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May 12, 2008

Re: **Comments on Proposed Amendments to Forms and Rules – the  
“Foreign Issuer Reporting Enhancements”**

**Release Nos. 33-8900; 34-57409; International Series Release No. 1308;  
File No. S7-05-08 (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 recent initiatives of the Securities and Exchange Commission (the “**Commission**”), including this Release, to modernize some of the outdated elements of U.S. securities laws, including recently adopted rules that relax the deregistration requirements for foreign private issuers and eliminate the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 International Financial Reporting Standards (“IFRS”) and meet certain conditions, recently proposed amendments to the rules that exempt a foreign private issuer from the registration requirements for certain equity securities and the Commission’s efforts to explore systems of mutual recognition for exchanges and broker-dealers.

**A. Form 20-F Deadline Acceleration**

We believe it is appropriate for the Commission to evaluate acceleration of the reporting deadline for Form 20-F annual reports filed by foreign private issuers with an objective of taking advantage of technological advances to give

investors more timely access to annual report filings. We respectfully submit, however, that the Commission should carefully consider the appropriateness of adopting a single set of accelerated deadlines for all foreign private issuers. There is significant diversity among foreign private issuers concerning two key aspects of annual reports, the timing of the home country deadline for annual reports and the home country requirements for accounting standards for presentation of financial statement reporting.

We encourage the Commission to design a rule that strikes the right balance between costs to specific classes of foreign private issuers and benefits to U.S. investors. We respectfully submit, therefore, that the Commission carefully consider alternative accelerated deadlines of:

- 30 days after the home country annual report deadline for foreign private issuers that only prepare annual financial statements in accordance with U.S. GAAP or IFRS;
- a longer duration after the home country annual report deadline for foreign private issuers that prepare annual financial statements in accordance with home country GAAP in addition to U.S. GAAP or IFRS; and
- a separate deadline for foreign private issuers for which the only annual reporting obligation is Form 20-F.

#### **I. Form 20-F Deadline Acceleration in Light of Home Country Deadlines**

As currently drafted, the proposed amendments to the Form 20-F annual report deadline would be accelerated to within 90 days after the foreign private issuer's fiscal year-end in the case of all large accelerated and accelerated filers. In many jurisdictions the accelerated Form 20-F deadline would occur at the same time as, or earlier than, the home country reporting deadline. The effect of the accelerated Form 20-F deadline in many cases would be to force a foreign private issuer either to file Form 20-F concurrently with its home country report or to accelerate the filing of its home country report to give the issuer time to prepare its Form 20-F.

Given the diversity of home country filing deadlines and the disparate burdens that would be imposed on foreign private issuers in different jurisdictions, we urge the Commission to consider Form 20-F deadlines that appropriately take into consideration the applicable home country annual report deadline. A number of foreign private issuers do complete and submit their annual reports on Form 20-F in a timeframe that meets or almost meets the proposed accelerated deadline. However, for many foreign private issuers the acceleration of the deadline would impose a significant incremental burden.

Home country annual reports and Form 20-F annual reports are prepared sequentially by many issuers. We believe that it will be difficult for some foreign private issuers to prepare home country annual reports concurrently with Form 20-F or to accelerate sequential home country and Form 20-F annual reporting without incurring significant additional incremental expenses due to the following considerations:

- substantial time and resources are required to prepare each of the home country annual report and the annual report on Form 20-F;
- home country reports and Form 20-F reports are often handled by the same departments and individuals within a foreign private issuer;
- significant differences in disclosure requirements between Form 20-F and home country annual reports necessitate additional time and resources for preparation of additional disclosure such as the table of contractual obligations, off-balance sheet disclosure and market risk analysis; and
- English language translation of portions of the home country annual report is often the starting point for preparation of Form 20-F. Where English is not the working language of a foreign private issuer, extensive translation requires significant time and effort.

We also believe that the investor information benefits of accelerated reporting will be limited. We believe that the market impact of the 20-F filings for many foreign private issuers is generally negligible, because the information principally of interest to investors is disclosed in home country year-end earnings announcements typically released within two months after fiscal year-end. Such information is also promptly made available to U.S. investors in 6-K filings. The importance of home country earnings release information is demonstrated by the fact that foreign private issuers that go on investor relations roadshows in the U.S. to report annual results typically do so after the home country year-end earnings announcement and prior to the filing of Form 20-F.

We respectfully submit, therefore, that the Commission consider modifying its proposal to accelerate the Form 20-F deadline to establish accelerated deadlines consistent with home country annual report deadlines.

## **II. Form 20-F Deadline Acceleration in Light of Financial Reporting Obligations**

Under the proposed amendment, foreign private issuers would be treated consistently regardless of which accounting standards a foreign private issuer uses in the preparation of its annual financial statements and regardless of whether a foreign private issuer is required to report under multiple standards. We expect, however, that the burdens imposed on foreign private issuers by the proposed acceleration of the Form 20-F deadline will vary significantly based upon the

nature of such financial reporting obligations. We respectfully suggest that the Commission consider varying the Form 20-F deadline based on two categories of foreign private issuers:

- those that only prepare annual financial statements in accordance with U.S. GAAP or IFRS; and
- those that prepare annual financial statements in accordance with home country GAAP in addition to U.S. GAAP or IFRS.

The impact of the proposed acceleration of the Form 20-F deadline will be more substantial for foreign private issuers (“**dual-GAAP preparers**”) that prepare their annual financial statements based on home country GAAP for home country filings and also based on U.S. GAAP or IFRS for the purpose of Form 20-F. Some jurisdictions require home country GAAP reporting, even if the issuer uses U.S. GAAP or IFRS for the financial statements in Form 20-F. Home country requirements can also vary within jurisdictions. For example, in Japan a foreign private issuer in a regulated industry such as banking is required to prepare home country financial statements, whereas no such requirement applies to Japanese listed companies generally.

The preparation of U.S. GAAP or IFRS financial statements by dual-GAAP preparers requires substantial incremental time and effort beyond that required for the preparation of home country GAAP financial statements. We understand that many or most dual-GAAP preparers prepare home country GAAP financial statements and subsequently prepare adjustments required for U.S. GAAP or IFRS financial statements. A large volume of additional journal entries and valuation work may be required. Adjustments may relate, for example, to consolidation, purchase accounting adjustments, hedge accounting, fair value of financial assets and pension fund disclosures. Furthermore, Regulation S-X requirements relating to significant business combinations and equity investees can require substantial additional time and effort, particularly for foreign acquirees and investees not subject to U.S. reporting requirements.

We note that our suggested framework of a fixed number of days after the home country annual report deadline would not make sense for a large number of foreign private issuers that are only subject to the annual reporting requirements of Form 20-F. Such foreign private issuers include, for example, companies listed or quoted only on the Nasdaq Global Market or the New York Stock Exchange and organized in the Cayman Islands, the British Virgin Islands or another offshore jurisdiction, as well as companies that are dual listed in a jurisdiction (such as Israel) that allows home country annual reporting requirements to be satisfied by Form 20-F. As a result, these foreign private issuers are not subject to reporting requirements in any home country jurisdiction and only report financial statements under U.S. GAAP or IFRS. We respectfully suggest that the Commission carefully consider an appropriate accelerated Form 20-F deadline for these foreign private issuers that balances the expected benefit of achieving

accelerated disclosure against the possibility that acceleration may disincentivize such companies from listing in the United States.

We respectfully submit, therefore, that the Commission consider addressing these differences in annual reporting burden by modifying its proposed acceleration of the Form 20-F deadline to reflect alternatives deadlines depending on whether a foreign private issuer is a dual-GAAP preparer, and whether a foreign private issuer is subject to home country annual reporting requirements in addition to Form 20-F.

## **B. Certain Other Proposals**

We support the Commission's proposal to permit foreign issuers to test on an annual basis their qualification to use the forms and rules available to foreign private issuers, rather than on the continuous basis that is currently required. We also encourage the Commission to eliminate the criterion that a majority of the officers and directors not be citizens or residents of the United States or, at a minimum, to allow flexibility for a foreign issuer to address a sudden change in the composition of its officers or directors that precedes the annual assessment of foreign private issuer status. Annual assessment using the existing criterion may have the effect of discouraging foreign issuers from appointing qualified U.S. citizens or residents for management vacancies, especially in cases where a foreign issuer's management composition is close to the threshold, and may also inhibit service by U.S. business leaders on boards of international corporations.


We generally support the Commission's proposal to amend Form 20-F to require substantially the same type of disclosure currently required for domestic issuers with respect to changes in and disagreements with their certifying accountant. This proposal would require disclosure of information relating to disagreements with an issuer's certifying accountant for the most recent two fiscal years. Because foreign private issuers would not have had notice that such disagreements in prior years would potentially be subject to public disclosure, we encourage the Commission to allow a transition period, which, for example, would only require disclosure of disagreements that occur subsequent to the publication of the Commission's final release.

We also generally support the Commission's proposal to require a foreign private issuer to provide certain financial information in annual reports on Form 20-F about an acquisition completed during the most recent fiscal year that is significant at the 50% or greater level. Specifically, the Commission proposes that Form 20-F include financial statements and pro-forma financial statements as required by Rule 3-05 and Article 11 of Regulation S-X. A potential effect of this proposal would be to discourage foreign private issuers from completing major acquisitions at or near the end of the fiscal year, because extensive financial information would need to be provided on an accelerated basis. We encourage the Commission to allow foreign private issuers to report a significant acquisition

that closes within 6 months of an accelerated 20-F deadline in an amended Form 20-F filed within 6 months of the closing of the acquisition.

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

Very truly yours,

A handwritten signature in black ink, appearing to read 'T. Paradise', with a stylized flourish at the end.

Theodore A. Paradise  
Margaret E. Tahyar

- cc: The Honorable Christopher Cox, *Chairman*  
The Honorable Paul S. Atkins, *Commissioner*  
The Honorable Kathleen L. Casey, *Commissioner*
- cc: 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*  
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Ethiopsis Tafara, *Director, Office of International Affairs*