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VIA E-MAIL

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

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

Dear Ms. Morris:

We submit this letter in response to the Securities and Exchange Commission's request for comments on Securities Act Release No. 34-57350.

We generally support the decision of the Securities and Exchange Commission (the "Commission") to propose amendments to the rule that exempts a foreign private issuer ("FPI") from having to register a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). In particular, we applaud the Commission's efforts to simplify the framework for U.S. investors to gain access to a non-reporting FPI's material non-U.S. disclosure documents in order to make better informed decisions regarding whether to invest in the FPI's equity securities through the over-the-counter market in the United States or otherwise.

However, as practitioners involved in cross-border and foreign domestic capital raising and business combination transactions, and otherwise representing FPIs in connection with the requirements of the Exchange Act, we are concerned about the consequences of a few aspects of the proposed amendments and have responded to the Commission's request for comments below.

1. *Proposed Quantitative Standard - Trading Volume Benchmark*

Background

Currently, an FPI can claim an exemption from Exchange Act Section 12(g) registration by electing to rely on the information supplying exemption of Exchange Act Rule 12g3-2(b), regardless of the trading volume of the subject class of securities. The proposed amendments would introduce a quantitative standard to Exchange Act Rule 12g3-2(b) that would make the current exemption unavailable for an FPI if the trading volume of the subject class of securities in the United States for the most recently completed fiscal year exceeds 20% of the average trading volume of that class of securities on a worldwide basis for the same period. For the reasons discussed below, we believe that the introduction of a quantitative standard related to U.S. trading volume to the information supplying exemption of Exchange Act Rule 12g3-2(b) is unnecessary and may have the unintended effect of decreasing access to, and the supply of, material non-U.S. disclosure documents to U.S. investors.

Our experience indicates that many FPIs are apprehensive about accessing U.S. investors and capital markets due to the perceived complexity, litigation risks and costs associated with registration under U.S. securities laws and the related reporting and disclosure obligations thereunder. Current Exchange Act Rule 12g3-2(b) is viewed by many FPIs as a partial accomodation that fulfills the Commission's goal of promoting access to, and the supply of, material information about FPIs to U.S. investors, while exempting FPIs from registration under Exchange Act Rule 12(g) when they have not conducted a public offering in the United States or listed on a national securities exchange. We believe that the introduction of a quantitative standard related to U.S. trading volume to Exchange Act Rule 12g3-2(b) may lead to FPIs taking actions to reduce the volume of U.S. trading so as to avoid the risk of triggering a registration obligation under the U.S. securities laws, including:

- terminating an existing sponsored ADR program;
- discouraging FPIs from sponsoring new ADR programs in the future;
- restricting the information currently provided to U.S. investors; or
- otherwise taking actions to discourage trading activity in the United States.

As a result, the net effect of introducing a quantitative standard related to U.S. trading volume to Exchange Act Rule 12g3-2(b) may be a reduction in the number of FPIs willing to sponsor ADR programs in the United States and a corresponding decrease in the supply of information from FPIs to U.S. investors.

We also believe that the proposed amendments to automatically grant the information supplying exemption of Exchange Act Rule 12g3-2(b) to FPIs that meet certain conditions (other than the quantitative standard related to U.S. trading volume as discussed above) would have the effect of encouraging greater compliance by FPIs that currently do not comply with Exchange

Act Section 12(g), either because they are not aware of the need to comply or because they have affirmatively determined not to comply for fear of creating a jurisdictional nexus with the United States by submitting required documentation to the Commission. We believe that introducing a new quantitative standard related to U.S. trading volume to Exchange Act Rule 12g3-2(b) will have a negative effect on the greater compliance with Exchange Act Rule 12(g) that we would otherwise expect from the proposed amendments.

As a practical matter, we also note that issuers, including FPIs, often do not exercise direct control over the trading volume of their securities, which can be impacted by many factors, including, among others, volatility in, or market focus on, the issuer or the issuer's business or industry, the inclusion of a security in an index, or the existence or establishment of unsponsored ADR programs. As a result, an FPI may exceed the proposed quantitative standard related to U.S. trading volume despite taking no affirmative action to access U.S. capital markets or to list its securities on a U.S. national securities exchange. We do not believe there is a strong policy rationale for changing the Commission's existing approach on this point.

Finally, to the extent that the Commission considers U.S. investor interest (i.e., a quantitative trading volume standard) to be an appropriate barometer for heightened Commission regulatory interest and the propriety of imposing Exchange Act Section 12(g) registration obligations on an FPI, we note that, even without an express U.S. trading volume disqualification threshold, the proposed amendments to Exchange Act Rule 12g3-2(b) include a requirement that a primary trading market exist outside of the United States (defined as constituting 55% of worldwide trading volume). We believe that this requirement provides an intrinsic limit to the amount of U.S. investor interest that would be acceptable to the Commission before the registration obligations of Exchange Act Section 12(g) are triggered. In addition, the imposition of a quantitative standard related to U.S. trading volume appears to us at odds with the Commission's recent initiatives with respect to FPIs and the developing trend of convergence and mutual recognition of disclosure standards in major developed trading markets.

Comment

We respectfully submit that the Commission should not introduce a quantitative standard related to U.S. trading volume to the information supplying exemption of Exchange Act Rule 12g3-2(b) since such a standard is unnecessary in light of recent Commission initiatives with respect to FPIs and may have the unintended effect of decreasing access to, and the supply of, material information to U.S. investors.

2. *Proposed Electronic Publishing of Non-U.S. Disclosure Documents - Electronic Publishing Requirement to Claim Exemption*

Background

We applaud the Commission's efforts to promote electronic publication in English of non-U.S. disclosure documents in connection with the proposed amendments to Rule 12g3-2(b). Electronic publication is a superior method for disseminating information to investors than the

current paper submission requirement. However, we do not think it is necessary for the Commission to designate which electronic information delivery system must be used in order to claim and maintain the Rule 12g3-2(b) exemption (e.g., designated information delivery system in the FPI's primary trading market or the FPI's Web site). In support of this position, we submit the following:

- electronic information delivery systems may not be available in every trading market, may be difficult to locate or navigate, may not be published in English (except for the non-U.S. disclosure documents), or may require registration or payment of a fee for access;

- FPI Web sites may be difficult to locate or navigate and may not be published in English (except for non-U.S. disclosure documents, which, in some cases, may not necessarily be accessible without navigating through non-English Web pages); and

- an FPI's primary trading market may change from fiscal year to fiscal year which may result in certain non-U.S. disclosure documents being published in different locations.

We believe that the Commission's stated purpose for the non-U.S. publication condition to provide U.S. investors with ready access to material information, as well as to assist broker-dealers in meeting their Rule 15c2-11 obligations and to facilitate resales of securities to qualified institutional buyers under Rule 144A, can be accomplished by permitting the use of any number of electronic information delivery systems accessible to U.S. investors. For example, such information may be published by the U.S. trading market of the FPI's securities, by the ADR portals of depositary banks, or by publicly available Web sites maintained by third parties.[1] We also believe that the Commission should require the chosen electronic information delivery system to be navigable in English and not require users to register or pay a fee for access to the information.

In connection with this proposed approach, we believe that FPIs seeking to rely on the exemption should be required to facilitate access to their non-U.S. disclosure documents by posting, whether through EDGAR or another simplified means of electronic submission, the Web site address where the information can be viewed. Otherwise, investors would not have a central source or database to indicate where the information may be located. We note that some FPIs are likely to remain concerned that the provision of such information will be viewed by the Commission as creating a jurisdictional nexus with the United States and, accordingly, in the interest of making this information more readily accessible to U.S. investors, it may be appropriate (i) to permit FPIs to disclaim that the provision of Web site information does not

[1] In this regard, we note that U.S. domestic issuers employ a range of methods for disseminating their own material disclosure documents, such as posting such documents in .pdf format on their Web sites or providing a hyperlink to the EDGAR database or other electronic information delivery system (e.g., www.10kwizard.com, www.edgar-online.com, etc.).

constitute an admission of submission to the Commission's jurisdiction or (ii) for the Commission to provide additional clarifying comfort regarding jurisdictional nexus concerns. An alternative approach would be to provide FPIs with the option to voluntarily provide this information to the Commission and to only require it in connection with the filing of an F-6 for a sponsored ADR program.

Comment

We respectfully submit that FPIs should be permitted to publish non-U.S. disclosure documents through an electronic information delivery system that is generally available to the public, even if that system is located outside of the FPI's primary trading market or is not the FPI's Web site; *provided*, that (i) the system is navigable in English and does not require users to register or pay a fee for access and (ii) the FPI posts on EDGAR or another means of electronic submission, the Web site address where the information can be viewed.

3. *Proposed Requirement Regarding Translation of Certain Non-U.S. disclosure documents into English.*

Background

We also support the Commission's proposed rule amendments to require translation of certain information into English, and we respectfully acknowledge that the proposed amendments codify the Commission's historic requirements with respect to such documents. However, we share the concern expressed by a number of FPIs and their professional advisors that full translation of certain non-U.S. disclosure documents into English can be a burdensome undertaking in many cases that requires significant time and cost commitments without providing any corresponding benefit to investors. The Commission's proposed rule would appear to require full English translations of (i) annual reports, including or accompanied by annual financial statements, (ii) interim reports that include financial statements, (iii) press releases and (iv) all other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

While we believe that material information should be made available to U.S. investors in English, we do not believe full translations should be required in every case. For example, translation of an annual report to shareholders, which may run more than 100 pages, is expensive and time-consuming, and likely will require review by legal and other advisors to confirm its accuracy. Furthermore, not all 100 pages of any such annual report to shareholders will necessarily include information material to U.S. investors. In this regard, we note that some FPIs customarily provide to U.S. and other investors more streamlined English versions of their annual reports to shareholders that are not identical to their home country reports, as a result of the desire to present information in a format that is more user-friendly for investors and to eliminate immaterial information that is otherwise required in home country reports by statute or otherwise. Similarly, we believe that requiring English translations of all communications and documents which are distributed directly to securityholders of each class of securities to which the exemption relates will not necessarily yield information that is material to U.S. investors.

Rather, we believe that discretion should be left to an FPI, in consultation with its legal and other advisors, as to which portions of its non-U.S. disclosure documents include material information that should be translated. An FPI may nonetheless choose to translate all, or substantially all, of a report in full, but we believe the FPI should have the discretion to omit or summarize information which it otherwise considers to be immaterial. We believe that this approach will eliminate extraneous information that is of little use to U.S. investors, result in the provision of higher quality and more readily accessible information, and better balance the cost burden of English translations against the benefits to investors.

Comment

We respectfully submit that all of the information requirements of Exchange Act Rule 12g3-2(b) are subject to a materiality standard and that translations of these items should also be subject to a materiality standard. Accordingly, we respectfully request that the Commission qualify the translation requirement for the information required by proposed Exchange Act Rule 12g3-2(b)(4)(iii) by the materiality standard set forth in proposed Exchange Act Rule 12g3-2(b)(4)(ii).

4. *Request for Commission Guidance Regarding Availability of Certain Securities Offering Exemptions and Safe Harbors in light of Proposed Amendments.*

Background

As practitioners engaged in cross-border and foreign domestic capital raising and business combination transactions, we frequently represent FPIs and their underwriters in connection with global offerings of securities exempt from, or in transactions not subject to, the registration requirements of the Securities Act of 1933, as amended (the "Securities Act"), including the exemption provided by Securities Act Section 4(2) and/or the safe harbors provided by Regulation D, Rule 144A and Regulation S thereunder. We note that FPIs involved in such offerings are counseled to implement publicity restrictions which are designed to prevent "general solicitation," "general advertising" and "directed selling efforts" in order to conduct such offerings in compliance with the applicable registration exemptions and/or safe harbors relied upon. Such publicity restrictions typically include not initiating or expanding the publication of material information in English on the FPI's Web site during the offering, and otherwise taking steps to prevent free access to material information in English (e.g., setting up a Web site firewall to limit and/or restrict access to, or the ability to copy, home country documents and other material information in English). In addition, many FPIs seek to establish an exemption from Exchange Act Section 12(g) registration in connection with such offerings by electing to rely on the information supplying exemption of Exchange Act Rule 12g3-2(b), in many cases prior to the closing of such offerings and often pursuant to an undertaking set forth in the underwriting or placement agreement. Accordingly, we believe that electronic publication in English of non-U.S. disclosure documents in connection with the proposed amendments to Rule 12g3-2(b) raises publicity concerns regarding compliance with the applicable registration exemptions and/or safe harbors relied upon in connection with global offerings, and we believe that further Commission guidance on this point is warranted.

Comment

We respectfully request that the Commission provide guidance to clarify that, with respect to global offerings of securities by FPIs, the electronic publication of material non-U.S. disclosure documents in order to establish the information supplying exemption of Exchange Act Rule 12g3-2(b) will not compromise the availability of existing registration exemptions and/or safe harbors provided by the Securities Act and the rules and regulations promulgated thereunder.

* * *

We would be pleased to discuss our comments with the staff of the Commission. Kindly direct any questions you may have to Peter T. Healy at (415) 984-8833 (telephone) and (415) 984-8701 (facsimile).

Very truly yours,

Peter T. Healy, Esq.
of O'MELVENY & MYERS LLP

cc: Gregory D. Puff, Esq.
Todd A. Hamblet, Esq.
Eric C. Sibbitt, Esq.