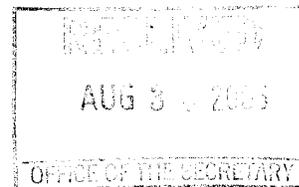


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August 30, 2006



Ms. Nancy Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

4-525

Re: Request for Rulemaking to Provide American Depository Receipt Owners  
With Certain Traditional Shareowner Rights When Foreign Corporations  
Advocate On Significant U.S. Social Policy Issues Or Have Significant U.S.  
Social Impacts

Dear Ms. Morris,

By this petition, we request that the Securities and Exchange Commission (the "Commission") institute a rulemaking to provide owners of American Depository Receipts ("ADRs") of certain foreign issuers with the ability to exercise certain traditional shareowner rights, including the ability to vote in the election of directors, and to submit and vote on shareowner proposals. The foreign issuers that would be subject to this rule are those that engage in lobbying or other advocacy activity on significant U.S. social policy issues or those who have significant national security, economic, environmental or other social impacts on the public.

The purpose of the requested rule is to ensure that U.S. investors in certain foreign corporate issuers have the same opportunities to participate in corporate governance concerning significant social policy issues that the shareowners of domestic corporate issuers already enjoy under Commission rules.

When foreign corporate issuers significantly affect U.S. social policy, the Commission should not relegate their U.S. investors to the inequitable status of "second-class shareowners."

The purpose of this petition may be achieved by: (1) amending Exchange Act Rule 3a12-3(b) to compel foreign issuers, under certain limited circumstances described below, to be subject to the Commission's proxy rules; or (2) amending Form F-6 to require that ADR depositaries affirmatively undertake to provide ADR holders, under certain circumstances described below, with meaningful opportunities to exercise the aforementioned rights.

Action Fund Management, LLC is the investment advisor to the Free Enterprise Action Fund, a mutual fund (Ticker: FEAOX).

Ms. Nancy M. Morris  
AFM Petition to Amend Exchange Act Rule 3a12-3(b)/Form F-6  
August 30, 2006  
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## I. Background

Foreign corporate issuers are increasingly participating in significant ways in political and public policy debates in the U.S., including lobbying the federal and state governments, supporting issue advocacy groups, conducting public relations campaigns and making political contributions. Foreign corporate issuers are also increasingly having significant economic, environmental and social impacts on the public.

For example, BP plc, Deutsche Telekom, Royal Dutch Shell plc, and Toyota Motor Corp. – all foreign corporations whose ADRs are bought and sold in the U.S. – actively support efforts to persuade the federal and state governments to adopt laws and regulations to limit greenhouse gas emissions and to establish a market for trading greenhouse gas emission permits.<sup>1</sup>

BP plc states on its web site, “We support precautionary action to limit greenhouse gas emissions even though aspects of the science are still the subject of expert debate” and spends more than \$100 million per year running an advertising campaign in the U.S. – including regularly-appearing full-page advertisements in major daily newspapers such as the *New York Times*, *Wall Street Journal*, and *Washington Post*, and regularly-running television advertisements – that operates, in effect, as an advocacy campaign for global warming regulation.<sup>2</sup>

Foreign corporations also spend tens of millions of dollars annually lobbying the federal and state governments on various public policy issues. Since 1998, Royal Dutch Shell has expended \$25 million; Toyota Motor Corp., \$21 million; BP plc, \$20 million; and Honda Motor Corp, \$14 million.<sup>3</sup> BP, in particular, has lobbied to gain exemption from corporate law reforms.<sup>4</sup>

Foreign corporations also make significant political contributions to U.S. politicians. British defense company BAE, for example, is the 18<sup>th</sup> biggest corporate donor in the current U.S. election cycle.<sup>5</sup> GlaxoSmithKline, HSBC, Rolls Royce, UBS, Daimler-Chrysler and BP are other examples of foreign corporations that make significant U.S. political contributions.

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<sup>1</sup> See e.g., Pew Center for Global Climate Change, Business Environmental Leadership Council ([http://pewclimate.org/companies\\_leading\\_the\\_way\\_belc/company\\_profiles/index.cfm](http://pewclimate.org/companies_leading_the_way_belc/company_profiles/index.cfm)).

<sup>2</sup> See e.g., The Times (London), BP drops shield in favour of floral emblem (July 25, 2000); and BP plc, Print Gallery (<http://www.bp.com/multipleimagesection.do?categoryId=9005564&contentId=7010886>) and TV Gallery (<http://www.bp.com/multipleimagesection.do?categoryId=9005563&contentId=7010889>).

<sup>3</sup> See e.g., OpenSecrets.org (<http://www.opensecrets.org>).

<sup>4</sup> OpenSecrets.org (<http://www.opensecrets.org/orgs/summary.asp?ID=D000000091&Name=BP>).

<sup>5</sup> The Financial Times, UK's BAE among top donors to candidates in US elections, August 22, 2005.

Other foreign corporate issuers participate in various European Union regulatory processes with an eye toward “exporting” burdensome EU regulations to the U.S. that hamper the competitiveness of U.S. businesses.<sup>6</sup>

Sony Corporation, for example, has implemented on a worldwide basis the European Union’s *Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment* (“RoHS”) directive – restricting specified chemical substances in products.<sup>7</sup> Such voluntary and “worldwide” adoption of European Union regulation by Sony effectively imposes EU regulations on U.S. businesses – including Sony’s competitors and suppliers – that are otherwise not subject to such regulation.

Foreign companies are also causing significant economic, environmental and other social impacts on the public. BP plc, for example, is under pressure because of a series of negligent and/or criminal actions, including:<sup>8</sup> (1) a deadly explosion in a Texas City, TX refinery in 2005; (2) possible market manipulation of propane gas, crude oil and unleaded gasoline prices that artificially raised the cost of energy; (3) the largest-ever oil pipeline leak on the Alaskan North Slope, which resulted in a major shutdown causing gasoline prices to spike; (4) possibly manipulating data from inspections of the Alaskan oil pipeline; and (5) failing to repair a leaking oil well in the Gulf of Mexico more than one year after Hurricane Katrina. Because of these actions, the company is under investigation by a number of federal and state agencies. These investigations could result in significant government actions against BP and could result in significant harm to BP’s U.S. investors.

Despite the lobbying and advocacy activities, and significant social impacts of foreign corporate issuers, current Commission regulations deny U.S. investors the opportunity to formally address foreign corporate managements through the proxy rules or other means.

Whereas Commission rules facilitate the right of shareowners of domestic issuers to vote in director elections, and to submit and vote on shareowner proposals concerning sufficiently significant social policy issues<sup>9</sup> – for example, the Commission recently required the General Electric Company (“GE”) to include a shareowner proposal concerning global warming in GE’s proxy statement<sup>10</sup> and required Dow Chemical Company to include in its proxy statement a shareowner proposal concerning the 1984 Bhopal, India chemical plant explosion – Commission rules do not provide similar opportunities to ADR owners when foreign corporations are involved in sufficiently

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<sup>6</sup> See e.g., Institute for Trade Standards and Sustainable Development, “Precautionary Preference: How Europe’s New Regulatory Protectionism Imperils American Free Enterprise,” August 2005 (<http://itssd.org/Press%20Release/ITSSDRevisedpressreleaseII.pdf>).

<sup>7</sup> <http://www.sony.net/SonyInfo/Environment/environment/management/efficiency/index.html>.

<sup>8</sup> Wall Street Journal, BP woes deepen with new probe, August 29, 2006.

<sup>9</sup> Exchange Act Release No. 40,018 (May 21, 1998).

<sup>10</sup> *General Electric Company* (January 17, 2006)

significant social policy issues or have significant social impacts. Commission rules, in fact, specifically exempt foreign corporate issuers from the proxy rules.<sup>11</sup>

We appreciate that the purpose of the proxy rule exemption for foreign issuers, originally promulgated in 1979,<sup>12</sup> is to facilitate investment by U.S. investors in foreign corporate issuers by relieving those issuers of onerous U.S. registration and reporting requirements.

But in 2006, given foreign issuers' increasing involvement in domestic public policy issues and social impacts, the exemption is now overly broad and operates to the detriment of U.S. investors. The blanket exemption deprives investors of a crucial voice with respect to the intersection of corporate governance and U.S. public policy – a voice that the Commission sanctions with respect to domestic issuers.

We believe the exemption can and ought to be updated and amended to satisfy its original purpose and to accommodate the current reality of foreign corporations advocating to change U.S. public policy and having significant social impacts in the U.S., without being accountable to U.S. investors.

In the alternative to modifying the exemption, the Commission should require that ADR depositaries undertake to provide ADR-owners, under certain circumstances, with the ability to exercise the rights of shareowners with respect to voting the shares their ADRs represent in director elections and to submit shareowner proposals.

## **II. Request for Rulemaking**

We propose the following two alternatives to affect the purpose of this request. We also encourage the Commission to seek public comment on other alternatives that may exist.

### **A. Alternative 1 – Amend Exchange Act Rule 3a12-3(b)**

Exchange Act Rule 3a12-3(b) currently states,

Securities registered by a foreign private issuer, as defined in Rule 3b-4, shall be exempt from sections 14(a), 14(b), 14(c), 14(f) and 16 of the Act.

We suggest that the rule be modified as follows:

Securities registered by a foreign private issuer, as defined in Rule 3b-4, shall be exempt from sections 14(a), 14(b), 14(c), 14(f) and 16 of the Act except that, with respect to sections 14(a) and 14(b), upon application to the Commission by an owner of an American Depository Receipt, the issuer is involved in a sufficiently significant social policy issue or activity that has significant social impacts and has taken affirmative steps to make its ADRs available for purchase or sale to the public. [supplementary language is underlined]

<sup>11</sup> Exchange Act Rule 3a12-3(b).

<sup>12</sup> 44 FR 70137, Dec. 6, 1979, as amended at 47 FR 54780, Dec. 6, 1982; 56 FR 30067, July 1, 1991.

This modification would subject the foreign issuers of the securities underlying ADRs to the proxy rules under certain circumstances, thereby enabling ADR owners to exercise voting rights in the election of directors and to submit shareowner proposals.

The term “sufficiently significant public policy issue or activity that has significant social impacts” would have the same meaning and interpretation as established by the Commission in Exchange Act Release No. 40,018 (May 21, 1998).

The modification ensures that issuers are not automatically subject to the proxy rules; they must be involved in a “sufficiently significant social policy issue” or engaged in activity that has “significant social impacts” – a determination made by the Commission upon application by an ADR holder within a reasonable timeframe that is consistent with the proxy rules, and their ADRs must be “sponsored” – that is, made available to U.S. investors through depositaries with a foreign issuer’s cooperation.

#### **B. Alternative 2 – Amend Form F-6**

Form F-6 is the statement filed by ADR issuers with the Commission to satisfy the registration requirements of the Securities Act of 1933. Item 4(a) in the statement, entitled “Undertakings,” currently states,

Notwithstanding the provisions of Rule 415(a)(2)(§230.415(a)(2) of this chapter), the undertakings in Item 512(a) of Regulation S-K are not required. Furnish the following undertakings:

- (a) The depositary hereby undertakes to make available at the principal office of the depositary in the United States, for inspection by holders of the ADRs, any reports and communications received from the issuer of the deposited securities which are both (1) received by the depositary as the holder of the deposited securities; and (2) made generally available to the holders of the underlying securities by the issuer.
- (b) If the amounts of fees charged are not disclosed in the prospectus, the depositary undertakes to prepare a separate document stating the amount of any fee and describing the service for which it is charged and to deliver promptly a copy of such fee schedule without charge to anyone upon request. The depositary undertakes to notify each registered holder of an ADR thirty days before any change in this fee schedule.

We suggest that Item 4 be modified to add a new subsection (c) as follows:

- (c) In the event the issuer of the deposited securities is involved in a sufficiently significant public policy issue or engaged in an activity that has significant social impacts, as determined by the Commission upon application by the owner of an ADR, the depositary hereby undertakes to recognize ADR owners as the effective shareowner of the underlying securities, including providing ADR owners with notices of meetings and voting materials in the manner prescribed by Exchange Act Rules 14b-1 and 14b-2 and enabling ADR owners to exercise

the rights of shareowners of the underlying securities including with respect to the election of directors and shareowner proposals.

The intent of this subsection is two-fold: (1) to establish that depositaries have the same duties with respect to ADR holders as banks and registered broker-dealers that hold securities in “street name” for their clients – i.e., to forward, within five business days, certain corporate communications, including proxies to the beneficial owners of the shares; and (2) to permit ADR owners to exercise the rights that pertain to the securities underlying their ADRs by directing the depositary to vote the underlying shares and to submit shareowner proposals in the manner prescribed by the ADR owner.

This modification may require that depositaries modify agreements with foreign issuers to ensure that depositary-issuer agreements do not infringe upon the depositaries’ undertakings to allow ADR holders to vote in director elections and to submit shareowner proposals.

Alternative 2 may be a preferred solution to Alternative 1 because it would apply to all ADRs – that is, sponsored and unsponsored – thereby ensuring that all ADR owners have the ability, under certain circumstances, to exercise traditional shareowner rights.

### **III. Conclusion**

The Commission’s rules limiting the shareowner rights of ADR owners were promulgated during a time when investors purchased and sold securities almost exclusively for financial reasons and publicly-owned corporations operated their businesses exclusively for the benefit of their shareowners. These circumstances do not hold true anymore.

Many shareowners purchase or sell securities based on non-financial reasons, often having to do with the issuers’ potential or actual participation in public policy debates or social impacts concerning health, environmental, labor, human rights issues and other so-called “corporate social responsibility” issues. Many corporate issuers implement – for a variety of reasons, including attracting investors and improving public image – corporate social responsibility initiatives they claim will benefit society as a whole rather than their shareowners.

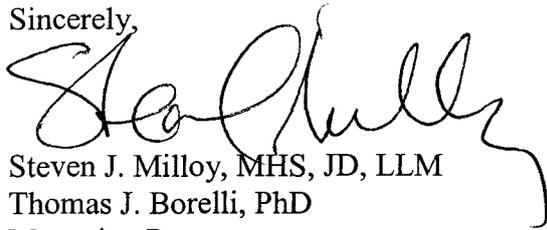
The Commission has already recognized these realities with respect to domestic corporate issuers by permitting shareowners to submit for inclusion in proxy statements proposals on significant public policy issues and on corporate activities with significant social impacts. Although foreign issuers may impact public policy and society in the same ways as domestic issuers, Commission rules effectively block ADR owners from submitting shareowner proposals and participating in elections of directors.

The Free Enterprise Action Fund – and, no doubt, many other U.S. investors – would like to invest in the ADRs of foreign companies but are reluctant to become second-class shareowners.

For these reasons, we respectfully petition the Commission to amend either Exchange Act Rule 3a12-3(b) or Form F-6 as described above, or to promulgate other regulations to affect the purposes of this petition.

If you have any questions, or if we can provide any additional information that would be helpful to the Commission or its staff, please feel free to call us.

Sincerely,



Steven J. Milloy, MHS, JD, LLM  
Thomas J. Borelli, PhD  
Managing Partners

cc: Chairman Christopher Cox  
Commissioner Paul S. Atkins  
Commissioner Roel C. Campos  
Commissioner Annette L. Nazareth  
Commissioner Kathleen L. Casey  
Mr. John White, Director, Division of Corporation Finance