Date: December 3, 2008

To: Interested Persons

Re: Rapid Growth of Unsponsored ADR Programs Following Recent Amendments to SEC Rule 12g3-2(b)

According to statements made by a number of market observers and regulators, over 700 unsponsored American Depositary Receipt ("**ADR**") programs have been established in the weeks following recent changes to Rule 12g3-2(b) ("**Rule 12g3-2(b)**") under the U.S. Securities Exchange Act of 1934, as amended (the "**Exchange Act**") and to the Securities and Exchange Commission ("**SEC**") Form F-6 registration statement[1].

The revised Rule 12g3-2(b) automatically exempts from the registration requirements of Section 12(g) of the Exchange Act foreign private issuers that maintain a listing of equity securities in a primary trading market located outside the United States and post on their websites English translations of the disclosures they make to their shareholders. The revised Form F-6 allows a depositary to file for an unsponsored ADR program if, after exercising reasonable diligence, it holds a "reasonable, good faith belief" that the issuer meets the requirements of Rule 12g3-2(b). Prior to these amendments, an unsponsored ADR program could only be established with respect to shares of issuers who had filed applications with the SEC to qualify for the 12g3-2(b) exemption. These amendments to a large extent take away issuers' control over whether an unsponsored ADR program is created with respect to their shares.

This memorandum provides a broad overview of sponsored and unsponsored ADR programs and a discussion on the main effects of the changes to Rule 12g3-2(b) and Form F-6 on such facilities.

1. What is an ADR?

An ADR is a security that represents an ownership interest in a specified number of other securities that have been deposited with a depositary bank by the holder of such securities. Upon deposit of the underlying securities, the depositary issues a depositary receipt that gives the holder the right to receive distributions on the deposited securities and to obtain those securities upon cancellation of the receipt. The records of the issuer then show the ADR depositary, or its nominee, as the registered holder of the underlying securities.

ADR arrangements traditionally have been put in place to facilitate U.S. ownership of the equity securities of non-U.S. issuers, including by allowing of share transfers within U.S. clearing systems and conversion of dividends paid in a currency other than U.S. dollars. Depositary receipts have also been used to facilitate ownership of foreign equities in other jurisdictions by investors resident in those jurisdictions. In addition, non-resident investors in some cases may prefer to hold an investment in the jurisdiction of the depositary receipt program rather than that of the issuer of the underlying security.

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[1] The adopting SEC release can be found at http://www.sec.gov/rules/final/2008/34-58465.pdf.

2. Sponsored and Unsponsored ADR facilities

There are two types of ADR facilities, sponsored and unsponsored.

A sponsored ADR facility is established jointly by an issuer and a depositary. The issuer of the deposited securities enters into a deposit agreement with the depositary that sets out the rights and responsibilities of the issuer, the depositary and the ADR holders. In most sponsored programs, the depositary agrees to distribute notices of shareholder meetings and voting instructions to ADR holders, thereby allowing ADR holders to exercise voting rights through the depositary with respect to the deposited securities. In addition, the depositary usually agrees to distribute to ADR holders shareholder communications and other information at the request of the issuer of the deposited securities.

The issuer plays no role in the establishment or operation of an unsponsored ADR program, which may be established and operated without the issuer's knowledge. The depositary of an unsponsored facility is not required to distribute to ADR holders shareholder communications received from the issuer of the deposited securities or to pass through voting rights to ADR holders in respect of the deposited securities.

3. Regulation of ADRs under the U.S. securities laws

The ADR depositary is required to file a registration statement on Form F-6 with the SEC in connection with the establishment of the ADR program. The F-6 includes limited information, mainly regarding the depositary arrangements, and requires the deposit agreement to be filed as an exhibit. The F-6 is signed by the depositary and, in a sponsored program, by the issuer and a majority of its board of directors as well.

A depositary may file a Form F-6 and issue ADRs (either in a sponsored or unsponsored program) only if the non-U.S. issuer of the underlying securities is a reporting issuer under the Exchange Act (i.e., a 20-F or 10-K filer) or exempt from the reporting requirements pursuant to Rule 12g3-2(b). In order to be able to claim the Rule 12g3-2(b) exemption, an issuer must not be required to file Form 20-F or 10-K with the SEC and must (i) maintain a listing of the underlying securities in a jurisdiction or jurisdictions outside the United States that constitute the primary trading market for the underlying securities and (ii) have published in English, on its website or through an electronic information delivery system generally available to the public in its primary trading market, information that, since the first day of its most recently completed fiscal year, it (a) has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile, (b) has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and, (c) has distributed or been required to distribute to its security holders.

Until October 2008, an issuer had to apply to the SEC for a Rule 12g3-2(b) exemption and then provide information to the SEC on an ongoing basis in order to maintain the exemption. This requirement meant that an issuer could prevent an unsponsored ADR program from being launched simply by not applying for the exemption. Effective October 10, 2008, Rule 12g3-2(b) was revised to provide an automatic exemption from SEC reporting for non-U.S. issuers meeting the requirements described above. In addition, under revised Form F-6, a depositary may file a Form F-6 for an unsponsored ADR program if, after exercising reasonable diligence, it holds a "reasonable, good faith belief" that the issuer complies with these requirements.[2] Because many companies publish information on their website that might be reasonably believed to be 12g3-2(b)-compliant and are principally traded in their home country markets, the change in Rule 12g3-2(b) and Form F-6 opened up a significant new source of unsponsored ADR programs.

4. Consequences of an unsponsored ADR program

There are certain practical consequences to a non-U.S. issuer under the U.S. securities laws as a result of the establishment by a depositary bank of an unsponsored ADR program for such issuer's securities. The development of an active ADR program could result in such issuer's having more than 300 holders of a class of its equity securities in the U.S., which could trigger a requirement to register that class with the SEC under Section 12(g) of the Exchange Act and become a 20-F filer, depending upon the level of the issuer's jurisdictional contacts with the United States. This requirement will have no effect for so long as the issuer can rely upon the automatic Rule 12g3-2(b) exemption, which will remain available as long as the issuer maintains its primary non-U.S. listing and continues to publish the same level of English language investor information on its website. However, if the issuer were to fail to continue to meet the requirements for the exemption under these circumstances, it would become obligated to register its equity securities with the SEC. Because the Section 12(g) registration requirement is determined based on the number of beneficial holders at the end of the issuer's last fiscal year, an issuer with an undesired unsponsored ADR program should act as far in advance of its fiscal year end as possible to cause the depositary for that program to terminate the program.

There may also be some practical corporate governance consequences if a large number of the issuer's equity securities are deposited in an unsponsored program because there is no way for the issuer to ensure that shareholder communications are distributed to ADR holders or that voting rights (which attach to the underlying equity securities) have been passed on to ADR holders in respect of the deposited securities. At the least, an unsponsored ADR program may impair investor relations activities. If the program were large enough it could impair the issuer's ability to obtain a quorum in shareholders meetings or to pass shareholder resolutions. By contrast, subject to local law restrictions, deposit agreements for sponsored ADR programs often require the depositary to be present at shareholders meetings for purposes of establishing a quorum and, depending on the agreement, to vote with management in respect of shares for which no instructions are received from ADR holders.[3]

Finally, although the issuer's potential for liability under the U.S. securities laws for false or misleading disclosure should not be affected by the nature of the instrument that evidences investors' shareholding (i.e., the fact that they hold ADRs instead of shares), a meaningful increase in the number of U.S. investors could have such an effect. To the extent that an active sponsored or unsponsored ADR program increases U.S. investor interest, then the risk of complaints from U.S. investors would increase.

[2] It is not clear in Form F-6 that compliance with the primary foreign trading markets prong of Rule 12g3-2(b) may be established as a matter of good faith belief, but the SEC adopting release suggests that this is the case.

[3] Such voting arrangements have been criticized by some corporate governance organizations.

5. Preventing the establishment by a depositary bank of an unsponsored ADR program

Under the new Rule 12g3-2(b), the issuer's consent to the establishment of an unsponsored ADR program by a depositary bank is not necessary.[4] If an issuer wished to prevent an unsponsored ADR program from being established, it would need to ensure that the new Rule 12g3-2(b) automatic exemption did not apply to it — for example, by ceasing to publish English language disclosures on its website.[5] If an unsponsored ADR program is established notwithstanding the issuer's non-compliance with the conditions of Rule 12g3-2(b), the issuer may inform the ADR depositary of such non-compliance, thereby making it difficult if not impossible for the depositary for reasonably believe that the issuer is in compliance. If the program is not withdrawn, the issuer could inform the SEC of its views and request that the Form F-6 for the unsponsored program not be declared effective or that a stop order be placed upon its use. However, there are a number of potential pitfalls associated with this approach, not least that if an unsponsored facility was already in existence, investors may be displeased by its suspension or termination and termination may lead to selling pressure on the issuer's stock to the extent that ADR holders are not willing to hold shares directly following termination of the program. If the issuer is in compliance with Rule 12g3-2(b), it may not be possible to force the termination of an unsponsored program although, as described more in detail below, the establishment of a sponsored ADR program may lead to withdrawal of the unsponsored program or programs.

Recently, a number of unsponsored ADR programs were withdrawn shortly after their establishment, in certain cases, apparently upon the request of the issuer. Nevertheless, as noted above, the depositary is under no legal obligation to do so as long as it continues to reasonably believe that the issuer is in compliance with the conditions of Rule 12g3-2(b).

6. Establishment of a sponsored ADR program when an unsponsored ADR program is already in place

Although multiple unsponsored ADR programs may coexist, the SEC has long taken the position that an unsponsored ADR program cannot coexist with a sponsored one because it believes that this situation would lead to a disorderly trading market and confusion among investors[6]. It continues to be the SEC's policy that the registration statement on Form F-6 for a sponsored ADR program will not be declared effective until

[4] In adopting the new automatic exemption rule, the SEC staff acknowledged that unsponsored programs would no longer need the de facto consent of an issuer. However, the SEC staff appeared to accept the few comments it received from market participants that, in practice "depositary banks typically obtain the issuer's consent before establishing an unsponsored ADR facility" and so "a rule requiring consent was not necessary". (See note 113 to the SEC Final Rule: Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, SEC Release No. 34-58465). It remains to be seen if the SEC staff's position will change given the sudden increase in the number of unsponsored ADR programs being launched, in some cases apparently without the consent of issuers.

[5] Short of removing English language disclosure from the website, there may be some benefit from installing a filter or gateway page that attempts to exclude U.S. persons from viewing the English language portions of the site.

[6] SEC Release Nos. 33-6894 and 34-29226, Sections II.B.3 and III. C (May 23, 1991).

any unsponsored program is terminated. As a matter of market practice, depositary banks for unsponsored programs historically have been willing to cancel such programs upon the formation of a sponsored program and transfer ADR holders to the new sponsored program in exchange for payment by the issuer or the new depositary of cancellation fees for the old program. However, the depositary of an unsponsored program has no legal obligation to do so and could prevent the formation of a sponsored program by refusing to cooperate.

A sponsored ADR program may exist without a U.S. stock exchange listing and, subject to the automatic exemption from reporting being available, the foreign private issuer would have no SEC reporting obligations as a result of establishing a sponsored program. The general advantage of a sponsored program over an unsponsored program is that an issuer may, through the terms of the deposit agreement, ensure that ADR investors receive shareholder communications and an entitlement to vote through the depositary at shareholder meetings.

If you have any questions, please contact either of the lawyers listed below or your regular Davis Polk contact.

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