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May 19, 2008

By Electronic and United States Mail

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-9303

Re: File No. S7-05-08
Release Nos. 33-8900; 34-57409;
International Series Release 1308: Foreign Issuer Reporting Enhancements

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee") of the Section of Business Law of the American Bar Association ("ABA"), in response to the request by the Securities and Exchange Commission (the "Commission") for comments on the release described above dated February 19, 2008 (the "Proposing Release") relating to foreign issuer reporting enhancements under the Securities Act of 1933, as amended (the "Securities Act") and the Securities Exchange Act of 1934, as amended (the "Exchange Act").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

We have circulated this letter to the leadership of the International Securities and Capital Markets Committee of the ABA Section of International Law, who have advised us that such committee concurs with and supports the comments set forth in this letter.

At the outset, we heartily commend the Commission and its Staff for their extraordinary efforts over the past two years to recognize and respond to the progressive internationalization of our capital markets. The Commission's initiatives

to provide accommodations to foreign private issuers ("FPIs"), consistent with the maintenance of investor protection, and to adopt rules intended to attract FPIs into the U.S. markets have demonstrated the Commission's awareness that the interests of U.S. investors are best served by eliminating "speed bumps" in the capital raising process, and by providing U.S. investors enhanced opportunities for portfolio diversification through access to the securities of FPIs. As you will see from our comments below, we support the Commission's desire to improve transparency and timeliness of the information provided by FPIs under the Exchange Act and the Securities Act and the respective rules and regulations promulgated thereunder. As the Commission has long recognized, however, FPIs have significant attributes distinguishing them from U.S. domestic issuers, and these distinctions justify regulatory treatment which differs from that applicable to U.S. domestic issuers. Our comments below are made both in the spirit of assisting the Commission to achieve its goals of investor protection and efficient capital formation, and with a sensitivity to the distinguishing factors relating to FPIs.

In responding to the request for comments as set out in the Proposing Release, we follow the general topical outline set out therein. We note that the Proposing Release sets forth four principal proposals, and then solicits comments regarding "Other Matters Under Consideration." We comment on each of the principal proposals and, thereafter, upon the other matters for which comments have been solicited.

1. Annual Test for Foreign Private Issuer Status (Section II.A., Questions 1-8):

We support the proposal to permit FPIs to assess their eligibility to use the special forms and rules available to them once a year on the last business day of their second fiscal quarter rather than on a quarterly, more frequent or continuous basis. The proposal would eliminate the need for a FPI to implement excessive compliance procedures to determine its status. More importantly, and especially in the case of a FPI that has close to 50% of its outstanding voting securities held of record by U.S. residents, the amendment would also eliminate the burdens currently imposed on a FPI that fails to comply with the test on each day during its fiscal year.[1] As the Commission notes in the Proposing Release, a FPI that loses its status as such would be required, among other things, to file reports on forms applicable to domestic companies and become subject to more extensive Exchange Act obligations.[2] We believe the Commission's proposal represents a reasonable response to this undue burden.

Further, we note that the proposal to test eligibility once a year as of the last business day of the issuer's second quarter is consistent with the rules applicable to determination of status as an accelerated filer and smaller reporting company status.[3] We believe that a consistent approach to the determination of filing status will eliminate confusion for issuers as well as investors.

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[1] In addition to the loss of FPI status as a result of changes of shareholdings, the loss of FPI status could also, among other things, arise by reason of a change to the directors or officers of a company.

[2] The loss of FPI status would also result in the loss of accommodations granted to FPIs by many securities exchanges. Continued listing by a foreign issuer that has lost its FPI status could require the issuer to reconstitute its board of directors and committees, which may be contrary to local rules and practice.

[3]Accelerated filer status is determined in compliance with Exchange Act Rule 12b-2; smaller reporting company status is determined in compliance with Item 10(f)(2)(i) of Regulation S-K.

We also support the Commission's proposal that Canadian issuers utilizing the MJDS system be permitted to assess their eligibility only once a year, on a basis consistent with other FPIs, for purposes of the Exchange Act and the Securities Act. We do not believe a further assessment at year-end is warranted. A requirement to assess status at two time periods annually will lead to significant confusion and unnecessary cost burdens as issuers face uncertainty as to their filing status every six months.[4]

The Proposing Release asks whether FPIs will attempt to manipulate the various elements of the foreign private issuer test in order to maintain their status. Although it is impossible to assess the potential extent of any such manipulation by issuers, our experience suggests that the vast majority of issuers would not attempt to circumvent the rules in such a manner. Among other things, manipulation would be a difficult and costly undertaking for companies and may be disruptive to their management structures. Thus, we consider that the risk is likely to be minimal and note that the Commission has means available to it to deal with instances of abuse. We do not consider prescriptive rulemaking to be appropriate in this regard.

We support the Commission's proposal that, following determination of the loss of FPI status, the reporting company would not become subject to the disclosure and reporting requirements of a domestic issuer until the end of its current fiscal year.[5] We consider that the six-month period from the end of the second quarter assessment to the fiscal year-end allows ample time for the issuer to prepare for the transition to the domestic reporting requirements and timetable. To require a FPI to comply with domestic filing requirements immediately upon determination of its loss of FPI status would impose unnecessary burdens and hardships on the issuer, without any significant advantage to investors. During the transition period, the issuer should continue to be required to submit on a Form 6-K information of material events, together with information otherwise required under home country or listing requirements, thus providing investors with ready access to material information.

We also concur with the Commission's proposal that a domestic issuer that determines it qualifies as a FPI may begin to avail itself of the FPI compliance regime immediately upon determination of such eligibility. These respective accommodations are appropriate and, in our view, neither impose unnecessary burdens on the issuer nor disadvantage investors who will receive Annual Reports on Form 20-F and other material information under cover of Form 6-K.

The Proposing Release raises the question as to whether a newly-qualified FPI that otherwise would have been required to file a Form 8-K after the end of its second fiscal quarter should still be required to do so given its new status. We would support a requirement that, with respect to an event occurring prior to the beginning of the third quarter that would give rise to the filing of a Form 8-K, such an issuer would nonetheless be required to file such Form 8-K within

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[4] Canadian issuers relying upon the MJDS forms have analogous concerns to other FPIs were their eligibility to change and, as a result, they were to become subject to increased reporting and disclosure burdens.

[5] We suggest that the Commission consider amending its rules promulgated under Section 16(b) of the Exchange Act to provide that a purchase or sale of a security of a FPI prior to its public announcement that it has lost its FPI status will not be matched against a later sale or purchase subject to Section 16(b).

the four-day filing period, despite the fact that the filing deadline may occur in the first four days of the third quarter.

We support a proposal to require issuers whose status changes in light of the second quarter assessment of eligibility either to file a Form 8-K or furnish a press release under cover of Form 6-K, depending upon its then-current reporting status. This information will alert investors as to the change in status and corresponding change in reporting obligations applicable to the issuer subsequent to the date of the notice.[6]

2. Accelerating the Reporting Deadline of Form 20-F Annual Reports (Section II.B., Questions 9-14):

Although we do not perceive any compelling reason to shorten the reporting deadline for Annual Reports on Form 20-F, we believe that if the Commission decides to change the current reporting deadline, it should consider an alternative to the proposed rule, which we set forth below. Specifically, and in view of the Commission's efforts, through its contemplated mutual recognition initiatives and otherwise, to consider the reporting and other obligations imposed on FPIs by their home country or stock exchange rules, we believe that any shortened Form 20-F timetable should be mindful of the home country reporting obligations of FPIs, and to the additional burdens that compliance with the Form 20-F imposes on FPIs beyond those required by home country or stock exchange rules. Although the current six-month filing deadline applies to all FPIs, we believe that any shortened Form 20-F deadline be tied to, among other things, foreign disclosure deadlines, and not reflect a "one size fits all" notion with the only distinctions based upon whether a FPI is a "large accelerated" or "accelerated" filer under U.S. rules.

First, we would note that there are compelling reasons for the Commission to retain the current six-month filing requirement, which we consider wholly appropriate in light of the following factors:

(a) As acknowledged by the Commission in the Proposing Release, different foreign jurisdictions impose different deadlines for the submission by issuers of their home country annual reports. For example, in accordance with the European Transparency Directive, companies are required to file their annual reports within four months after their fiscal year end. China and Hong Kong also adhere to a four-month requirement. In Japan and many South American countries, however, the annual report is required to be filed within three months after the fiscal year end.

(b) In connection with their U.S. filing obligations, certain FPIs are required to translate their annual report information into English.

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[6] In addition to the comments made above, we suggest that the Commission consider whether other accommodations may be appropriate for FPIs in specified categories. For example, a FPI that effects an initial public offering during the first two calendar quarters of its fiscal year would be obligated to determine its status as an "accelerated filer" or "large accelerated filer" as of the end of its second fiscal quarter, with associated conseqences to its obligations relating to internal control over financial reporting. We suggest that the Commission consider deferring the imposition of these requirements for such issuers until their subsequent fiscal year.

(c) Home country disclosure requirements, in many cases, require different disclosure from that of Form 20-F. Consequently, many FPIs are required to prepare for inclusion in their Form 20-F additional disclosure to that required in their home country disclosure documents.[7]

(d) Certain issuers are required to reconcile their financial statements to U.S. GAAP, as well as to obtain an auditor's report on the financial statements to be included in the Form 20-F. In addition, the financial statements of some foreign private issuers are required to include information regarding guarantees pursuant to Rule 3-10 of Regulation S-X.

(e) Certain issuers may be required to include in their Form 20-F exhibits not required to be filed in their home countries, as well as the financial statements of significant acquirees and equity investees pursuant to Rules 3-05 and 3-09 of Regulation S-X.[8] These financial statements may not be required under home country rules, and the companies whose financial statements are required may not be public companies or otherwise subject to a completion deadline (other than with respect to Form 20-F obligations).

(f) The categorization of issuers as "large accelerated" and "accelerated" filers is not common outside the United States. The application of such distinctions for purposes of determining annual reporting deadlines bears no meaningful relationship to the considerations set forth in (a) through (e) above which may be applicable to any FPI, regardless of size.

We acknowledge the Commission's comments in the Proposing Release that a number of FPIs file the Form 20-F well within the six-month requirement. Indeed, in our experience, FPIs proceed promptly after filing of the home country annual report to finalize the Form 20-F. Further, we note that substantially all FPIs issue a press release to announce their annual results as soon as such information is made publicly available and submit such information to the Commission under cover of Form 6-K. In addition, most FPIs will submit their home country annual report on a Form 6-K and/or post the document on their website. We consider that the ready availability of this information is important to investors and is the primary information relied upon by the investor community in evaluating the FPI.

We believe that accelerating the current due dates for the Form 20-F as suggested in the Proposing Release would have a disparate impact on various FPIs based upon the factors outlined in (a) through (e) above. In fact, in light of differing home country annual report requirements, the timetable set forth in the Proposing Release could impose significant and

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[7] Although we agree with the Commission that certain of the information needed to complete the Form 20-F is readily available once the home country report has been finalized, additional disclosure must be prepared as noted. Further, should the further disclosure requirements as set out in Section III of the Proposing Release be adopted in whole or in part, FPIs will require more time to collect, review and prepare the necessary information for inclusion in the Form 20-F.

[8] The Proposing Release sets forth a requirement that Form 20-F include financial statements in connection with certain acquisitions pursuant to Rule 3-05 of Regulation S-X.

costly burdens on FPIs whose home country reports are not due until <u>after</u> the filing deadline for the Form 20-F that the proposals would require.

Further, the proposed shortening of the Form 20-F filing deadline based upon "accelerated" status fails to take into account the home country considerations and complexities (such as those set out above) that influence a FPI's ability to finalize its Form 20-F. In light of these factors, we believe that it would be unnecessarily burdensome to require FPIs to file their Form 20-F within 90 days (for large accelerated and accelerated filers) or 120 days (for all other filers) as suggested in the Proposing Release. We are concerned that the imposition of this burden, without taking account of the considerations set forth above, could cause some FPIs to leave the US markets, and others to determine not to list or conduct an offering in the U.S. Because we believe there is adequate information available to investors between the filing of the home country annual report and the current six-month filing deadline for the Form 20-F, we see no compelling reason to shorten the current deadline.

Should the Commission determine that there are compelling reasons to accelerate the timetable for filing the Form 20-F, we suggest, as an alternative to the approach set out in the Proposing Release, that FPIs be required to file the Form 20-F on a variable timetable that uses the home country filing deadline as the starting point, taking into account any extensions of such deadlines that FPIs avail themselves of. Specifically, we suggest that the general filing deadline would be (i) 30 days following the home country filing deadline for FPIs that prepare their financials (and all other financials required to be included in the Form 20-F) in accordance with U.S. GAAP or financial standards that do not require reconciliation to U.S. GAAP, and that are not required to translate their Form 20-F into English, and (ii) 60 days following the home country filing deadline for all other FPIs, subject to a limitation that, in each case, the Form 20-F must be filed within six months of the FPI's fiscal year end[9]. We consider that this would allow the FPI sufficient time following the filing of the home country annual report to prepare the additional disclosure, financial statements (including, where applicable, U.S. GAAP reconciliation) and exhibits for the Form 20-F and, where necessary, to translate the disclosure into English. This proposal would prevent a situation where the Form 20-F would be required to be filed prior to the filing of the home country annual report. We believe that this approach achieves the Commission's goals of accelerating the timetable for annual reporting by FPIs without imposing undue cost and compliance burdens on them. Further, this approach provides a readily comprehensible and simple basis for determining the filing deadline without imposing unnecessary complexity.

In addition, we believe that despite the alternative timetable we have suggested above, some issuers may experience difficulties complying with any shortened timetable, particularly with respect to the preparation of financial statements in accordance with Rules 3-05, 3-09 or 3-10 of Regulation S-X (or, to the extent applicable, Item 11 of Regulation S-X). We suggest that, in these circumstances, further accommodation be provided and that these FPIs be permitted to

[9] Because FPIs will file their Form 20-Fs at different dates, if the Commission concurs with this approach, it may be appropriate for the Commission to instruct FPIs, on or prior to 30 days after the end of their fiscal year, to indicate under cover of Form 6-K the date by which their Form 20-F is to be filed based upon the above criteria.

file this information by amendment to the Form 20-F not later than six months after the end of its fiscal year.[10]

We do not believe that tying the filing deadline to a worldwide market value of an issuer's common equity (as suggested by the Proposing Release) provides an appropriate measurement for the reasons stated above. Such approach completely ignores home country considerations and complexities.

Should any acceleration of the current six-month deadline be adopted, we believe that a minimum two-year transition period for FPIs that are organized in the European Union, and three years for other FPIs, to allow sufficient time for FPIs to adjust their internal reporting mechanisms to accommodate the revised timetable.

3. Item 17 and Segment Data Disclosure (Section II.C., Questions 15-16; Section III.A., Questions 21-26):

We support the Commission's proposal to amend Form 20-F by eliminating Item 17 and requiring FPIs to submit financial statements under Item 18. However, we believe that the small number of FPIs using Item 17 are generally smaller companies for which the burden of compliance with Item 18 could be significant. Therefore, we recommend that any FPIs currently preparing financial statements in compliance with Item 17 (including Instruction 3 thereto permitting the omission of segment data) be permitted to continue to comply with such Item for a period of two additional fiscal years. We believe this will allow these issuers sufficient time to adopt and implement additional procedures necessary to comply with Item 18 in full without undue cost. In addition, we support the proposal that would permit a FPI to continue to utilize the more limited U.S. GAAP reconciliation requirements of Item 17 for any third party (non-issuer) financial statements it may be required to file with its Form 20-F. The imposition of a full Item 18 reconciliation requirement in respect of non-issuer financials could pose a considerable burden upon many FPIs.[11]

4. Exchange Act Rule 13e-3 (Section II.D., Questions 17-20):

We do not support the Commission's proposed amendment to Exchange Act Rule 13e-3, which pertains to going private transactions, to reference the recently adopted deregistration and termination of reporting rules applicable to FPIs. Unlike the situation involving domestic registrants, where a termination of Exchange Act reporting obligations would result in a substantial loss of liquidity and access to information regarding an issuer, many FPIs have liquid trading markets outside the U.S. and are subject to home country and/or foreign securities

[10] We believe such FPIs should be permitted, during the period prior to the date that such additional information is filed, to avail themselves of the accommodations comparable to those set forth in the Instruction to Item 9.01 of Form 8-K; including (i) offerings or sales of securities upon the conversion of outstanding convertible securities or upon the exercise of outstanding rights or warrants, (ii) dividend or interest reinvestment plans, (iii) transactions involving secondary offerings, and (iv) sales of securities pursuant to Rule 144.

[11] We note that many foreign jurisdictions do not impose obligations on public companies to furnish equity investee or acquiree financials under the circumstances required or proposed by the Commission, and that obtaining such financial statements in accordance with Commission requirements may impose significant burdens of FPIs.

exchange reporting obligations. In our view, Rule 13e-3 should not be applicable to a FPI whose shares will, following U.S. deregistration, be traded on a foreign securities exchange, and which will furnish the information required pursuant to Rule 12g3-2(b). Because Rule 12h-6 already accounts for these conditions, we consider the additional protections of Rule 13e-3 to be unnecessarily duplicative and potential confusing as to compliance requirements. Moreover, we believe that the potential application of Rule 13e-3 could act to deter the entry of FPIs into the U.S. markets.

5. Requiring Item 18 Reconciliation in Annual Reports and Registration Statements Filed on Form 20-F (Section III.A., Questions 21-26):

Please see the discussion under Section 3 above.

6. Disclosures About Changes in a Registrant's Certifying Accountants (Section III.B., Questions 27-30):

We support the proposed amendment to Form 20-F to require disclosure of changes regarding a registrant's certifying accountant, including disagreements with such accountants.

We note that General Instruction C.(b) of Form 20-F requires that information in the Form 20-F be as of the latest practicable date. To avoid delay in the filing of the Form 20-F by reason of unresolved questions about a certifying accountant's status that may arise immediately prior to the scheduled filing, we suggest that the Commission consider requiring disclosure of any change in or disagreement with the issuer's certifying accountant that occurs prior to the date that is 15 days before the Form 20-F is filed with the Commission.

Should such amendments be adopted, we believe conforming changes should be made to the disclosure requirements in FPI registration statements on Form F-1 and F-4 as proposed.

7. Annual Disclosure About ADR Fees and Payments (Section III.C., Questions 31-34):

We do not support the proposed annual disclosure of ADR fees and payments in Annual Reports on Form 20-F. Information regarding fees that may be charged to investors under ADR programs are required to be described in Form F-6 and on a registration statement on Form 20-F or on Form F-1. Annual amounts paid by or to issuers are, in our experience, immaterial to issuers, and therefore to investors. In addition, these fees and payments are typically the result of negotiations between the issuer and the depositary bank and may involve concessions based upon the issuer's unique circumstances. We believe that disclosure of these fees may be disruptive to the market for these services and may encourage depositary banks to be less flexible in negotiating arrangements with issuers. For the same reasons, we do not support a requirement that depositary banks be required to disclose payments made to third parties.

8. Disclosure About Differences in Corporate Governance Practices (Section III.D., Questions 35-37):

We support a general requirement that issuers whose securities are listed on a U.S. exchange provide a summary of differences between their corporate governance practices and those of domestic companies listed on the same exchange. However, any such disclosure should be consistent with existing stock exchange disclosure obligations, and should not require different or additional disclosure than that required by the rules of the applicable U.S. securities exchange upon which the FPI's securities are listed.

We do not believe that such a requirement will better enable investors to monitor an issuer's corporate governance practices, because such disclosure is already mandated by the applicable U.S. securities exchange. It would, however, as the Proposing Release suggests, consolidate the information regarding the issuer's corporate governance into one document.

9. Financial Information for Significant, Completed Acquisitions (Section III.E., Questions 38-42):

We support, in part, the proposal that Form 20-F include information regarding significant, completed acquisitions. We believe that information about such acquisitions would require disclosure under home country rules in substantially all instances. However, we recommend that certain limitations be applied to the disclosure in contrast to the approach suggested in the Proposing Release.

First, we believe the requirement should only apply in connection with acquisitions where one of the significance tests[12] has been exceeded at the 50% level in the registrant's most recent fiscal year. We would not impose a disclosure obligation on registrants where the significance threshold was exceeded only in prior years. We would defer to home country disclosure requirements and not mandate the provision of three years of financial statements as prescribed by Rule 3-05(b)(2)(iv) of Regulation S-X. Rather, we recommend that financial statements only with respect to the most recently completed fiscal year be provided, unless home country law requires more. To do otherwise would impose unnecessary burdens on FPIs and result in the imposition of inconsistent disclosure obligations on the issuer and a disparity in information available to investors in the home country and the United States that is neither warranted nor beneficial. We also recommend that issuers be entitled to provide, as an alternative to the financial statements, a pro forma balance sheet and income statement compliant with Article 11 of Regulation S-X for the most recently completed fiscal year reflecting the effect on the financial statements had the acquisition occurred at the beginning of such fiscal year.

Second, because considerable effort may be required to produce the financial statement and the pro forma information in compliance with the Commission's requirements, we recommend that the Commission permit a FPI to file its Form 20-F without such information, and to amend the Form 20-F subsequently, but not later than six months after the end of the

[12] See Rule 1-02(w) of Regulation S-X.

issuer's fiscal year, to include such information. During the period that the information is not filed, the registrant would be permitted to engage in securities offerings and shelf take-downs, and sales would be permitted under Rule 144. We consider this treatment consistent with that of a U.S. domestic issuer under the requirements of Form 8-K.[13]

Third, we do not consider it necessary for the issuer to include in Form 20-F financial statements with respect to an acquisition previously disclosed in a registration statement under the Securities Act. However, in the interest of convenience for the investor, we view it appropriate that the issuer reference in the Form 20-F the specific registration statement containing such financial information.

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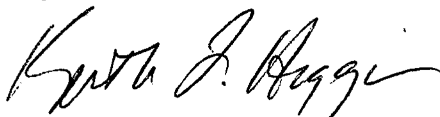
The Committee appreciates the opportunity to comment on the proposal and respectfully request that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the Staff and to respond to any questions.

Respectfully submitted,



/s/ Keith F. Higgins
Chair, Committee on Federal Regulation of Securities

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[13] Please see, in this regard, our comments above in connection with the proposed acceleration of the reporting deadline of Annual Reports on Form 20-F.

cc: Christopher Cox, Chairman
Paul S. Atkins, Commissioner
Kathleen L. Casey, Commissioner
John W. White, Director, Division of Corporation Finance
Paul M. Dudek, Chief, Office of International Corporate Finance
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