SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
787 SEVENTH AVENUE
NEW YORK, NY 10019
(212) 839 5300
(212) 839 5599 FAX

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April 23, 2008

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-04-08; Comments on Proposed Changes to Rule 12g3-2(b) Exemption for Foreign Private Issuers

Dear Ms. Morris:

We appreciate the efforts of the Commission to continue to consider appropriate treatment of foreign private issuers under the U.S. securities laws, and we appreciate this opportunity to provide our comments on one aspect of the Commission's proposed changes to Rule 12g3-2(b) under the Securities Exchange Act of 1934. Our comments are based on our experience representing issuers, underwriters and other market participants, although the comments expressed below are solely our own.

We certainly support the Commission's efforts to modernize U.S. securities regulation and to make it more appropriate for foreign private issuers, consistent with the need for investor protection. Pursuing these objectives, the Commission recently examined the difficulties facing a foreign private issuer that had been required to register under the Exchange Act, but that had low levels of trading volume in the U.S. Those efforts led to new, relaxed rules for termination of registration and associated reporting duties, including Rule 12h-6, which, for the first time, allowed trading volume to serve as the basis for deregistration. The Commission now is considering proposals for the amendment of Rule 12g3-2(b) that, in the main, will serve these objectives well by simplifying the procedures for claiming the exemption from Exchange Act registration and improving the accessibility to information for investors in the United States. The proposed requirement for English-language Internet availability will be a striking improvement over the current availability of foreign issuer disclosure. The requirement of Rule 101(c) of Regulation S-T that Rule 12g3-2(b) submissions to the Commission may only be made in paper, rather than through EDGAR, has meant, as a practical matter, that such submissions are available only after the time and expense of a document request to the Commission.

However, the Commission is also considering the historically unprecedented action of disqualifying foreign private issuers from reliance on Rule 12g3-2(b) if trading volume in the United States reaches certain levels. The proposals would apply to all present claimants of the

exemption, including both issuers who never listed or registered securities in the U.S. as well as issuers that delisted securities in the U.S. markets and took other steps to terminate registration under the Exchange Act and to remove themselves from the periodic reporting system. The Commission has apparently concluded that for a foreign private issuer that was a registrant and then used the new trading volume test under 12h-6 as a basis to exit the system, such a foreign private issuer needs to continue to satisfy certain trading volume limitations and conditions in order to remain outside of the Exchange Act reporting system. For companies relying on Rule 12h-6, such a change would create parallelism in the regulations. However, it does not follow that these new trading volume requirements should also be relevant for a foreign private issuer that has never been in the U.S. securities registration system in the first place. Furthermore, such a measure would assert a new basis for Exchange Act jurisdiction in apparent contradiction of well-settled practice and, more important, Congressional intent as the Commission has customarily explained its understandings of the legislative purposes.

Since its origins, Section 12(g) has presented sensitive issues concerning the appropriate treatment of the securities of foreign private issuers. In 1963, the Commission itself counseled the Congress to exercise caution in the application of the new registration requirement to securities of foreign issuers, citing the possibility of disruption in legitimate over-the-counter trading in such securities, as well as the impediments to the enforcement of such a requirement. The legislative result was the specific authorization for exemption of the securities of foreign issuers in Section 12(g)(3) together with the remainder of the 1964 amendments to the Exchange Act.

The Commission promptly used its authority to postpone application of the new law and to submit the matter to a painstaking study. In 1967, Rule 12g3-2(b) was adopted, largely in its present form. The Commission commented that, subject to the provision of certain information to be lodged with the SEC, and because of the character of information provided to markets outside the U.S., "the provision of an exemption from section 12(g) for those foreign companies which have not sought a public market for their securities in the United States through public offering or stock exchange" listing would be in the public interest and consistent with the protection of investors. Securities Exchange Act Release No. 34-8066, 32 FR 7845, 7846 (1967). More pointedly, the Commission observed in 1982:

> Section 12(g)(3) authorized the Commission to exempt foreign securities if in the public interest and consistent with the protection of investors. Congress recognized that it was imposing burdens and obligations on issuers, but indicated that *it did not intend to impose these burdens on foreign issuers whose securities were imported into the U.S. and traded in the over-the-counter market without the issuer's approval, or, in some cases, knowledge.* Securities Act Release No. 33-6433, 47 FR 50292, 50293 (1982). [Emphasis supplied.]

Accordingly, the Commission has historically attempted to develop a regulatory structure that distinguishes between voluntary and involuntary entry into the U.S. capital markets. This structure also reflects the Commission's long-held perspective under the Securities Act of 1933 that the registration requirement of Section 5 was not intended to regulate transactions outside the United States and so should not apply to offers and sales made exclusively outside our national borders, as reflected in Regulation S. Existing Rule 12g3-2(b) creates a very clear exemption from Section 12(g) registration under the Exchange Act for a foreign private issuer that has never been required to register an offer or sale of its securities under the Securities Act and has never listed its securities on a U.S. exchange (and never consented to its securities being admitted to trading on NASDAQ before NASDAQ became an exchange). In proposing to broaden Rule 12g3-2(b) to permit more former Exchange Act reporting issuers to use the exemption, why at the same time reduce the availability of the exemption to foreign private issuers that have never been SEC registrants?

Based on Commission releases reporting the names of companies using the Rule 12g3-2(b) exemption, it appears that there may have been at least 140 foreign private issuers that were using the exemption in 1995 and were still relying on that exemption in 2005. This means that there is a large stable group of foreign private issuers that have not been SEC registrants, that are not doing anything voluntarily to get into the U.S. trading systems and that are relying on the existing exemption.

The proposed new U.S. trading volume limitation and foreign primary trading market condition may be particularly troublesome in light of the development of active over-the-counter markets that are outside of the control or consent of foreign private issuers. The dealer-focused Pink Sheets do not require any action or participation by an issuer, and issuers cannot even require that they or their securities be taken off the Pink Sheets. Being identified in the Pink Sheets may certainly facilitate over-the-counter trading in the identified securities. It appears that over 160 of the issuers that the Commission reported in 2005 were relying on the Rule 12g3-2(b) exemption may be currently listed on the pink sheets. While most of these 160 companies are listed for ADR programs, there are some companies (primarily Canadian companies) whose equity securities are traded directly in the over-the-counter markets.

To similar effect, the Commission's proposal to condition the Rule 12g3-2(b) exemption on the maintenance of a foreign listing for the issuer's securities likewise carries the danger that a company that has not sought the use of the public markets in the United States will be subjected to Exchange Act regulation. It seems highly anomalous that the assertion of the Commission's jurisdiction over a foreign company could come as the result of actions unrelated to the U.S. capital markets.

Turning to foreign private issuers that were at one time SEC registrants, the legitimate reliance interests of foreign issuers that have removed themselves from the Exchange Act

registration and reporting regimes should also be taken into account, whether those issuers relied on Rule 12g-4 or 12h-3 or the recently promulgated Rule 12h-6. The proposed use of the U.S. volume test for disqualification from Rule 12g3-2(b) would nullify the considerable effort and expense undertaken by companies relying on Rule 12h-6. The trading volume requirements proposed for Rule 12g3-2(b) would impair the value of Rule 12h-6 by effectively renewing a registration requirement imposed on a foreign issuer because of the unwanted and uncontrollable development of excess OTC trading of its securities in the United States. Such a result would be a worsened version of the problem, and would reintroduce the disincentives, that Rule 12h-6 was intended to eliminate. (We note that the proposing release contends at one point that a 12h-6 claimant would continue to be exempt under Rule 12g3-2(b) after the proposed amendments. We respectfully submit that no such immunity is conferred under the text of the proposal beyond a brief window.)

In summary, we believe that it is inappropriate to apply the proposed trading volume limitation and the foreign primary trading market condition (a) to those foreign private issuers relying on Rule 12g3-2(b) that have not previously been subject to Exchange Act registration or (b) to foreign private issuers that have appropriately terminated their registration and reporting obligations under the Commission's rules . A number of foreign private issuers have relied on the current form of exemption for many years, and there is no evidence cited of particular abuses or investor harm as a result of those issuers relying on the current 12g3-2(b) exemption without any trading volume limitation or primary foreign trading market condition. Applying these new proposed requirements relating to U.S. trading volume and foreign primary trading market, goes in the opposite direction from making the U.S. capital markets more attractive and from improved respect and recognition by the U.S. and the Commission of other regulatory systems around the world, especially with respect to Canadian companies that are affected.

We appreciate your considering our comments.

Sincerely,

Sidley Austin LLP