of corporate rules intended to be offensive to U.S. persons, or (as has been done by certain U.K. companies, such as Enodis plc and O2 plc), the amendment of company charter documents to permit the compelled disposition of company securities held by U.S. persons. In addition, foreign private issuers could adopt bans on the dissemination of investor-related information into the U.S. (such as imposing jurisdictional web-site screens on access to investor information), and exclude U.S. media from corporate announcements and events. Also, such issuers would be incentivized to exclude U.S. persons from rights offerings or other transactions that may result in a distribution of securities into the U.S. (for example, rather than issuing securities to U.S. persons in connection with acquisitions or reorganizations effected pursuant to schemes of arrangement, U.S. persons may be provided only entitlement to cash payments). Finally, it is conceivable that certain foreign private issuers may determine not to make any of their investor-related information available in English. If U.S. broker-dealers were unable to use non-English issuer documents to satisfy their Rule 15c2-11 obligations, they would not be permitted to submit quotations for the issuer's securities.

[16] It is possible that some foreign private issuers may determine not to undertake the efforts to assess the number of the issuer's U.S. holders pursuant to Exchange Act Rule 12g3-2(a). It is also possible that some issuers will not undertake the task of determining the relative amounts of their U.S trading volume. We strongly believe the Commission should refrain from adopting rules which may be unenforceable. See note 15 of the Proposing Release.

[17] We use the term OTC here to refer to markets in which the securities of nonreporting companies may trade. Certain over-the-counter markets, such as the OTC Bulletin Board (OTCBB), are not

shares directly or acquire such shares indirectly in the form of ADRs through sponsored or unsponsored ADR programs.[18] Although the acquisition of a foreign private issuer's securities outside the U.S. would not directly affect U.S. trading volume, the disposition of such holdings, as well as the acquisition and disposition of shares on the OTC markets, would contribute to the U.S trading volume.

Although a foreign private issuer may engage in securities offerings and marketing activities in its home jurisdiction, and may meet with investors, brokers and others in the U.S., it does not necessarily have any ability to create or manage its U.S. trading volume.[19] Trading volume may arise due to factors completely extrinsic to the activities of a foreign private issuer, such as purchases or sales by or through one or more U.S. brokers, or by one or more U.S. institutional investors. As a result, were the trading volume condition to be adopted, an issuer which never had trading volume in excess of a specific threshold may find itself, without any action on its part, excluded from continued Rule 12g3-2(b) eligibility and subject to U.S registration and reporting obligations by reason of an increase in the volume in one particular year.

(c) Prior to adopting any U.S. trading volume condition, we believe the Commission should confirm that reliable trading volume information is readily available (at reasonable cost) to issuers, and that the trading volume information currently available to issuers does not include instances of double-counting (for example, if a purchase and a sale are treated as two transactions instead of one). Absent the Commission's determination that clear and authoritative trading volume information is readily available at reasonable cost, it seems to us unfair to impose on foreign private issuers the burden of ascertaining, and making judgments based upon, OTC trading volume information.[20]

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within the scope of the definition because they require listed companies to be subject to Exchange Act reporting obligations.

[18] Unsponsored ADR programs are programs created by depositories without the consent of, or any participation by, the foreign private issuer.

[19] Foreign private issuers are generally unable to prevent the sale of securities to U.S. persons in their home countries, and have no control as to the number of shares sold to investors in the U.S. Although the issuance of ADRs requires that the shares be registered pursuant to Form F-6, an issuer has absolutely no control as to the number of shares registered in an unsponsored program. Although an issuer may determine to terminate or limit the number of shares registered in a sponsored ADR program, we question whether such a limitation would benefit U.S. investors. Sponsored ADR programs often serve the interests of U.S. investors, for example, by expediting issuer communications to investors and by permitting the payment of dividends and other amounts in U.S. currency. Even in the case of a sponsored program, however, a foreign private issuer does not necessarily have any control over the level of trading activity in the U.S. In our view, the termination of sponsored ADR programs (or the determination by an issuer not to commence a sponsored ADR program) would not be in the interests of U.S. investors.

[20] In this connection, we note that experience based on the recently adopted deregistration rules may not be relevant, since those rules require a one-time determination, while the Commission's Rule 12g3-2(b) proposals will require annual determinations for an indefinite period, and because U.S. trading information may be more readily available if the issuer is traded on an exchange or the OTC Bulletin Board, rather than the OTC trading that would apply to Rule 12g3-2(b) companies.

(d) The current Rule 12g3-2(b) provisions without a trading volume test have served U.S investors well. Many world class companies have claimed Rule 12g3-2(b) status, and U.S. investors have, as a result, been able to achieve the benefits of portfolio diversification. We see no reason to impose the additional qualification standard of a trading volume test. As indicated above with respect to the foreign listing condition, the imposition of this condition could result in the loss of exemption of some current Rule 12g3-2(b) companies, and impose significant burdens on these companies. Should the Commission determine to adopt a quantitative standard, we believe the Commission should consider granting grandfathered status (exemption from this requirement) to those companies currently claiming the Rule 12g3-2(b) exemption.

4. Proposed Electronic Publishing of Non-U.S. Disclosure Documents

Although, as indicated above, we question the imposition of U.S. securities law obligations on foreign private issuers that have neither accessed the U.S. public capital markets nor listed securities in the U.S., in general we support the provisions of the Proposing Release that would (except in connection with or following a recent Exchange Act deregistration) require an issuer to have published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, prescribed non-U.S. disclosure information. However, we believe that compliance with this condition should not impose a significant burden on foreign private issuers. Accordingly, we suggest that the Commission require English language translations only with respect to that information for which translation is currently required under Rule 12g3-2(b)(4). Any expansion of the scope of documents with respect to which the translation requirement pertains could impose substantial burdens on foreign private issuers based in non-English speaking jurisdictions that do not otherwise provide English language shareholder information.

The electronic publication provisions of the Proposed Amendments would remedy the current deficiencies in Rule 12g3-2(b) regarding non-U.S. disclosure information. The furnishing of information to the Commission in paper form is anachronistic and unhelpful to investors, who generally have access to such information directly from the issuer or from the exchanges on which the issuer's securities may trade. The current process imposes unnecessary burdens both on the foreign private issuer and on investors. Even if the information required by the Rule is otherwise publicly available on its Web site or elsewhere, a foreign private issuer is required to identify and submit such information to the Commission in paper form. In order to obtain such information from the Commission (and to confirm whether the information provided to the Commission is fully consistent with information available elsewhere), an investor is either required to visit the Commission's public reference facilities or to obtain such information (at cost) from a commercial service provider. We believe the replacement of the paper filing requirement with a requirement of Internet availability would be of significant benefit both to companies and investors. Many foreign private issuers already provide such information on their Web sites, and the information that is available to investors through a Web site would, in many instances, be more extensive than that currently available to investors through Rule 12g3-2(b) submissions. Such additional information would assist investors in better understanding the foreign private issuer, its products and services, management, and strategies.

Accordingly, we believe the electronic publishing requirement proposed in the Proposing Release should be adopted by the Commission, but that the Commission should retain the current Rule 12g3-2(b)(4) provisions relating to the documents required to be translated into the English language.

5. Proposed Elimination of the Written Application Requirement[21]

We believe the Commission's proposal regarding automatic eligibility for Rule 12g3-2(b) exempt status would represent a significant improvement over the current process for claiming Rule 12g3-2(b) status. Under the current rules, a foreign company may technically be eligible to claim Rule 12g3-2(b) status only once, during the 120 day period from the end of the fiscal year in which it had over 300 US holders, 500 holders worldwide and over $10 million of assets. Claims for exemption prior to that window period may be viewed by the Commission as being premature,[22] and claims following that window period would be submitted too late, because the issuer will already have become subject to registration under the Exchange Act.[23] In order to properly identify the relevant window period in which a claim of exemption would be appropriate, a foreign private issuer is required, on an annual basis, to perform a calculation of the number of its U.S holders, using the methodology prescribed by Commission rules. Although we do not have empirical data, we suspect that many foreign private issuers without a U.S. market presence may either not be aware of, or not be willing to devote the effort necessary to undertake, this annual review. For certain foreign private issuers, the submission of a claim of exemption carries with it the risk that the failure to have properly performed the analysis in a prior year would result in the denial of the exemption and the issuer being subject to Exchange Act registration and reporting.

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[21] Throughout the Proposing Release, the Commission repeatedly refers to a company seeking the Rule 12g3-2(b) exemption as being an "applicant" and refers to a written "application" requirement. We understand the term "applicant" to refer to one who requests, petitions or applies for something, connoting that the application process is subject to the receipt of a grant, approval or consent from another person. Rule 12g3-2(b) does not use these terms, or involve or refer to any application. The Rule provides that "Securities of any foreign private issuer shall be exempt from Section 12(g) of the Act" (emphasis added), if the issuer furnishes specified information. The Rule notes that the information and documents furnished need not be under cover of any prescribed form. The description of the Rule and the list compiled by the Division of Corporation Finance of companies that have claimed the exemption do not refer to the terms "applicant" or "application". We believe that the use of such terms in the Proposing Release is inconsistent with the Rule, and implies a procedure regarding exemption from Section 12(g) registration differing from the automatic exemption that currently exists for qualified companies furnishing the Commission the information required by the Rule.

[22] Such claims may not be premature, though, if the issuer is seeking to establish an ADR facility for its equity securities or to satisfy the information requirement in Rule 144A(d)(4).

[23] As provided in the Proposing Release, "Currently an issuer may apply for the Rule 12g3-2(b) exemption, although it may have exceeded the Section 12(g) shareholder thresholds on the last day of its most recently completed fiscal year, as long as the statutory 120-day period for filing a Section 12(g) registration has not lapsed." The Proposing Release notes that several issuers have requested the Commission staff to accept their applications although the 120-day period has lapsed, but does not indicate the staff's position on granting such requests.

The Proposing Release addresses this issue in what we believe to be an intelligent and appropriate manner. If the Rule 12g3-2(b) amendments are adopted as proposed, most foreign private issuers will, by reason of the automatic application of the Rule, be freed from the obligation to perform an annual analysis of the number of their U.S. shareholders, and will also avoid the risks associated with the current system requiring the submission of a claim of exemption during a short window period.[24] In order to avoid any doubt that foreign private issuers may have as to the availability of the Rule 12g3-2(b) exemption, we request that the Commission explicitly state, in its adopting release, that all foreign private issuers are automatically entitled to the exemption if they meet the conditions set forth in the Rule, whether or not they have neglected to timely claim such exemption in the past, and notwithstanding the number of U.S. holders they may have had.

We believe the Commission should adopt the proposed elimination of the written application requirement from Rule 12g3-2(b) eligibility.

6. Proposed Duration of the Amended Rule 12g3-2(b) Exemption

For the reasons addressed above, we believe that the duration of the Rule 12g3-2(b) exemption should not be tied to either the foreign listing condition or the trading market condition. Accordingly, in our view the exemption should continue with respect to a class of securities unless and until the foreign private issuer registers that class under Section 12(g) of the Exchange Act or incurs reporting obligations under Section 15(d) of the Exchange Act, provided that the issuer continues to make available information as provided in the Rule.

We respectfully suggest that the Commission carefully consider the consequence of the proposals to a foreign private issuer that fails to satisfy the foreign listing or the trading volume conditions. Such an issuer would be obligated to file an Exchange Act registration statement with the Commission, and undertake the extensive (and costly) effort to implement internal control procedures, undertake an audit in accordance with the standards of the Commission and the PCAOB (by an auditor registered with the PCAOB, which may require retention of an auditor other than the firm regularly engaged by the issuer), prepare an annual report on Form 20-F (which may include certain financial information that would not necessarily be required in the issuer's home jurisdiction, such as the certain equity investee financial statements and financial statements of material acquirees in accordance with Commission requirements[25]). In addition, registration would subject the foreign private issuer, as well as its directors and officers, to liabilities pursuant to a liability regime which may be more extensive than that in its home

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[24] Although we note that if the trading volume condition is adopted, every nonreporting foreign private issuer will be required to determine annually the amount of its U.S. trading volume and also perhaps whether it has more than 300 record holders of a class of its equity resident in the U.S. (using the Commission's look-through rules in Exchange Act Rule 12g3-2(a)).

[25] The obligations imposed on foreign private issuers (including the Form 20-F filing deadline) may increase were the Commission to adopt its proposals relating to "Foreign Issuer Reporting Enhancements", Rel. No. 33-8900, File No. S7-05-08 (February 29, 2008). See also note 27 below.

jurisdiction or trading markets.[26] Once subject to Exchange Act registration, the issuer may find it difficult to exit the U.S. reporting system under the Commission's deregistration rule (Rule 12h-6 under the Exchange Act), because in order to deregister, the issuer must have had reporting obligations under the Exchange Act for at least the 12 months preceding the filing of a Form 15F, and must have filed at least one annual report. For example, if a calendar-year foreign private issuer determines it does not qualify under Rule 12g3-2(b), it would be obligated to file its Exchange Act registration statement (which would generally be on Form 20-F) not later than April 30) of the following year (120 days after the end of the fiscal year). Before it would be eligible to deregister, it would be obligated to file an annual report for the year in which its registration became effective under the Exchange Act. However, deregistration may not be possible for such an issuer. Although the issuer may have become subject to registration by virtue of the 20% average daily trading volume ("ADTV") trigger, in order to deregister under the Exchange Act, the issuer would be required to satisfy the 5% ADTV test of Rule 12h-6 or to have fewer than 300 equity security holders in the U.S. In the Proposing Release, the Commission states "We believe it is appropriate to have a stricter trading volume standard for determining when an issuer may exit the Exchange Act registration and reporting regime compared to when it must enter that regime. In the former instance, an issuer has availed itself of U.S. market facilities and filed Exchange Act reports upon which U.S. investors have relied." The Commission's observation in the prior sentence does not, in our view, represent an accurate assessment of the circumstances that would be applicable to a foreign private issuer required, as a result of the Commission's adoption of the foreign listing and trading volume conditions, and without any act or activity on the part of the issuer to encourage a U.S. market, to become an Exchange Act reporting company. To require such an issuer to file Exchange Act reports even if it may never have undertaken efforts to create or encourage U.S. market activity, and then deny the issuer the ability to deregister until it meets a much tighter standard because it "filed Exchange Act reports upon which U.S. investors have relied" places a foreign private issuer in an untenable position. If the Commission determines to require Exchange Act registration of such issuers, it should, in our view, consider adopting a different standard for deregistration, such as the issuer's U.S. trading volume falling below the 20% level during a defined subsequent period.

7. Proposed Elimination of the Successor Issuer Prohibition

We support the proposal to permit a successor issuer to claim the Rule 12g3-2(b) exemption upon the effectiveness of its exit from the Exchange Act reporting regime under Rule 12g-4, Rule 12h-3 or Section 15(d), as proposed.

8. Proposed Elimination of the Rule 12g3-2(b) Exception for MJDS Filers

We support the elimination of the ability of a MJDS issuer to claim the Rule 12g3-2(b) exemption while having Exchange Act reporting obligations, as proposed. As stated above, however, we believe that the disability should only operate on a class-by-class basis.

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[26] Issuers would be subject, among other things, to liabilities under Sections 10(b), 13(a), 13(b) and 18 of the Exchange Act, and directors and officers may be subject to the liabilities referred to in note 12 above.

9. Proposed Elimination of the "Automated Inter-Dealer Quotation System" Prohibition and Related Grandfathering Provision

We support the elimination of the automated inter-dealer quotation system prohibition, as proposed. We also support the elimination of the grandfathering provision to Rule 12g3-2(b)'s automated inter-dealer quotation system prohibition, as proposed.

10. Proposed Revisions to Form F-6

We support, in general, the proposed revisions to Form F-6. However, as discussed above, we believe that the Form should be amended so that an issuer using the Form, and not otherwise required to claim a Rule 12g3-2(b) exemption, is not required to agree to be subject to all the conditions of Rule 12g3-2(b) merely by virtue of the Form F-6 requirement. We believe the interests of investors could be satisfied by having the issuer confirm that it will make available the information that it would have been required to furnish had it claimed an exemption pursuant to Rule 12g3-2(b).

11. Proposed Amendment of Exchange Act Rule 15c2-11

We support the proposed requirement that a broker-dealer have available the information published by an issuer to maintain the Rule 12g3-2(b) exemption. On the other hand, we note that broker-dealers are not in a position to be able to confirm whether an issuer relying upon Rule 12g3-2(b) has complied with all of the applicable information requirements of the Rule. We believe that broker-dealers should have to do no more than provide investors with appropriate instructions regarding how to obtain the foreign private issuer information electronically. We also suggest that the Commission add a provision (i) confirming that a broker-dealer has no obligation to confirm independently that the issuer has complied with its Rule 12g3-2(b) information obligations; and (ii) stating that a broker-dealer shall not be deemed to be in violation of Rule 15c2-11 if it has acted in good faith.

12. Proposed Transition Periods

As discussed above, we believe the Commission should consider providing permanent "grandfather" relief to issuers currently claiming the Rule 12g3-2(b) exemption that do not comply with the foreign listing or the trading volume conditions of the Rule (should those conditions be adopted). If the grandfather relief is not provided, we suggest the adoption of a five year transition period. We believe this period is appropriate because of the many obligations that would be imposed upon a foreign private issuer that ceases to be eligible for the Rule 12g3-2(b) exemption, including (i) the need to have three years audited financial statements, audited in accordance with PCAOB requirements by an auditor meeting the PCAOB's and the Commission's auditor independence requirements – these requirements may impose considerable obligations on foreign private issuers whose current requirements are not as stringent, (ii) the need to include financial statements relating to significant business acquisitions

and equity investees under Rules 3-05 and 3-09 and Article 11 of Regulation S-X,[27] and (iii) the need to implement governance changes, such as pre-approval of non-audit expenses by the issuer's audit firm.

We believe a three month transition period should be a sufficient period with respect to the processing of paper Rule 12g3-2(b) submissions. In addition, we believe the Commission should notify each current Rule 12g3-2(b) claimant by letter advising it, in plain English, of the changes implemented as a result of any amendments to Rule 12g3-2(b), and that the paper filing transition period should commence from on or about the date such letter is mailed.

13. Revisions to Form 15

We support the proposed revisions to Form 15 to reflect the current rules and proposed rule amendments.

General Comments Regarding the Foreign Listing and Trading Volume Conditions

Although we support the Commission's efforts to better protect U.S. investors, we believe the Proposed Amendments fall short of that objective in certain respects, and should be considered in a larger context.

First, the trading volume condition would impose burdens on many thousands of foreign private issuers. Each of the world's nonreporting foreign private issuers with over 500 shareholders and over $10 million of assets, which seeks to maintain an Exchange Act exemption, would be obligated to determine annually the amount of its U.S. trading volume and also possibly the number of its U.S. holders.[28]

Second, many companies (including many large companies) have claimed Rule 12g3-2(b) status based on their determination not to incur the costs, burdens or liabilities associated with Exchange Act registration. While some foreign private issuers may, following the adoption of any foreign listing or trading volume conditions, determine to register their equity securities pursuant to the Exchange Act, others may elect not to do so, and others still may adopt provisions to their corporate charters or otherwise that would deter or discourage U.S. persons from acquiring or holding their securities in order to bring the number of their U.S. holders below 300 or the U.S. share of trading volume below 20%.[29]

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[27] We note that the Commission has proposed amendments that would require foreign private issuers to present financial information about significant, completed acquisitions in their annual reports under the Exchange Act, pursuant to Rule 3-05 and Article 11 of Regulation S-X. See "Foreign Issuer Reporting Enhancements", Rel. No. 33-8900, File No. S7-05-08 (February 29, 2008).

[28] Please see our comment above regarding the potential difficulty of determining OTC trading volume information.

[29] See note 15 above. In the Proposing Release, the Commission states that "by enabling a qualified foreign private issuer to claim the Rule 12g3-2(b) exemption automatically, and without regard to the number of its U.S. shareholders, the proposed rule amendments should encourage more foreign

If foreign issuers take measures to restrict or discourage U.S. ownership of their securities, U.S. investors may lose the ability they currently have to invest in the securities of such foreign private issuers. To the extent that one of the goals of the U.S. securities laws is to protect investors, and portfolio diversification is one means of doing so[30], the Commission's proposal could, in our view, operate against such goal.

We are also concerned that the Commission's enhanced standards for Rule 12g3-2(b) eligibility may increase the likelihood of a challenge to the scope of the Commission's authority to impose U.S. securities law obligations on foreign issuers. Especially where a foreign private issuer has never taken efforts to establish a U.S. presence, or sought to create or encourage a U.S. shareholder base, we believe that significant legal and practical issues arise would arise in connection with the enforcement of Exchange Act registration and reporting obligations. We also believe there is a substantial risk of noncompliance with the Commission's requirements, and note, as pointed out in the Proposing Release, that a U.S. Senate report justified an exemptive provision for the securities of foreign private issuers based on the serious difficulties that would result in the enforcement of Exchange Act Section 12(g)'s registration and reporting obligations "against foreign issuers outside the jurisdiction of the United States who do not voluntarily seek funds in the American capital markets or listing on an exchange . . ."[31]

Finally, we believe that the adoption of additional conditions to Rule 12g3-2(b) would send the wrong message to the foreign private issuer community. In our view, the imposition of Exchange Act registration obligations that may arise as a result of the activities of persons not associated with, and outside the control of, foreign private issuers is, we believe, inconsistent with international comity. It would be appropriate for the Commission to consider, in this regard, how U.S. companies would view the imposition of similar requirements by one or more foreign jurisdictions. Were a foreign jurisdiction to require a U.S. issuer to register its securities and to commence reporting according to foreign financial and other disclosure requirements (which may require reports to be filed in a language other than English), and to comply with

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private issuers to claim the Rule 12g3-2(b) exemption." The Commission has not, however, addressed the implications to U.S. investors of potential adverse reaction by foreign private issuers as a result of the adoption of the proposed foreign listing and trading volume conditions, including the risk of foreign issuer noncompliance or the effect of possible efforts by foreign private issuers to dissuade U.S. investor interest in their securities.

[30] See, Tafara, E. and Peterson, R., A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework, Harvard International Law Journal, Volume 48, No. 1, Winter 2007, at page 41: "Simultaneously with this trend, retail investors, like institutional investors, no longer limit themselves to investment opportunities within the United States. This trend is logical. Many of the world's fastest growing and most profitable companies are headquartered outside the United States, and many of these companies are already familiar names to American investors, who on a daily basis use the cars, computers, clothing, and services provided by these companies. Likewise, modern portfolio theory advises the wise investor to diversify his or her risk widely. Investing abroad offers the investor just this kind of diversity, even offering a degree of hedging against exchange-rate fluctuations and (to some degree) macroeconomic cyclical events that a purely domestic investment portfolio might not provide."

[31] See note 15 in the Proposing Release, quoting 88th Congress, 1st Session, U.S. Senate Report No. 379 1, 29 (July 24, 1963).

substantive governance and other requirements based solely on the number of foreign holders of the U.S. company or the amount of trading in that country, and without any effort by the U.S. company to access the capital markets of that jurisdiction, we believe that U.S. companies would either remonstrate strongly against such requirements, or ignore them.

As stated above, we believe that certain aspects of the Proposed Amendments are commendable, but respectfully request the Commission to consider carefully the implications of the additional foreign listing and trading volume conditions both to U.S. investors and to foreign private issuers. If the Commission's intention is to assure that in a mutual recognition context, the securities of foreign private issuers offered to U.S. investors adhere to specific standards, we believe the Commission should defer proposing additional conditions until such time as a definitive mutual recognition proposal is put forth. At that time, and in that context, these matters may be better considered.

The Committee appreciates the opportunity to comment on the Proposed Amendments and respectfully requests that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Respectfully submitted,

/s/ Keith F. Higgins

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