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By Electronic Mail

File No. S7-05-08 - Foreign Issuer Reporting Enhancements, Release Nos. 33-8900, 34-57409; International Series Release No. 1308 (the "**Proposing Release**")

Ladies and Gentlemen:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "**Commission**" or the "**SEC**") for comments on the Commission's above referenced proposal for a series of amendments (the "**Proposals**") to the rules under the US securities laws applicable to foreign private issuers. We represent foreign private issuers who report under the Securities Exchange Act of 1934 (the "**Exchange Act**") as well as global financial institutions that advise a wide range of foreign private issuers on the structuring of their capital raising and merger and acquisition transactions. We regularly advise these clients on the application of the US federal securities laws, including in relation to their assessments of the costs and benefits associated with entering the US securities registration and reporting regime.

We strongly support the recent initiatives that the Commission has taken to accommodate the interests of foreign private issuers who have registered, or who may seek to register, their securities with the Commission. In particular, we and our clients have welcomed the Commission's revisions to the deregistration rules as well as its elimination of the US GAAP reconciliation requirement for issuers who prepare their accounts in accordance with International Financial Reporting Standards ("**IFRS**") as issued by the International Accounting Standards Board ("**IASB IFRS**"). However, we believe that some of the Proposals hark back to an earlier era of the Commission's rulemaking, when US standards were imposed without adequate consideration of either the burden they added to an issuer's existing obligations in other jurisdictions as compared to the resulting benefit to US investors, or the effects of such regulations on the

competitiveness of US capital markets and the attractiveness of the United States as a listing, trading and capital-raising venue. When the United States becomes less attractive to non-US companies than other jurisdictions for listing securities or raising capital, US investors are harmed by being deprived of investment opportunities. In short, we believe that certain of the Proposals, if adopted, would unduly burden foreign issuers without providing a justifying benefit for US investors and could well undermine the progress that the Commission has made in its efforts to make US capital markets more attractive by removing unnecessary regulatory burdens.

Our specific comments on the Proposals are set forth below.

Annual Report Acceleration

One Proposal would accelerate the deadline for foreign private issuers to file their annual reports on Form 20-F ("**Form 20-F**") from 6 months to 90 days after an issuer's fiscal year-end for large accelerated filers and accelerated filers, and 120 days after an issuer's fiscal year-end for all other foreign private issuers (the "**Acceleration Proposal**").

The Proposing Release rightly bases its defense of the Acceleration Proposal on two principal developments, convergence and technology. However, in both cases, we believe that the advances that have been made do not justify the changes contained in the Acceleration Proposal.

Financial reporting standards across different jurisdictions have incrementally converged in recent years, most significantly of all perhaps in the form of the Commission's elimination of the US GAAP reconciliation requirement for foreign private issuers that issue financial statements prepared in accordance with IASB IFRS, but also in the form of increasing acceptance of financial statements prepared in accordance with IFRS by other securities regulators around the world. There has also been a not insignificant measure of substantive convergence between the principles of various national accounting standards and IFRS. Without a doubt convergence will continue, and one can already glimpse a future with a single accounting standard accepted in all major jurisdictions. Convergence generally reduces the need for an interval between the deadline for a foreign private issuer to meet its home-market annual disclosure obligations and the deadline to meet its US disclosure obligations since the same financial information will satisfy both jurisdictions' requirements.

The convergence described above remains fundamentally incomplete, and the Acceleration Proposal is almost certainly premature in this respect. First and most obviously, there continue to be significant differences in financial reporting standards across jurisdictions that make it exceptionally difficult to conclude that the Acceleration Proposal does not impose an unjustified burden on foreign private issuers as a class. A very substantial number of foreign private issuers that are subject to the Exchange Act reporting regime do not prepare their financial statements in accordance with IASB IFRS. Many foreign private issuers are required to issue financial statements in their home jurisdictions prepared in accordance with a local GAAP, including issuers domiciled and traded in Brazil, Russia, India and China among others. For purposes of their Annual Reports on Form 20-F, most of these issuers must either provide a reconciliation of their home country financial statements to US GAAP or present a full set of US GAAP financial statements. Second, we are aware of companies that prepare financials in accordance with IASB IFRS yet intend to continue filing separate US GAAP financials with the SEC in order, among

other reasons, to enhance the comparability of their US financial statements with those produced by US issuers.

Financial reporting standards have converged to a meaningful extent only for European Union foreign private issuers, who generally prepare financial statements in accordance with IFRS as adopted by the European Union ("**EU IFRS**") and may, as a transitional matter, supplement such financial statements with a reconciliation to IASB IFRS to satisfy their US reporting obligations. For most other issuers, the only relevant convergence with respect to financial reporting has been the substantive convergence by which the principles and rules of their home-market accounting and disclosure have become similar to US GAAP.

In addition, while there has been some measure of convergence in non-financial disclosure standards as a result of high-level dialogue between national securities regulators, primarily through the International Organization of Securities Commissions ("**IOSCO**"), convergence in this area also remains fundamentally incomplete. Most notably, no other jurisdiction has yet adopted rules comparable to those adopted by the Commission pursuant to the Sarbanes-Oxley Act of 2002, particularly Section 404, which add substantial time-consuming steps to foreign private issuers' preparation of their Annual Reports on Form 20-F.

Finally, home country disclosure requirements for many foreign private issuers mandate the production of documents in languages other than English, requiring those issuers to prepare English-language translations of their home country disclosures for purposes of preparing their Annual Reports on Form 20-F. These translations cannot realistically be prepared until such foreign private issuers have completed their home country filings.

Technology, for its part, should reduce the time that an issuer needs to prepare the disclosure required to meet both its home market and its US obligations, thereby supporting a reduced interval between the end of an issuer's fiscal year and the deadline for its annual disclosures and financial statements. Although we agree with the Commission that technological advances have made it easier for companies to process information more quickly, we are not convinced that these advances support reducing the time available to a foreign private issuer to file its Annual Report on Form 20-F so dramatically (halving it in the case of large accelerated filers and accelerated filers). Technological developments, to be sure, have expedited preparation of financial statements and other disclosure, but issuers' overall disclosure obligations have also continued to increase. For purposes of US disclosure, the most significant of these increased obligations are generally associated with Section 404 of the Sarbanes-Oxley Act. Technology may have helped issuers keep up with these changes, but we are not certain it has left them ahead of the game.

What is most troubling about the Acceleration Proposal, however, is that it would set the deadline for the filing of Annual Reports on Form 20-F by large accelerated filers and accelerated filers to a date that is *earlier* than the deadline imposed by a substantial number of other important jurisdictions, including all of the Member States of the European Union as well as China and Brazil. Neither the London Stock Exchange nor any of the European Euronext exchanges require publication of annual financial statements prior to 120 days after the end of an issuer's fiscal year. Similarly, issuers whose shares are listed on the São Paulo Stock Exchange (BOVESPA) have 120 days from the end of their fiscal year to publish their annual Brazilian GAAP financial statements. Chinese regulators also allow issuers 120 days from the end of their fiscal year to prepare and submit their annual financial statements prepared in accordance with Chinese Accounting Standards. If enacted, the Acceleration Proposal would therefore effectively

compel foreign private issuer registrants that are large accelerated or accelerated filers and subject to the disclosure regimes of those countries to either (i) accelerate very significantly their home country reporting or (ii) complete their US disclosure, and (where applicable) US GAAP financial statements or reconciliations, prior to their home country disclosure. The fact that domestic US registrants have been able to comply with even shorter deadlines than those proposed by the Acceleration Proposal proves, at most, that such compliance is possible; it does not address the issues of comity, fairness, competitiveness or investor benefit that must be, and have not been, addressed.

We also respectfully disagree with the distinction the Acceleration Proposal makes between large accelerated filers, accelerated filers and all other foreign private issuers. In our experience representing numerous foreign private issuers in connection with their Exchange Act reporting obligations, the key timing constraint in producing an Annual Report on Form 20-F is not the size of the issuer, but rather (for issuers who choose or have to do so), the production of either a second set of full financial statements in accordance with US GAAP or a reconciliation from the home country accounts to US GAAP. A rule that recognizes this burden, rather than distinguishing among foreign private issuers by size, would better reflect the nature of the time required to produce an Annual Report on Form 20-F.

For these reasons we do not believe a change to the Form 20-F filing deadline is appropriate. However, should the Commission change the deadline, in the interest of comity, fairness, competitiveness and the interest of US investors in attracting foreign listings to US exchanges, we urge adoption of a rule that better reflects the principal additional burdens faced by foreign private issuers in complying with their obligations under the Exchange Act reporting regime. It appears to us that the most important ground of distinction among foreign private issuers is, and will continue to be, whether or not the financial statements they prepare for their home jurisdiction are sufficient for Form 20-F purposes. However, even foreign private issuers that do not need to prepare either US GAAP financial statements or a US GAAP reconciliation need and deserve time for translation and additional US disclosure compliance. We would propose for such issuers a Form 20-F filing deadline that is set at 30 days beyond their home country annual reporting deadline, but in no event longer than the current 180 days from their fiscal year end. Issuers that need to prepare either a reconciliation (including from EU IFRS to IASB IFRS) or a second set of financial statements need and deserve more time than those that do not, and for these issuers we urge that they continue to be allowed to file their Annual Reports on Form 20-F 180 days after the close of their fiscal year.

Foreign Private Issuer Definition

The Proposals would permit foreign private issuers to assess their status as foreign private issuers once a year, on the last business day of their second fiscal quarter. We welcome the Commission's efforts to provide clarity for foreign issuers and believe a firm determination date would be helpful in this respect.

The Proposing Release asks for comment on how the Commission should address the potential flow-back of securities into the United States if a reporting foreign issuer concludes that it does not qualify as a foreign private issuer only in its third fiscal quarter and, under the Proposal, is able to qualify as a Category 2 issuer under Regulation S and also avoid the restrictions of Category 3 and Rule 905 of Regulation S for unregistered offshore offerings of its equity securities for a significant additional period of time. We recommend adopting a consistent approach and applying the proposed timing for the determination of foreign private issuer status across the board. To do otherwise would effectively create

two "determination dates" for foreign private issuers: one with respect to Regulation S sales of equity and one for all other purposes. In addition to burdening issuers, this would result in market confusion as to the status of foreign private issuers.[1] We believe this would negate the clarity the SEC is attempting to achieve in the Proposals.

Financial Information for Significant, Completed Acquisitions

Home Country Acquisition Disclosure

Under the Proposals, foreign private issuers would be required to provide in their annual reports historical financial statements for an acquired business, as well as pro forma financial information showing the effects of the acquisition, in connection with highly significant, completed acquisitions. The Proposals contemplate the provision of financial statements of the acquired business for three fiscal years as well as pro forma financial information showing the effects of the acquisition on the issuer for the most recently completed fiscal year or any interim periods prior to the acquisition.

While we appreciate the rationale behind reconciling the disclosure requirements applicable to US domestic and foreign private issuers who complete significant acquisitions, we believe the Proposals could be better tailored to address the particular disclosure burdens faced by foreign private issuers and reduce disincentives for foreign private issuers to become SEC reporting companies. Often, foreign private issuers will have already prepared business combination financial information for investors in fulfillment of home country financial disclosure requirements in connection with the acquisition. Indeed, many will have provided that information to their shareholders in connection with a shareholder vote approving the significant acquisition. We believe it would be unduly burdensome, and in many cases would not materially enhance the information available to investors, to require foreign private issuers to resubmit that information in their Annual Report on Form 20-F, especially if the information would need to be updated and/or reconciled to US GAAP in order to comply with the technical requirements of Regulation S-X. We respectfully suggest that the Commission consider accommodating foreign private issuers who are otherwise providing robust and adequate home country business combination financial information by providing that these issuers should be deemed to have satisfied the proposed amendments to Item 17(a) of Form 20-F if they submit under cover of Form 6-K home country financial information with respect to acquisitions that are significant at the 50% level.

We appreciate, however, that this accommodation cannot be extended to all foreign private issuers. Rather, it is only appropriate for foreign private issuers with robust home country disclosure standards. We suggest that the Commission's recent efforts to develop a mutual recognition regime, as well as its recognition of the quality of IOSCO disclosure, may provide useful guidance in drawing a line between robust and adequate, and insufficient home country disclosure.

We believe that such an accommodation is particularly appropriate given the acknowledgement by the Commission of the importance of consistent, high quality international disclosure standards as well as its mutual recognition efforts. The Commission has noted that when international disclosure standards are of sufficiently high quality, they can be critically important pillars of integrity in the global capital markets.

[1] While there will always be some potential for inconsistency as to the status of an issuer vis-à-vis Regulation S, given the enduring nature of the Regulation S Category 3 distribution compliance period, we believe a consistent "determination date" is the best approach to minimize confusion.

Chairman Cox has recently stated that the Commission in particular has long been a proponent of international regulatory harmonization such as IASB IFRS and IOSCO's own International Disclosure Standards, on which the Commission's substantial amendments to Form 20-F in 2000 were based. Indeed, the convergence of international disclosure standards and their positive impact on the integrity of our global capital markets are in part at the origin of the Commission's ongoing initiatives in the area of mutual recognition.

In short, we believe that there should be an exception to the requirement to provide information required by Rule 3-05 and Article 11 of Regulation S-X for the most recent fiscal year covered by the annual report where robust home country financial and non-financial disclosure of business combinations that are significant at the 50% level is submitted to the Commission under cover of Form 6-K before the 20-F annual report filing deadline.

Extensions for Filing Business Combination Financial Information

Furthermore, we believe that a reasonable extension should be provided for any requirement to file Rule 3-05 acquired business financial statements and Article 11 pro forma financial information for the most recent year covered by the Annual Report on Form 20-F for business combinations that occur late in the fiscal year, particularly if the Commission decides to accelerate the filing deadline for Annual Reports on Form 20-F and particularly where the issuer would be required to reconcile such financial statements and information to US GAAP.

As noted elsewhere in this letter, we believe that it is not appropriate to accelerate the filing deadline for Annual Reports on Form 20-F, particularly for foreign private issuers who must, under Commission rules, continue to reconcile their primary financial statements to US GAAP or who present financial statements in accordance with US GAAP. We believe that accelerated annual report filing deadlines are even less appropriate for foreign private issuers who would be obligated to include Rule 3-05 acquired business financial statements and Article 11 pro forma financial information in their Annual Reports on Form 20-F under the Proposals. We believe that compliance even with existing, let alone accelerated, filing deadlines for Annual Reports on Form 20-F would cause undue hardship to issuers who consummate business combinations late in their fiscal years and may be obligated to prepare reconciliations of the financial statements of the acquired business and the pro forma financial information to US GAAP.

Accordingly, we urge the Commission to adopt a reasonable extension for foreign private issuers to accommodate this undue hardship. For example, under circumstances where foreign private issuers are obligated to include Rule 3-05 financial statements and Article 11 pro forma financial information for the latest fiscal year covered by their Annual Report on Form 20-F and the business combination transaction was consummated in the last financial quarter of the fiscal year, the Commission could provide that the issuer would be entitled to a 90-day extension with respect to the Rule 3-05 statements and Article 11 information, which would then be furnished under cover of Form 6-K. At the very least this extension should be provided to those foreign private issuers that need to prepare either a reconciliation (including from EU IFRS to IASB IFRS) or a second set of financial statements for their Form 20-F.

Previously Provided Information

We also believe that the Proposals should be amended to clarify that the exception to the requirement to provide information required by Rule 3-05 and Article 11 of Regulation S-X when the information has

previously been provided in a registration statement applies even if the information in the registration statement relates to earlier dates and periods than would be required in the Annual Report on Form 20-F.

By way of example, where common equity securities being issued in a business combination are being registered on Form F-4, Rule 3-05 significance thresholds are exceeded and the issuer's security holders are voting on the transaction, the issuer will need to include or incorporate by reference to the registration statement financial statements of the acquired business that comply with Item 8.A of Form 20-F (see Item 10(b), Instruction 2 to Item 11, Item 12(a)(2) and 12(b)(2), Item 17(b)(5) and (6), in each case, of Form F-4) and include an Article 11 compliant pro forma (i) balance sheet, as of the end of the most recent period for which a consolidated balance sheet of the issuer is required by Rule 3-01 of Regulation S-X (unless the transaction is already reflected in the issuer's balance sheet), and (ii) income statement, for the issuer's most recent fiscal year and for the period from the most recent fiscal year end to the most recent interim date for which a balance sheet is required, with the relevant dates and periods in each case measured at the date of the registration statement. See Item 5 of Form F-4. Under such circumstances, the Rule 3-05 financial statements of the business being acquired and the issuer's Article 11 pro forma financial information filed in the F-4 registration statement will, under Item 8.A of Form 20-F and Article 11 of Regulation S-X, relate to dates and periods that precede the date of the consummation of the business combination.

While the Proposals would generally not require the updating of Rule 3-05 financial statements as the acquired business will be consolidated into the issuer's financial statements as of the date of acquisition, they would generally require the Article 11 pro forma income statement to be updated for the fiscal year in which the completed acquisition takes place.

We believe that any final rule should clarify that even if the acquired business financial statements and pro forma financial information that are filed in the registration statement relate to dates and periods that precede those that would otherwise apply under the Proposals, such previously filed statements and information will constitute "information [that] has already been provided previously in a registration statement" and will render unnecessary the further filing of Rule 3-05 statements or Article 11 pro forma financial information for the business combination. We believe that this interpretation is consistent with the Proposals, and that clarification in the final rule would be helpful.

Change in Accountants

Under the Proposals, foreign private issuers would be required to provide disclosure about changes in and disagreements with their certifying accountant in their annual reports and initial registration statements. While we do not disagree in principle with the rationale behind this disclosure requirement, we are concerned about the obligations placed on issuers by proposed Item 16-F, and in particular the ability of issuers to fulfill those obligations when dealing with non-US accounting firms.

Under this Proposal, where an issuer has changed its accountant, it has the obligation to ask the former accountant for certain information and to file that information when received within certain time limits. The Proposals do not contemplate the situation where the accountant is unwilling or unable to provide the required information. In order to provide for this scenario, we would recommend that the obligation on the issuer be solely to *request* the information from the accountant, and to *file* it when received, without the imposition of a specific filing deadline. While we appreciate that the Proposals largely replicate the rules

applicable to domestic issuers, the additional complexity posed by reporting outside the United States means that it may be more difficult for an issuer to obtain the required disclosures from its accountant in a timely fashion and it would be unfair to penalize the issuer if the accountants do not provide the information.

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We would be pleased to respond to any enquiries regarding this letter or our views on the Proposal generally. Please contact Edward Fleischman (edward.fleischman@linklaters.com), Jeff Cohen (jeff.cohen@linklaters.com), Thomas N. O'Neill, III. (thomas.oneill@linklaters.com), Jennifer Schneck (jennifer.schneck@linklaters.com) or Lawrence Vranka, Jr. (larry.vranka@linklaters.com), or any of the above by telephone at (212) 903 9000, if you would like to discuss any of these matters. We thank the Commission in advance for considering our and others' comments on the Proposals.

Yours sincerely,

/s/ Linklaters LLP

Linklaters LLP