



THE BANK OF NEW YORK MELLON

May 12, 2008

Ms. Nancy M. Morris,  
Secretary,  
Securities and Exchange Commission,  
100 F Street, N.E.,  
Washington, DC 20549-9303.

Re: File Number S7-05-08

Dear Ms. Morris:

The Bank of New York (“BNY”) is very pleased to have the opportunity to comment on the proposal by the Securities and Exchange Commission (the “Commission”) to change certain rules relating to the filing of annual reports on Form 20 F and the information required to be included therein.<sup>1</sup> This letter addresses two of the changes included in the Commission’s proposal – the acceleration of the reporting deadline for annual reports filed on Form 20-F and the inclusion of annual disclosure regarding fees and payments in connection with foreign private issuers’ American Depositary Receipt (“ADR”) programs.

BNY is the world’s largest depository for American and global depository receipts and currently issues depository receipts for more than 1,300 programs

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<sup>1</sup> The SEC Proposal is contained in Release Nos. 33-8900; 34-57409; International Series Release No. 1308 (February 29, 2008).

representing 63 countries, accounting for 64% of all public sponsored depositary receipt programs. Based on the views expressed by many of our ADR clients and our broad international experience we submit the comments expressed herein.

**A. Accelerating the Reporting Deadline for Form 20-F Annual Reports**

In the section of the Commission’s proposal entitled “Overview of the Proposed Amendments”, the Commission states that the objective of Form 20-F is “to place the disclosures required of foreign private issuers on a more equal footing to that required of domestic issuers”, while acknowledging “that differences in the national laws and accounting regulations applicable to foreign private issuers should be considered when establishing disclosure requirements for foreign private issuers.”<sup>2</sup> BNY does not believe that accelerating the reporting deadline for Form 20-F annual reports as proposed adequately weighs these competing interests.

BNY understands that requiring uniformly that a foreign private issuer file an annual report on Form 20-F within six months after the end of the issuer’s fiscal year may not provide U.S. investors information as quickly as is desirable from the perspective of U.S. investors, and that a number of foreign private issuers already file their annual reports on Form 20-F well before the current six-month deadline.<sup>3</sup> However, merely shortening this time frame to 90 days for large accelerated filers or 120 days for other foreign private issuers does not sufficiently take into consideration the legal and accounting requirements of a foreign private issuer’s home country or the burden such a short time-frame would impose on these issuers. Additionally, BNY believes that universally imposing a 90 or 120 day deadline on foreign private issuers, without regard for the issuer’s home country reporting requirements, risks making the U.S. capital

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<sup>2</sup> *Id.* at page 7, citing Release No. 34-16371 (Nov. 29, 1979) [44 FR 70132].

<sup>3</sup> *Id.* at page 26.

markets less attractive to foreign private issuers and further limiting U.S. investors ability to invest internationally.

The proposed rule-change underestimates the resources required of a foreign private issuer to comply with both its domestic and U.S. reporting obligations. Many issuers will have difficulty meeting a strict 90 or 120 day deadline because they will be required to simultaneously prepare their Form 20-F and their home country annual report. While recent changes allowing financial statements prepared in accordance with IFRS to be included in a Form 20-F without reconciliation to U.S. GAAP will alleviate pressure on certain foreign private issuers, not all foreign private issuers are or will be permitted to prepare their home country financial statements in accordance with IFRS, and will therefore be required separately to prepare a U.S. GAAP reconciliation. For many of these issuers, a strict 90 or 120 day filing deadline will require the issuer to maintain separate domestic and U.S. accounting teams, at great expense. While the Commission is correct that more jurisdictions are likely to adopt IFRS in the coming years, it is premature to assume that this will be prove to be true, and applying a universal deadline for the filing of an annual report on Form 20-F in anticipation of the IFRS standard becoming more widely accepted risks imposing tremendous burdens on foreign private issuers organized in jurisdictions that do not adopt the IFRS standard.

BNY believes that the more appropriate method for determining the deadline for the filing of a Form 20-F is by reference to the deadline imposed by a foreign private issuer's home country, plus an additional window of 60 days. This window would allow issuers to focus first on meeting their domestic disclosure obligations, and to then focus on translating their home country materials into English, preparing any necessary U.S. GAAP reconciliations, and otherwise ensuring compliance with the requirements of Form 20-F imposed by the Commission, which in many cases exceed the disclosure obligations of foreign private issuers' home countries. This would obviate the unnecessary expense and burden of maintaining two parallel accounting

teams and would, in many cases, provide U.S. investors access to disclosure information regarding a foreign private issuer in a more timely manner than is required under the current rule. This would also avoid a situation where a foreign private issuer was required to file its annual report on Form 20-F before it was required to file its annual report in its home country, and would ensure that foreign private issuers are not given additional reasons to avoid the U.S. capital markets entirely.

**B. Annual Disclosure About ADR Fees and Payments**

The Commission has indicated that it is considering requiring foreign private issuers to disclose in their Form 20-F the fees and other charges incurred in connection with the issuer's ADR facilities. BNY does not believe that these fees or charges are material to ADR holders or that requiring the disclosure of the type and amount of these fees or charges should be required in an annual report on Form 20-F.

BNY understands that certain costs incurred by a foreign private issuer in establishing and maintaining an ADR program, such as stock exchange listing fees, may be reimbursed by the depository, and that the Commission is concerned that the cost to the depository of reimbursing these fees may be passed on to investors in the issuer's ADRs. However, the deposit agreement relating to a particular ADR will specify who is responsible for the payment of particular fees, and many of these fees are not borne by ADR holders but rather by the broker-dealer creating or surrendering ADRs. While the Commission is correct that ADR holders frequently purchase their ADRs in book-entry form and therefore do not see the disclosures provided in the physical certificate or the deposit agreement at the time of purchase, many deposit agreements are electronically available on EDGAR and an explanation of the fees charged to ADR holders are available from the depositories upon request.

BNY also understands that the fee arrangements between the depository and the issuer are relevant in the context of a capital raising where a Form F-1 or F-3 is filed, and that such fee arrangements should be disclosed in the registration statement

relating to such capital raising. BNY does not believe, however, that these fees are material to U.S. investors such that these fees should be reported annually on Form 20-F.

In sum, the fees for which ADR holders are responsible are clearly established in the relevant deposit agreement, the terms of which are available to U.S. investors. Additionally, BNY does not believe that these fees are materially relevant to the ADR holders and the Commission should not require an issuer to disclose these fees in its annual report on Form 20-F.

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

Very truly yours,

Cristina Cobb

The Bank of New York