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May 12, 2008

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Proposed Foreign Issuer Reporting Enhancements – File No. S7-05-08

Dear Ms. Morris:

In Foreign Issuer Reporting Enhancements, Release Nos. 33-8900, 34-57409 (the "Release"), the Commission has proposed various changes in its rules relating to foreign private issuers that are subject to reporting under the Securities Exchange Act of 1934. We welcome the opportunity to comment on the proposals.

In general, we believe that, at this time, the Commission should avoid or minimize changes in its disclosure requirements that increase the burdens on reporting foreign private issuers. Over the past few years, there has been rapid change in market and regulatory conditions for reporting foreign private issuers, primarily because of (a) the continuing globalization of investment, (b) developments in securities markets outside the United States and (c) changing U.S. disclosure requirements, especially as a result of the Sarbanes-Oxley Act of 2002. From an issuer's perspective, speaking very generally, the benefits of being a reporting company have decreased while the burdens have increased. Market perceptions have further exaggerated these effects.

As the Commission has recognized, U.S. investors have a strong interest in the attractiveness of the U.S. public markets to foreign private issuers.[1] When foreign issuers leave the U.S. public markets, or decline to enter them, U.S. investors will still invest in their securities but will not have the benefit of the issuer's compliance with the Commission's reporting requirements. Particularly at

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1 *See, e.g.*, Termination of a Foreign Private Issuer's Registration of a Class of Securities under Section 12(g) Release No. 34-55540 at 6 (April 5, 2007) ("We recognize that U.S. investors benefit from the investment opportunities provided by foreign private issuers registering their securities with the Commission and listing and publicly offering those securities in the United States.").

present, foreign issuers are skeptical about the merits of submitting to the public reporting regime, and sensitive to the risks. Accordingly, we believe the Commission should try to avoid changes that increase the disclosure burdens on foreign private issuers, and should only make such changes if there is a strong reason to do so.[2] Even changes that are insignificant, or that affect few issuers, contribute to the perception that the regulatory framework is subject to unpredictable, adverse changes, which tends to discourage issuers from relying on the U.S. public markets. The potential impact on foreign private issuers, discouraging them from registering or encouraging them to deregister, is particularly great where additional requirements relate to changes or additions to the financial statement requirements.

Some of the proposals mandating additional disclosures also run counter to one of the Commission's most successful initiatives in the international markets, which is the global convergence of disclosure practices around the IOSCO disclosure standards.[3] The IOSCO standards have served to catalyze the adoption in other jurisdictions of key features of U.S. disclosure, such as MD&A, disclosure of related-party transactions or disclosure of share ownership. By participating in the development of the standards and promptly adopting them in 1999 as the basis for Form 20-F, the Commission helped to stimulate these important improvements in disclosure standards abroad, to the benefit of U.S. investors as they increase their international investment.

In reviewing its disclosure requirements for foreign private issuers, the Commission should, where possible, adhere to the IOSCO standards, because the Commission's leadership in embracing them has been beneficial to global convergence. Of course, the Sarbanes-Oxley Act required the Commission to add extensive new disclosure requirements to Form 20-F, but in doing so it took great care to consider and respect the circumstances of foreign private issuers. Several of the changes proposed in the Release would move Form 20-F still further from the IOSCO standards, without the same justification.

For several of the proposals in the Release, we suggest that rather than unilaterally amend its rules the Commission should work through IOSCO to encourage global convergence on improved disclosure.[4] This approach would be preferable in two ways. It would reduce the cases where a foreign private issuer can escape a particular disclosure requirement by deregistration. And it would protect U.S. investors with better disclosures whether or not foreign issuers submit to the U.S. public reporting regime.

In the balance of this letter, we discuss the proposals in the order in which they are discussed in the Release.

<u>Annual Test for Foreign Private Issuer Status</u>

We strongly support the Commission's proposal. We urge the Commission to adopt as proposed (a) the timing of the determination at the end of the issuer's second quarter, (b) the immediate effectiveness of a change to foreign private issuer status and (c) the effectiveness of the loss of foreign private issuer status at the beginning of the next fiscal year. We would also support the suggestion in the

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[2] In particular, conforming the disclosure requirements for foreign private issuers to those applicable to domestic issuers is not in itself a strong argument for a change.

[3] See the discussion in Part I of the Release.

[4] We note that Chairman Cox is Vice Chairman of IOSCO's Technical Committee, which reviews regulatory issues related to international securities and futures transactions, and coordinates responses to these concerns.

Release that an issuer changing status from domestic issuer to foreign private issuer be required to give notice of the change.[5]

Accelerating the Reporting Deadline for Form 20-F Annual Reports

For the reasons given in the introduction above, we believe this is an inopportune time for the Commission to accelerate the reporting deadline for annual reports on Form 20-F. We agree that the current six-month deadline is unnecessarily long, but there are already market and regulatory factors impelling issuers to file, and otherwise to disclose material information, before the deadline.[6] The proposed deadlines of 90 days for accelerated filers and 120 days for other filers are too short, and as discussed below we believe for many issuers the Commission should not reduce the deadline to less than five months. We question whether it is preferable to make that change, or to leave the reporting deadline as it stands.

Rather than impose a shorter deadline than most jurisdictions outside the United States, the Commission should allow an issuer additional time to file its annual report on Form 20-F after the deadline the home country imposes for an annual report. The preparation of the Form 20-F annual report is typically a very substantial undertaking in addition to the work an issuer performs for home country reporting. In some jurisdictions the home country requirements have not converged toward the IOSCO standards, so Form 20-F imposes extensive additional disclosure. In any case, many requirements of Form 20-F have no analogue in the disclosure regimes of other jurisdictions. The most obvious examples are the U.S. GAAP reconciliation (for issuers that do not report under IFRS at home) and reporting on internal control over financial reporting, but there are many others, including additional disclosures in the notes to the financial statements pursuant to Item 18; Industry Guide disclosures, especially Guide 3 and Guide 7; market risk disclosures under Item 11; exhibit filing requirements; and several elements of the Operating and Financial Review under Item 5, such as the table of contractual obligations and the discussion of critical accounting estimates.

Much of the work on the Form 20-F is practically difficult to perform before the home country report is substantially complete. It typically involves the same personnel, and many of the same subjects, but it requires the production of different information often in a different language. To produce it in parallel on the same timetable presents difficult logistical challenges.

Even for elements of disclosure that need only be translated into English, the undertaking is more difficult and time-consuming than the Commission appears to realize. The translation must not only faithfully replicate the substance of the original text, but it must appear as if it were originally

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5 We believe there is no reason why the benefits of the proposed amendments should not be extended to issuers using the U.S.-Canadian multi-jurisdictional disclosure system (“MJDS”). Accordingly, we believe an MJDS filer should only be required to test its foreign private issuer status once per year, at the end of its second fiscal quarter, and should be permitted to use MJDS forms for the balance of any year in which it determines that it is no longer a foreign private issuer as of the end of its second fiscal quarter. Such an approach (together with any necessary conforming changes to Form 40-F) would in our view appropriately treat MJDS and non-MJDS foreign private issuers on a consistent basis for purposes of determining such status and the consequences thereof.

6 The Release states that approximately one-third of reporting foreign private issuers file within 120 days of fiscal year-end. It would be interesting to know how many file within five months. It would also be interesting to understand whether the timing of filing has been changing. Anecdotally, we suspect that, on average, foreign private issuers were tending to file annual reports more quickly until the imposition of internal control reporting resulted in delays for many of them, and that the trend to file earlier will resume now that issuers have gained experience with internal control reporting.

drafted in English, rather than appearing as a word-for-word translation. This is particularly true for a document such as a Form 20-F, which is an important tool for investor communications, and also carries significant liability risk in case of error or omission.

The difficulty of translation can best be demonstrated with an example. A French company might include the following in its French annual report to describe a share offering completed during the relevant year: "*La société a réussi son augmentation de capital, qui a fait l'objet d'une garantie par un syndicat bancaire.*" A literal translation of this sentence (similar to what our firm typically receives from outside translation services) would be "The company succeeded its capital increase, which was guaranteed by a banking syndicate." The literal translation is essentially meaningless to an English-speaking reader. Faced with this translation, our lawyers would rewrite the sentence as follows: "The company successfully completed its underwritten share offering." Dealing with language problems like these in a document that is hundreds of pages long takes a substantial amount of time.

We have reviewed our internal time records for the preparation of the Form 20-F of one of our major foreign private issuer clients to provide an idea of the time required to transform the home country annual report into a Form 20-F (*excluding* work on the English language financial statements). Our internal translator (who is a former attorney) spent approximately 150 hours preparing a full translation of the company's home country annual report, as well as preparing a first draft Form 20-F. Three lawyers (a partner and two associates) spent a total of approximately 185 hours reviewing the translation and performing other procedures necessary for the preparation of the Form 20-F (all of which time was spent *after* the company's home country language annual report was substantially final). The Form 20-F was then reviewed by specialists in the company's home country corporate law, as well as tax specialists (U.S. and home country). The description of certain legal proceedings was also reviewed by one of our litigation experts. Several paralegals also spent time assisting our lawyers in preparing the Form 20-F draft. All of this occurred before the draft was submitted to the Company's disclosure committee, then to the audit committee, before finally being filed.

We also believe an earlier Form 20-F deadline would produce limited benefits for U.S. investors. Most foreign private issuers announce key information on an ongoing basis over the course of the year, including unaudited annual financial information that is typically released well before the Form 20-F is published (and well before the Commission's proposed deadline). The value of the Form 20-F is that it is both a compilation of information released over the course of the year, as well as a detailed disclosure document that can be used for in-depth analysis of a company's trends and perspectives. It is not a "real-time" publication that affects short-term share price movements, and the Commission's revised deadline would not change this. As a result, we do not believe shortening the deadline would produce significant benefits for U.S. investors.

In view of the significant burdens and questionable benefits, if the Commission decides to accelerate the deadline, we believe the deadline should be the longer of (a) four months after the end of the fiscal year and (b) 30 days after the local deadline for a full annual report, but in any event no later than five months after fiscal year-end. We note, however, that this might be a difficult rule to formulate and to apply. Deadlines for annual reports outside the United States vary, and some countries have an early deadline for publication of financial statements and a later deadline for a full annual report. By far the most common deadline is 120 days or four months.[7] Accordingly, if the Commission determines to shorten the deadline, the best approach may be to impose a five-month deadline for all issuers.

Segment Data Disclosure

We do not support the proposal to eliminate the option to omit segment disclosures under Item 17. As the Release observes, few issuers make use of the accommodation permitting segment data to be omitted from their financial statements, because reporting requirements outside the United States have generally moved toward requiring segment data and because most issuers use Item 18. This trend can be expected to increase as IFRS (or convergence towards IFRS) become increasingly universal. As a result, the proposed change is unnecessary, because its goals are already being achieved by other means. So while the point is admittedly minor, it is an example of a change in financial reporting requirements that for at least some issuers will fuel an argument for avoiding the U.S. public market.

Exchange Act Rule 13e-3

We support the Commission's proposal to amend Rule 13e-3 so that becoming eligible to deregister is a specified effect that may trigger the requirements of the rule. But while we agree that Rule 13e-3 should be triggered when a transaction is undertaken for the *purpose* of making a class of securities eligible for deregistration, we suggest that it should not be triggered by a transaction that only has the *reasonable likelihood* of bringing about that result. Examples would include share repurchases. We also note that the disclosures in Schedule 13E-3 concerning fairness to unaffiliated security holders are largely inapposite in the context of deregistration of a foreign private issuer, particularly where the applicable corporate law does not call for such determinations, and we would welcome an instruction recognizing that.

Requiring Item 18 Reconciliation in Annual Reports and Registration Statements on Form 20-F

We do not support the proposal to eliminate the option to use Item 17 rather than Item 18 in most situations. As the Release recognizes, accounting standards in other countries are generally moving towards providing footnote disclosures of comparable scope and depth to those required by U.S. GAAP and Regulation S-X. As a result, the Commission's goals are already being achieved by other means, and that will continue as IFRS becomes increasingly universal outside the United States. This convergence is one reason that most issuers use Item 18, in addition to the fact that Item 18 is required for Securities Act registration statements.

As discussed in the introduction, we believe the Commission should require a strong reason before eliminating a longstanding accommodation for foreign private issuers. We do not see such a reason here. The Release asserts that the additional disclosures required by Item 18 "can provide important additional information," but there is no evidence that they would in fact. For example, for each matter that must be addressed under Item 18, do issuers currently using Item 17 in fact address it as Item

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[7] Among countries with shorter deadlines, Note 54 of the Release cites Canada and Israel, but we believe there are a handful of others as well, including Australia and Korea. Otherwise, in our experience the deadline outside the United States is generally four months or 120 days. We would caution that we have not surveyed non-U.S. legislation systematically, and that the Commission might wish to do so before adopting any rule that turns on home-country deadlines. We would also caution that if the Commission adopts a rule that refers to home-country deadlines or filings, it should take care to be very precise about which deadline or filing is intended—e.g., publication of financial statements for the annual shareholders meeting, filing with securities regulators, filing with securities exchanges, or providing a report to shareholders.

18 would require, address it by other means, or omit it? Under what circumstances do issuers actually rely on Item 17, and why? What would be the burden of eliminating the option?[8]

In view of these uncertain benefits and burdens, the Commission should weigh the broader cost of freely making changes that reduce flexibility for foreign issuers, and the risk of bolstering the view that the Commission's welcoming attitude to foreign issuers is intermittent and lightly held.

Disclosure About Changes in a Registrant's Certifying Accountant

We support the proposal to add a new item to Form 20-F requiring disclosures about changes in auditors and disagreements with auditors. For the reasons discussed in the introduction, however, we suggest that the Commission consider pursuing this change through a change in the IOSCO standards. We note also that the proposed language, adapted verbatim from the Commission's rules for domestic issuers, is relatively complex—prescribing at length, and imposing elaborate procedures—but does not take account of international variations in the engagement and rotation of auditors, local regulation of issuers, local regulation of auditors, and the complex interaction between the different national practices of the international auditing firms. A rule drafted in concert with non-U.S. regulations in the IOSCO setting might better reflect those issues.

Annual Disclosure About ADR Fees and Payments

We support the proposed additional disclosures on ADR-related fees and payments. We believe this information will be useful for investors, and that Form 20-F is the appropriate location for the disclosures.

Disclosure About Differences in Corporate Governance Practices

We do not support the proposal to include in Form 20-F disclosures for listed issuers about differences between corporate governance regimes. The current requirements of the national securities exchanges in this regard are appropriate and workable. Regulation of corporate governance matters through exchange rules is a sensible practice, which the Commission is not proposing to change. It makes sense that the related disclosures also remain a matter for exchange regulation. It is also sensible to locate the required disclosures on the corporate website, where they can be regularly updated and where investors know to look for it.

Nevertheless, if the Commission believes that Form 20-F disclosure concerning corporate governance is necessary, as discussed in the introduction, we would suggest that the Commission pursue this kind of change through IOSCO. We also suggest that the Commission adopt a narrower requirement: identify those elements of the exchange rules applicable to a U.S. domestic company that the issuer does not follow. This would be preferable to the open-ended invitation in the proposed language to discuss "any significant ways in which [the issuer's] corporate governance practices differ from those followed by domestic companies," which in spite of the proposed instruction will often result in long, boilerplate

8 The Release is unclear on how many foreign private issuers actually use Item 17, saying only that "most" do not, and estimating that "approximately 200" companies will be impacted by the proposal. It also estimates that burden hours for an affected company would increase by 2%, but the basis for this surprisingly low figure is unclear.

disclosures.[9]

Financial Information for Certain Completed Acquisitions

We do not support the proposal to require separate financial statements for the target of a completed acquisition. As discussed above, the Commission should not impose additional financial statement requirements on foreign private issuers unless there is a strong reason to do so, and moving a little closer to the domestic issuer requirements is not in itself a satisfactory reason.

There is little benefit to the proposed disclosures. They are unlikely to be useful to investors, since by the time the requirement applies, the acquisition will always be reflected in the audited balance sheet and will usually have occurred long before. The burdens, on the other hand, can be great. We note that the significance tests of Rule 1-02(w) are difficult to apply, especially because U.S. GAAP determinations are required even to perform the tests. Despite the Commission's selection of a high, 50% threshold, an acquisition that is small in absolute terms can qualify as significant where the registrant's pre-tax income is small even using three-year averaging. Moreover, where the target was not itself a U.S. reporting company the burdens of producing the information can be great.

It is common for a foreign private issuer to abstain from conducting a registered offering because of the difficulty of providing financial statements required by Rule 3-05. If the Commission introduces this disclosure requirement in Form 20-F, issuers will face the difficult choice of abandoning a major acquisition (even if it is in the best interests of shareholders), or deregistering. For the reasons discussed in the introduction above, rather than adopt this proposal the Commission should pursue through IOSCO the development of a global standard for disclosures required following a major acquisition.

We thank you for the opportunity to submit this comment letter. Please do not hesitate to contact Alan Beller, Nicolas Grabar or Leslie Silverman (212-225-2000) if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON

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
Wayne Carnall, Chief Accountant, Division of Corporation Finance
Paul M. Dudek, Chief of the Office of International Corporate Finance
Ethiopis Tafara, Director, Office of International Affairs
Conrad Hewitt, Chief Accountant
Julie Erhardt, Deputy Chief Accountant

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[9] We note that describing the differences between two corporate governance regimes is not as straightforward as it might appear. How should a foreign private issuer decide which are the main features of the U.S. corporate governance regime? Should it take account of the ways in which formally similar requirements may operate completely differently because of applicable state law? What should it include under the heading of "corporate governance": matters such as mandatory bids, which are considered a fundamental governance issue outside the United States, or executive compensation?