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April 25, 2008

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

Re: Comments on Proposed Amendments to Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers
File No. S7-04-08

Dear Ms. Morris:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments on the Commission's proposal to amend Rule 12g3-2(b) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The proposal is discussed in Release No. 34-57350; International Series Release No. 1307; File No. S7-04-08 (the "Release"). This letter supports the comments of European Issuers and its member organizations and makes additional comments on the proposal.

We believe the Commission's proposal represents a substantial improvement compared to the current exemption system. Switching from paper submissions to electronic publication, and doing away with the need for a company to apply for the Rule 12g3-2(b) exemption, are precisely the right responses to the monumental changes that have occurred in the worldwide capital markets since the last time the Commission significantly reviewed these rules.

These changes have also made the application of Section 12(g) of the Exchange Act outside the United States considerably more complex than it was in the past. Forty years ago, it was unlikely that a non-U.S. company might become subject to Section 12(g) and need the Rule 12g3-2(b) exemption without taking voluntary action to create a U.S. public trading market for its shares.

Today, there are literally thousands of companies worldwide that fall under the Section 12(g) regime (often without their knowledge) as a result of nothing more than natural global flows of capital.

As a result, we believe it is important that the revised Rule 12g3-2(b) treat distinctly two very different categories of non-U.S. companies:

- Companies that fall under Section 12(g) inadvertently, because U.S. investors choose to purchase shares that trade publicly only in the companies' home markets. These companies should be automatically and unconditionally exempt from Section 12(g).

- Companies that voluntarily seek to create a U.S. public trading market for their equity securities (typically by sponsoring an unrestricted ADR program). The Section 12(g) exemption for these companies should legitimately be subject to conditions to ensure that U.S. investors receive appropriate information, but these companies should not be subject to conditions that will motivate them to curtail U.S. trading in their securities, to the detriment of U.S. investors.

1. <u>Companies that do not voluntarily create a U.S. public trading market for their shares should be unconditionally exempt from Section 12(g).</u>

Rule 12g3-2(b) currently provides a single exemption regime applicable to all non-U.S. companies that do not list or publicly offer their securities in the United States. A company that sponsors an unrestricted ADR program is treated in the same manner as a company that has no relation whatsoever with the United States.

We believe the Commission should change this situation by imposing conditions to the Rule 12g3-2(b) exemption only for companies that voluntarily create a U.S. public trading market for their securities (we refer to this as a "U.S. Public Market," a term that we discuss in section 1.C. below). Doing so would be consistent with investor protection, international comity and the history of Section 12(g) of the Exchange Act.

A. <u>An unconditional exemption makes substantive sense.</u>

When a company decides to create a U.S. Public Market for its shares, it takes affirmative steps to facilitate U.S. public trading. In the most common situation, a company agrees to allow a bank to establish a sponsored, unrestricted ADR program.[1] It signs an agreement with the depositary bank. It cooperates in the preparation of a registration statement on Form F-6 by the bank. It voluntarily applies (under the current regime) for the Rule 12g3-2(b) exemption. In many cases, it actively cooperates with the depositary bank to provide information to U.S. investors by making it available on an English language website, by cooperating with research analysts and sometimes by establishing a U.S. investor relations function.

[1] In its memorandum of March 10, 2008, the Commission's Office of Economic Analysis found that 276 issuers had ADR programs (sponsored or unsponsored) out of 340 unregistered foreign issuers with securities quoted on the Pink Sheets as of September 2007 and as to which sufficient trading volume information was available to make a judgment on eligibility for the modified Rule 12g3-2(b). <u>See</u> Office of Economic Analysis Memorandum, available at http://www.sec.gov/comments/s7-04-08/s70408-2.pdf. We note that in judging eligibility for Rule 12g3-2(b), the Office of Economic Analysis has reviewed only companies that are quoted in the Pink Sheets. The analysis does not cover companies that are not quoted in the Pink Sheets, including thousands of companies that have no voluntary interaction with the U.S. public trading markets.

Most non-U.S. companies do not take these steps, and do not otherwise seek to create a U.S. Public Market for their shares. The shares of these companies trade only in their home markets, on exchanges, on alternative trading platforms or in the interdealer market.

Many of these companies regularly find themselves with numerous U.S. shareholders, who in today's market search the globe for investment opportunities, aided by a wide array of information technology tools. These companies can easily fall within the Section 12(g) regime without taking any action, and often without even knowing about the regime. With today's technology, 300 U.S. investors is a small number even for modest sized companies, and most companies do not even know how many U.S. investors they have.[2] Most companies in this situation have not applied for the Rule 12g3-2(b) exemption, and the Commission has not enforced Section 12(g) against them, presumably because it would be difficult to do so for practical and jurisdictional reasons.

The Commission's proposed modifications to Rule 12g3-2(b) go a long way to addressing this problem by making the exemption automatic for companies that meet the required conditions. Many non-U.S. companies that are listed in their home countries publish English language business and financial information on their websites as a matter of their financial communications policy. A large number of these companies would become exempt under the Commission's proposal without even knowing about the exemption.

While this is an important step in the right direction, it is troublesome that most companies would only accidentally meet the conditions included in the Commission's proposed rule modifications. In these cases, the proposal would in substance amount to an unconditional exemption, because the companies will not take any action to determine whether they are eligible for the exemption or to monitor their ongoing eligibility.

However, in other cases, the ordinary practices of companies will not satisfy the conditions of the exemption in the form proposed by the Commission. Nonetheless, the Commission would have no reason to require these companies to register under the Exchange Act assuming they did not voluntarily create a U.S. Public Market for their securities. Examples of companies in this situation could include the following:

- A Korean company listed in Korea, which publishes its annual report only in Korean.
- An Italian company listed in Italy, which prepares an abridged English version of its Italian annual report.
- An Argentine fund that is not listed on any exchange, but that has shares that trade through dealers in Argentina.[3]
- A Guernsey permanent capital vehicle listed in Amsterdam, in which there are only a handful of trades each year, most of which take place between U.S. institutional investors.

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2 This situation is exacerbated by the practical difficulties of counting shareholders under the standards of Rule 12g3-2(a).

3 We note that this fund would be exempt from registration under the Investment Company Act under the Touche Remnant line of no-action letters (see, e.g., Touche Remnant & Co, publicly available Aug. 27, 1984; Investment Funds Institute of Canada, publicly available Mar. 4, 1996), but would be subject to Exchange Act registration if the Commission's Rule 12g3-2(b) proposal were adopted.

U.S. investors can and do regularly purchase shares in companies such as these. Those investors do not expect the companies to become subject to Exchange Act registration. To the contrary, when they make their investment decisions, the U.S. investors expect that they will have to rely on non-U.S. laws and regulations for information.[4] Unlike the antifraud rules of the federal securities laws, which merit broader application, there is not a similarly important interest served that would require expansive application of the Exchange Act registration requirements.

We believe the Commission should not adopt a rule modification that will result in companies "slipping through the cracks" in circumstances where Exchange Act registration is inappropriate. Instead, we believe the Commission should adopt our recommendation to exempt automatically and unconditionally from Section 12(g) any non-U.S. company that does not list or publicly offer its securities in the United States, and that does not voluntarily create a U.S. Public Market for its securities.[5]

B. <u>An unconditional exemption is consistent with the history and intent of Section 12(g) as applied to non-U.S. companies.</u>

We believe that distinguishing among non-U.S. companies on the basis of whether they voluntarily seek to create a U.S. Public Market for their securities is fully consistent with the history and intent of the Section 12(g) regime as applied to non-U.S. companies. The Commission has explicitly acknowledged this in the past. Most notably, when the Commission adopted amendments to Rule 12g3-2(b) in 1982, it focused on whether companies had voluntarily entered the U.S. market as the main factor in determining Rule 12g3-2(b) eligibility, citing Congress' intent in its adoption of Section 12(g) not to impose the significant burdens of registration on non-U.S. companies whose securities were traded in the U.S. over-the-counter market without the company's approval.[6]

As the Commission noted in the Release,[7] when Congress initially considered Section 12(g) in 1964, it contemplated exempting non-U.S. companies fully from its application, except in cases where the Commission found a registration requirement necessary or appropriate. The version of Section 12(g) that was ultimately adopted reversed the situation, subjecting the securities of non-U.S. companies to the same registration rules as U.S. companies, but giving the Commission broad powers to exempt non-U.S. companies. The legislative history of Section 12(g) indicates that Congress made this switch only because it believed it would be easier procedurally for the Commission to adopt exemptions as opposed to subjecting otherwise exempt companies to registration.[8] The change was not intended to modify the substance of Section 12(g) as applied to non-U.S. companies.

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4 <u>See, e.g.</u>, SEC Release No. 33-6863; 34-27942 (Apr. 24, 1990), Part II ("Principles of comity and the reasonable expectations of participants in the global markets justify reliance on laws applicable in jurisdictions outside the United States to define requirements for transactions effected offshore….As investors choose their markets, they choose the laws and regulations applicable in such markets.").

5 There would also be a serious question as to whether the requisite jurisdictional nexus with the United States would exist to permit regulation of many companies for which we are proposing an unconditional exemption. We believe it is highly preferable to exempt these companies from Exchange Act registration, rather than requiring them to rely on jurisdictional arguments that by definition are subject to uncertainty.

6 SEC Release No. 33-6433; 34-19187 at 3 (Oct. 28, 1982).

7 Release at 6.

8 <u>See</u> 88th Congress, 2d session, U.S. House of Representatives Report No. 1418, at 1945 (1964) ("As originally proposed, these securities would have been exempt unless the Commission by rules or regulations or by order removed the exemption upon a finding that a substantial public market existed for the securities of such issuers and that continued exemption was not in the public interest …. The committee amendment simply reverses this exemption procedurally.").

When the Commission adopted the original exemptions found in Rule 12g3-2 in 1967,[9] the exemption of Rule 12g3-2(a) was sufficiently broad to avoid the involuntary application of Section 12(g) from a practical perspective, as non-U.S. companies ordinarily would not have exceeded the 300 U.S. shareholder threshold without voluntarily taking steps to access a U.S. investor base. The exemption provided by Rule 12g3-2(b) was needed mainly for non-U.S. companies that chose to attract or accommodate U.S. shareholders, generally by establishing an ADR program.

More than forty years after the adoption of the original exemptions, and more than twenty-five years after the adoption of the 1982 amendments, increased global trading and U.S. investor interest in non-U.S. securities have made the currently available exemptions less functional. The 300 U.S. shareholder threshold of Rule 12g3-2(a) is no longer sufficient to exempt companies from Exchange Act registration when they do not voluntarily create a U.S. Public Market for their securities.

We see the Commission's proposal to amend the Rule 12g3-2(b) exemption as an important opportunity to improve the functioning of the Section 12(g) regime in light of the current context of the global securities markets. We believe the amendments to this exemption should reflect the philosophy, evident in the history of Section 12(g) and the exemptions therefrom, that the securities of a non-U.S. company should not be subject to Exchange Act registration unless its voluntary actions make a registration requirement appropriate.

C. Defining a "U.S. Public Market."

We recognize that, if the Commission were to accept our recommended modification, it would have to define what is and what is not a "U.S. Public Market." While this would be difficult, we believe it can be achieved in a principled manner. In any event, we believe the benefits of creating an automatic and unconditional exemption make the additional effort worthwhile.

We believe the Commission should consider that a U.S. Public Market exists for a class of a company's securities when (i) the company enters into an agreement with a depositary bank with a view to establishing an unrestricted American Depositary Receipt program for such class of securities, or (ii) the company enters into an agreement or submits an application with a view to such class of securities being quoted on an organized, unrestricted over-the-counter market in the United States.

We also believe there are four circumstances that should not constitute the creation of a U.S. Public Market.

The first is the establishment of an unsponsored depositary receipt program by a bank. As discussed in more detail below, the proposed amendments to Rule 12g3-2(b) would, if adopted, vastly increase the number of companies that could become subject to unsponsored programs. The establishment of such a program clearly is not a voluntary step on the part of the subject company, and it should not even potentially subject the company to Exchange Act registration.

The second is the offer and sale of securities in transactions that are exempt from registration under the Securities Act of 1933 (the "Securities Act"), particularly Rule 144A offerings. If the conduct of Rule 144A offerings were to give rise to a potential Exchange Act registration obligation, then many companies would exclude U.S. institutions from their global offerings. This would particularly harm medium sized institutions that are qualified institutional buyers but that do

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9 SEC Release No. 34-8066 (Apr. 28, 1967).

not have the global networks that would enable them to invest extensively in offerings made exclusively outside the United States.[10] Moreover, Rule 144A already contains ongoing information requirements, and it is premised on the theory that qualified institutional buyers will insist on receiving additional information if they believe publicly available information is not adequate.[11]

The third is the development of a U.S. over-the-counter market independent of any voluntary action on the part of the issuer. In particular, unlike the process for listing on a registered exchange in the United States, foreign private issuers typically need not provide consent to the establishment of such a market, as they cannot control the extent to which dealers effect transactions in their securities and elect to post quotations or indications of interest in U.S. quotation media.[12]

The fourth is the conduct of visits with, and the furnishing of information to, U.S. research analysts, media sources and investors. It would clearly be contrary to the interests of U.S. investors for the Commission to adopt a rule that would make non-U.S. companies reluctant to provide the same quality of information to their U.S. investors as they furnish to investors abroad. It would particularly harm smaller U.S. investors, who would have more difficulty obtaining information published outside the United States than large institutions with global networks.

2. The Commission should modify the conditions in the proposed amendments to Rule 12g3-2(b).

While we agree that it is appropriate for the Commission to establish minimum standards for the exemption from Exchange Act registration of companies that voluntarily create a U.S. Public Market for their securities, we believe these standards should focus on the availability of English language information, as has traditionally been the case. We recommend that the Commission eliminate or substantially modify the proposed 20% trading volume test, and that it make some technical modifications to the other conditions.

A. The 20% Trading Volume Test

The 20% trading volume test proposed by the Commission would unnecessarily change the nature of the exemption for companies with sponsored, unrestricted ADR programs from one based on the provision of information to one based on fluctuating market interest. We do not think this change would provide significant benefit to U.S. investors, and in some cases it could prove detrimental to U.S. investors.

A trading volume test would unduly penalize thinly traded companies, subjecting them to the risk of Exchange Act registration due to over-the-counter trades in the United States that are outside their control. Over the years, there have been periods of intense focus by U.S. investors on investments in certain areas of the world, including East Asia in the early 1990s and the recent focus on companies from strong emerging markets such as Brazil, Russia, India and China. In addition, as mentioned above, a company with very limited trading, such as a permanent capital

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10 It would also harm U.S. broker-dealers, as companies would be reluctant to conduct Rule 144A offerings if doing so could lead to an Exchange Act registration requirement, meaning that a greater share of underwriting business would be awarded to non-U.S. broker-dealers.

11 We similarly believe Rule 701 employee offerings should not be viewed as giving rise to a U.S. Public Market. The Commission should not take steps that would discourage non-U.S. companies from including their U.S. employees in global share programs. In addition, Rule 701 itself requires that employees receive specified information when they make an investment decision, and there is no reason to subject companies to a more onerous information requirement after the investment decision is made.

12 Typically it is the dealer, and not the issuer, that takes action to satisfy the filing requirements of Rule 15c2-11, or to create the conditions for an exemption, in order to allow the dealer to post such quotations.

vehicle, could conceivably become subject to Exchange Act registration under the proposed rule amendments, based on one or two significant over-the-counter trades by U.S. qualified institutional buyers.

We understand that the Commission might be concerned that certain non-U.S. companies with substantial U.S. investor bases could avoid registration based on the exemption while at the same time using the U.S. market as a principal source of liquidity for their shares. It is important to remember, however, that investors in such companies will have invested in a non-reporting, non-U.S. company in an offshore or over-the-counter transaction. Those investors will have made their investment decisions on the basis of the issuing company's home country documents, and would not expect to receive any additional information at a future date.

At the same time, those investors would have a legitimate expectation that the company's U.S. public trading market would continue to exist. The 20% trading volume test increases the risk that this would not be the case. Rather than facing the effort, expense and liability risk of Exchange Act registration, many companies with trading that approaches the 20% threshold would take actions to discourage U.S. trading, such as terminating their sponsored ADR programs and limiting the information provided to U.S. investors. Some companies might decide never to establish ADR programs to avoid subjecting themselves to the difficult dilemma of disappointing important investors or registering under the Exchange Act, or might include provisions in their governing instruments permitting them to take unilateral action to reduce U.S. share ownership. None of this is in the interest of U.S. investors.

In addition, a volume-based test could present some challenges from a policy standpoint as well as in its implementation. Some of our broker-dealer clients have advised us that the rules involved in trade reporting and public dissemination of trade data, particularly in the context of foreign securities and ADRs, have as a matter of practice been inconsistently applied and interpreted (sometimes on a country by country basis), and have been subject to change under SRO rules.[13] As a result, an issuer is unable to control or verify whether reported transactions in fact take place in the United States, or whether reporting by broker-dealers accurately reflects over-the-counter activity.

We therefore recommend that the Commission eliminate the trading volume threshold when it adopts the final rule amendments.

If the Commission nevertheless decides to include a trading volume threshold, we recommend that adjustments be made. Most importantly, we believe the trading volume threshold should be increased to at least 50% of worldwide trading volume. We also believe the numerator in the calculation should only include trading in sponsored, unrestricted ADRs, excluding U.S. trading in ordinary shares, or unsponsored or restricted ADRs.

These changes would limit the risk that a company could become subject to Exchange Act reporting due to events completely outside its control. A company whose U.S. trading volume is above the 50% level may also be less likely to take steps to discourage U.S. trading, through termination of an ADR program or otherwise, reducing the risk that U.S. investors would be harmed by the inclusion of the threshold.[14]

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[13] See, e.g., SR-FINRA-2007-18 (proposed rule change to disseminate all last sale reports of transactions in over-the-counter ADRs and Canadian issues immediately upon receipt of such reports by FINRA).

[14] We note that Pink OTC Markets Inc. has proposed an alternative, under which the exemption would be available to companies with ADR programs that are limited to 30% of their outstanding shares. Letter of R. Cromwell Coulsen, Chairman and CEO, Pink OTC Markets Inc. (Apr. 10, 2008), available at

B. The English translation requirement.

The proposed rule amendments set forth a list of the documents that an issuer relying on the Rule 12g3-2(b) exemption would need, at a minimum, to translate into English and publish electronically. While we believe it is entirely appropriate for the Commission to require companies that voluntarily create a U.S. Public Market for their securities to publish important information in English in order to rely on the exemption, we believe the Commission should modify its proposed requirement slightly.

Specifically, we believe the Commission should require an English translation only of a company's annual and interim consolidated financial statements, and material press releases and results announcements or presentations. For documents such as annual and interim reports, an English "version" should be sufficient. An English version would be required to contain in substance all information that is material to an investment decision and that is contained in the local annual or interim report, including at a minimum the information currently listed in paragraph (4)(ii) of the modified version of Rule 12g2-3(b) as proposed by the Commission. This would in our view provide potentially more useful information to U.S. investors while eliminating unnecessary burdens on companies.

In many cases, there will be no difference between an English translation and an English "version," particularly because some companies will find it most convenient to translate their entire annual and interim reports. However, in our experience there are many companies that include information in their home country reports (due either to local regulations or to local practices) that is not of interest for U.S. investors.

For example, many non-U.S. companies are required by local regulations to include unconsolidated parent company financial statements in their home country annual reports. It would seem inappropriate for the Commission to require unconsolidated financial statements to be translated and provided to U.S. investors, when those financial statements are not required to be included in the periodic reports filed under the Exchange Act by registered companies. Similarly, many non-U.S. companies publish information in their annual reports that is of interest only to local investors (a description of tax consequences for local residents, for example) or to other stakeholders such as employees. Conversely, some companies provide information in their English language investor reports designed to be helpful for international investors that would be inappropriate, and therefore contrary to practice, for local language reports (such as descriptions of local company law provisions that are unlike those in the United States).

3. The Commission should carefully consider the implications of the rule amendments for unsponsored ADR programs.

Under the proposed amendments, the shares of thousands of non-U.S. companies will likely become eligible for unsponsored ADR programs, which may benefit U.S. investors. While we support a change that will benefit U.S. investors by making trading in non-U.S. company shares easier, we believe non-U.S. companies need to retain some degree of information and control with respect to the development of ADR programs. As a result, we believe the Commission should

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http://www.sec.gov/comments/s7-04-08/s70408-5.pdf. While this represents a substantial improvement compared to the 20% trading volume test, we would strongly prefer to see neither test included in the final rule. In any event, if the proposal of Pink OTC is adopted, the Commission should include a "grandfather clause" so that ADR programs established before the adoption of the rule amendments will not be subject to the 30% limitation.

consider adopting a few rules to protect non-U.S. companies in the context of unsponsored ADR programs:

- A bank should be required to notify a company before establishing an unsponsored ADR program relating to the company's shares.
- If the unsponsored program is created without the consent of the company, then the bank should be required to terminate the program at no cost to the company or to ADR holders, if the company decides to create a sponsored program (and ADR holders should incur no cost in switching to the sponsored program).
- A bank should be required to provide the company with information regarding the identity of ADR holders at the request of the company.
- If the Commission decides to retain a U.S. trading volume test under Rule 12g3-2(b), then ADRs issued under unsponsored programs should not be counted as part of U.S. trading volume.

4. <u>The Commission should consider the impact of the proposed amendments on other rules under the Exchange Act and the Securities Act that refer to the Rule 12g3-2(b) exemption.</u>

In the Release, the Commission indicates that it will no longer publish a list of companies claiming the Rule 12g3-2(b) exemption. This is a necessary consequence of the fact that thousands of companies will become automatically exempt on the basis of the proposed amendments, so a decision to publish a list would necessarily face insurmountable obstacles.

As a result, under the proposed amendments, market participants will no longer be able to rely on the Commission's list to determine whether a company is exempt under Rule 12g3-2(b). In particular, banks seeking to establish an ADR program, broker-dealers seeking to meet their obligations under Rule 15c2-11 under the Exchange Act and entities wishing to make resales in reliance on Rule 144A under the Securities Act will have difficulty in determining whether a company benefits from the exemption.

We believe the Commission should adopt a safe harbor that will allow market participants to assume that a non-U.S. company is eligible for the Rule 12g3-2(b) exemption so long as the company does not file periodic reports under the Exchange Act, and so long as the company publishes in English on its website an annual report with consolidated financial statements, an interim report with consolidated financial statements, and press releases containing results announcements. To ensure that the information is up to date, the Commission could provide that the assumption applies only if the English language documents are dated no later than a certain amount of time (for example, one month for annual and interim reports, and one week for press releases) after the date of the most recent corresponding home country language documents[15] (the difference would allow time for translations).[16]

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[15] For companies that publish their original documents in English, the safe harbor could apply if documents appearing on the web site are dated no later than a specified amount of time after a period end (for example, 6 months after the end of a fiscal year or half-year).

[16] Even if the Commission decides not to accept this recommendation, it should allow parties other than the issuer to assume that the issuer has complied with its home country publication and distribution requirements absent actual notice to the contrary. The Commission's proposal provides that a company benefiting from the exemption must publish electronically documents that it "is required" to make public, file or

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This is only the second time since Section 12(g) was adopted in 1964 that the Commission has thoroughly reviewed the application of Section 12(g) to non-U.S. companies. Given the number of important topics that the Commission has to address, it is not surprising that it revisits this area only once a generation. This makes it all the more important for the Commission to make the exemptive regime flexible and well adapted to the current needs of the global marketplace.

We believe the Commission's proposals go a long way to achieving this objective, and we believe our suggested modifications would, if adopted, allow the Commission to go further while ensuring the protection of U.S. investors. We hope the Commission will agree with our suggestions.

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

Very truly yours,

Andrew A. Bernstein

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*
Paul M. Dudek, *Chief of the Office of International Corporate Finance*
Ethiopis Tafara, *Director, Office of International Affairs*

Commissioner Charlie McCreevy, *European Commission*
David Wright, *Deputy Director General, Financial Markets, DG Internal Market*
Eddy Wymeersch, *Chairman, Committee of European Securities Regulators*

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distribute to security holders under local law, and not just those that it actually makes public, files or distributes. Third parties typically are not in a position to know what a company's home country requirements are.