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April 28, 2008

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Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Attention: Nancy M. Morris, Secretary

File Number S7-04-08 – Release No. 34-57350; International Series Release 1307 - Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers

Ladies and Gentlemen:

We are submitting this comment letter in response to Release No. 34-57350, Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers (the "Proposing Release"), which requests comment on proposed revisions to Rule 12g3-2(b) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and related forms. Our firm has offices in both Canada and the United States (where we advise our clients on both Canadian and U.S. law), and we have a substantial number of clients that are foreign private issuers (each, an "FPI") that either currently claim the Rule 12g3-2(b) exemption from registration under Section 12(g) of the Exchange Act or may do so in the future. Many of our clients also avail themselves of the Canada/U.S. Multijurisdictional Disclosure System ("MJDS").

We most certainly welcome the Commission's substantial efforts to improve and modernize Rule 12g3-2(b) for the benefit of FPIs claiming the exemption and U.S. investors who hold their securities. There are, however, three aspects of the proposed rule which concern us and which we believe should be reconsidered prior to the adoption of final amendments to Rule 12g3-2(b) as they will likely deter FPIs from voluntarily entering the U.S. capital markets.

Disqualification if U.S. Average Daily Trading Volume Exceeds 20%

Our most significant concern is the new proposed condition that an FPI have less than 20% of its average daily trading volume occur in the United States. This new condition appears as both an initial condition to Rule 12g3-2(b) eligibility (proposed Rule 12g3-2(b)(3)(i)), and also as a condition of continued eligibility (proposed Rule 12g3-2(d)(3)).

We recognize that, as a matter of policy, the Commission is attempting to develop a rule that will require an FPI to register a class of its securities under the Exchange Act if the trading volume of that class in the United States is significant relative to worldwide trading volume. However, we respectfully submit that a bright-line eligibility test tied to U.S. trading volume, particularly as it relates to continued eligibility, is inappropriate for several reasons, and we urge the Commission not to adopt this condition as currently proposed.

We respectfully submit that the proposed new condition creates an unacceptable level of uncertainty for an FPI that has previously claimed the exemption under the current rule or begins to rely upon the amended rule. To date, Rule 12g3-2(b) has always provided absolute certainty to an FPI that registration under the Exchange Act will not be required unless or until the FPI takes the voluntary, affirmative and deliberate step of registering a class of securities under the Exchange Act, or incurring reporting obligations under Section 15(d) by filing a registration statement that becomes effective under the Securities Act of 1933, as amended. However, under the proposed amendment to the rule, an FPI will lose this certainty. An FPI does not itself control the trading activities of market participants. There is no way that an FPI which relies upon the Rule 12g3-2(b) exemption can limit or restrict the ability of U.S. registered broker-dealers to make an over-the-counter ("OTC") market for its securities in the United States. This concern is particularly acute for Canadian public companies that are not registered or reporting under the Exchange Act, because of the proximity and interdependence of the Canadian and U.S. trading markets. We note that the web site for Pink OTC Markets Inc. makes the following statements:

> Pink OTC Markets Inc. provides the leading inter-dealer electronic quotation and trading system in the over-the-counter (OTC) securities market. We create innovative technology and data solutions to efficiently connect market participants, improve price discovery, increase issuer disclosure, and better inform investors. Pink OTC Markets operates the third largest U.S. equity trading venue which includes both the elite OTCQX market tiers for strong OTC-traded companies that can satisfy financial and disclosure listing standards and Pink Sheets for all other OTC quoted securities.
>
> Over 230 financial services firms, including the ten largest U.S. investment banks, actively make markets in OTCQX and Pink Sheets quoted securities. In 2007 these firms traded over $160 billion of OTCQX and Pink Sheets securities. Pink OTC Markets offers widespread access to all U.S. broker-dealers, enabling investors to seamlessly trade these securities through their institutional, online, or full service brokers.

Although we recognize that in most cases the risk that an FPI's U.S. trading volume will exceed 20% of worldwide trading volume solely as a result of OTC trading may be remote, we submit that even a remote risk is significant, and one which FPIs will be unwilling to accept, given the severe consequences if the risk materializes. Following the adoption of the Sarbanes-Oxley Act of 2002, the consequences of incurring reporting

obligations under the Exchange Act have become significantly more onerous, time-consuming and costly, with only very limited instances where any exemption or dispensation is made to accommodate the home country rules or practices. In particular, it has been our experience that the requirements relating to auditor review and attestation of internal control over financial reporting, as required by Section 404 of the Sarbanes-Oxley Act and the Commission's related rules, are the primary reason that many of our FPI clients have determined that they will not voluntarily subject themselves to registration or reporting obligations under the Exchange Act. We respectfully submit that introducing a rule which could subject an FPI to those obligations involuntarily as a result of the acts of others will further deter FPIs from voluntarily entering the U.S. capital markets. As under the current rule, an FPI should incur these Exchange Act reporting obligations only as a result of voluntary action on its part.

Even if, as a policy matter, the Commission were to determine that the U.S. trading volume restriction is appropriate for an FPI seeking to claim the exemption in the future under the amended rule, we strongly urge the Commission to consider permanently grandfathering the status of those FPIs who have previously claimed the Rule 12g3-2(b) exemption under the existing rule, and those who do so during a prescribed transition period. Currently, those issuers who have already claimed the exemption have a legitimate expectation that they will not be at any risk of having to register their securities under the Exchange Act. Other FPIs are currently relying upon the provisions of the current Rule 12g3-2(a) exemption with the legitimate expectation that they will be able to claim the benefit of the Rule 12g3-2(b) exemption within 120 days of the first year end at which they have more than 300 beneficial holders in the United States, without regard to their U.S. trading volume. Both of those categories of FPI have relied upon the existing Rule 12g3-2(b) regime in making past decisions that could have an impact on their future U.S. trading volumes.

We understand that the Commission has recently endorsed initiatives to encourage FPIs to reconsider participating in the U.S. capital markets through unregistered securities offerings to institutional investors, and in particular to revitalize the PORTAL market as a means by which an FPI may access the Rule 144A qualified institutional buyer market without incurring Exchange Act registration requirements. It appears to us that the adoption of a U.S. trading volume condition in Rule 12g3-2(b) runs contrary to that objective. We believe that many of our FPI clients would take active steps to avoid any involvement in the U.S. securities market that could potentially increase the risk of exceeding the 20% U.S. trading volume condition, no matter how remote that risk. As a result, we further believe that many Canadian issuers would seriously reconsider making their securities available to U.S. institutional investors on a Rule 144A basis concurrently with a Canadian prospectus offering. Such issuers would also likely hesitate to encourage U.S. securities analysts to follow their securities, and consider actively taking other steps to reduce their level of U.S. share ownership as a means of indirectly

attempting to manage their U.S. trading volume. We recently were involved in discussions with one Canadian public company whose securities trade on the Toronto Stock Exchange (the "TSX"), that had been considering making its employee stock purchase plan available to the employees of a U.S. subsidiary. That FPI is now reconsidering whether to do so, out of a concern that taking any steps whatsoever to increase the level of U.S. share ownership, interest or demand may be imprudent as it could accelerate the eventual unavailability of Rule 12g3-2(a), while at the same time there will be a risk that Rule 12g3-2(b) could be unavailable if OTC trading levels in the United States exceed the new 20% condition.

Requirement for Home Country Listing

Under current Rule 12g3-2(b), there is no requirement that an FPI be listed on an exchange in any jurisdiction outside the United States.

We are concerned that the proposed foreign listing condition for Rule 12g3-2(b)(2) eligibility will unfairly prejudice those issuers who currently rely on existing Rule 12g3-2(b), but are not listed on any stock exchange. Those issuers would become subject to an obligation to register their securities under the Exchange Act. We respectfully submit that such a draconian result is not appropriate.

In addition, because of the proximity of Canada to the United States, and the substantial number of Canadian FPIs with extensive U.S. operations and employees, we are particularly concerned by the implications of the foreign listing condition for two categories of Canadian FPIs.

The first category is a Canadian FPI that has never conducted an initial public offering or stock exchange listing of its securities in any jurisdiction, but that has a substantial employee equity participation program. A Canadian FPI, for example, may have several thousand employees worldwide, each of whom holds a small equity interest in the issuer, but still be considered a "private issuer" within the meaning of Canadian securities laws.[1] If that issuer were to have more than 300 shareholders in the United States (even if all of them are employees or former employees of the FPI's U.S. subsidiaries), under new Rule 12g3-2(b) it would be required to register under the Exchange Act, even though its home country considers it to be a private issuer. Although we question the appropriateness of imposing an Exchange Act registration obligation on an FPI in this situation under any

[1] Under Section 2.4(1) of National Instrument 45-106 *Prospectus and Registration Exemptions* of the Canadian Securities Administrators, a "private issuer" means any issuer that has not become a reporting issuer by filing a prospectus or taking other action to become a reporting issuer in Canada, so long as its securities are subject to restrictions on transfer and not held by more than 50 persons, exclusive of employees and former employees of the issuer and its affiliates.

circumstances, we are particularly concerned by the implications for FPIs who have relied upon current Rule 12g3-2(b), and the expectation that it would continue to be available to them, in making past decisions regarding their equity compensation programs and policies for U.S. employees.

The second category of concern is the situation faced by a Canadian FPI which is a reporting issuer (and thus subject to regulatory oversight) in one or more provinces and territories of Canada, and fully subject to all of the continuous disclosure and corporate governance requirements of public company status in Canada, but which does not maintain a listing of its equity securities on a Canadian or other stock exchange. We understand that the Commission's purpose in adopting the foreign listing condition in proposed Rule 12g3-2(b)(2) is to ensure that there is a foreign regulator with oversight over the FPI. However, there are several instances where a Canadian company will commence or continue reporting as a public company in Canada, but not obtain or maintain a Canadian stock exchange listing. We would ask that the Commission expand the scope of the condition to include, as an acceptable alternative to maintaining a foreign listing, a condition that the issuer be subject to the continuous disclosure or similar reporting requirements of a foreign jurisdiction such as Canada, and effectively be regulated as a public company by a non-U.S. securities regulatory authority.[2]

Proposed Elimination of the Availability of Rule 12g3-2(b) For Canadian Issuers Upon the Registration of Debt Securities Using MJDS

Currently, a Canadian FPI that has claimed the Rule 12g3-2(b) exemption with respect to a class of equity securities may subsequently acquire, without losing the exemption, Exchange Act reporting obligations under Section 15(d) for a class of debt securities by filing a registration statement on Form F-9 or Form F-10 pursuant to MJDS. We recognize that this situation is entirely unique to Canadian issuers, and arises only

[2] The most significant example is in the case of a Canadian FPI that conducted an initial public offering in Canada and became listed on the TSX. Then, solely as a result of secondary market trading on the TSX, that FPI acquired more than 300 beneficial shareholders in the United States, and accordingly claimed the Rule 12g3-2(b) exemption. Thereafter, its stock price drops below the minimum price required for continued listing on the TSX, and its shares become delisted. As a result of the foreign listing condition in proposed Rule 12g3-2(d)(2), that FPI would then be required to register its securities under the Exchange Act because it could no longer rely upon the Rule 12g3-2(b) exemption. However, notwithstanding delisting from the TSX, the issuer will continue to be subject to continuous disclosure obligations as a public company in Canada, and otherwise continue to be regulated as a public company by Canadian securities regulatory authorities. We submit that it is inappropriate to require the issuer to register under the Exchange Act in such circumstances, especially as it is likely that it will not in those circumstances be in the best interests of the issuer's shareholders to require the FPI to expend the management time and financial and other resources necessary to effect and comply with the ongoing obligations of an Exchange Act registration.

because certain MJDS forms are expressly carved out of the provisions of Rule 12g3-2(d)(1) that otherwise would have resulted in loss of the Rule 12g3-2(b) exemption upon incurring Section 15(d) reporting obligations for any other class of security. The Commission has solicited comment on whether the ability of a Canadian issuer to continue to rely upon Rule 12g3-2(b) after incurring Exchange Act reporting obligations by virtue of filing an MJDS registration form should be eliminated. We respectfully urge the Commission not to eliminate this ability.

When MJDS was adopted in 1991, its intention was to facilitate the satisfaction of registration and reporting obligations by eligible Canadian issuers in the United States, and by eligible U.S. issuers in Canada, without the need for duplicative regulatory review. Rules were adopted both in Canada and the United States to implement MJDS, including various accommodations for issuers in the opposite country that were consistent with the spirit and intent of MJDS. The carve-out for certain MJDS forms afforded by Rule 12g3-2(d)(1) was part of that well-considered policy initiative.

Although we understand that this accommodation allowing continued reliance upon Rule 12g3-2(b) is used relatively rarely by Canadian issuers, we believe that it remains an important one, especially for those Canadian issuers who have conducted their affairs in reliance upon it and the expectation that its availability would continue. For example, a Canadian MJDS-eligible FPI may have determined to claim the Rule 12g3-2(b) exemption for its equity securities, notwithstanding that it would have been eligible to register its equity securities under the Exchange Act using Form 40-F, so as to avoid the application of certain Exchange Act provisions to its equity securities and the likely result of becoming permanently subject to Exchange Act reporting and other obligations.[3] Subsequently, among other available financing alternatives, that FPI may have considered engaging in a registered debt offering in the United States (including a Rule 144A offering with subsequent registration rights). The factors it would have considered at the time of that decision would have included the implications of registration of its debt securities, in light of the Rule 12g3-2(b) exemption already being claimed for its equity securities. In going ahead with the decision to complete a registered debt offering, that FPI may well have relied upon the provisions of current Rule 12g3-2(d)(1) in making the decision to register its debt securities on Form F-9 or Form F-10, knowing that it would neither be required to subject its equity securities to the full scope of Exchange Act regulation as a result of doing so, and also believing that, upon the maturity of the debt, its Exchange Act reporting obligations under Section 15(d) could then be suspended or terminated.

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[3] Although an FPI is exempt from some Exchange Act obligations, including insider reporting, the short-swing profit rules and the proxy rules, there are other provisions of the Exchange Act which apply to a class of equity securities, such as Schedule 13D/G reporting obligations and the tender offer regulations, that an FPI may not wish to become subject to.

As a result of the proposed changes to Rule 12g3-2(b), that FPI would not be eligible for Rule 12g3-2(b) for its equity securities because it will be subject to reporting obligations under Section 15(d) for its debt securities, and will be required to register its equity securities under the Exchange Act. In addition to the more onerous consequences of the registration of a class of equity securities under the Exchange Act, that FPI would likely become permanently subject to Exchange Act reporting obligations as a result of having been required to register its equity securities, notwithstanding its belief at the time of filing the registration statement for its debt securities that Exchange Act reporting obligations would be suspended or terminated upon maturity of the debt.

For these reasons, we respectfully request that the Commission reconsider its proposal to eliminate the ability of a Canadian MJDS-filer to rely upon the Rule 12g3-2(b) exemption for equity securities notwithstanding a Section 15(d) reporting obligation for debt securities filed on an MJDS form. Alternatively, if the Commission determines as a matter of policy that this accommodation for Canadian FPIs is no longer appropriate, we would strongly urge the Commission to adopt transitional provisions so that a reporting obligation arising as a result of an MJDS registration statement that became effective prior to the adoption of the new rule would not preclude continued reliance upon Rule 12g3-2(b) by an FPI that had already claimed the exemption.

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We sincerely thank you for considering our comments. Please do not hesitate to contact the undersigned in our New York office at (212) 991-2504 if you would like to discuss any of our comments further.

Yours very truly,

/s/ Rob Lando

Rob Lando
RCL: