

Market Integrity Notice |

Guidance

February 17, 2006

No. 2006-006

Suggested Routing

- Trading
- Legal and Compliance

SALE OF SECURITIES SUBJECT TO CERTAIN UNITED STATES SECURITIES LAWS

Key Topics

- Designated Offshore Securities Market
- Offshore Transaction
- Regulation S
- Rule 144A
- Rule 904
- Short Sale
- Special Terms Order

Summary

This Market Integrity Notice provides guidance relating to a transfer of securities into Canada from the United States in reliance on Rule 904 under *Regulation S - Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933*.

UMIR Provisions Referenced

- Rule 1.1 – Definitions – “short sale”
- Rule 6.2 – Designations and Identifiers

Questions / Further Information

For further information or questions concerning this notice contact:

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Market Integrity Notices Referenced

- Market Integrity Notice 2005-028 - *Sale of Securities Subject to Transfer Restrictions Only in the United States* (July 29, 2005)

SALE OF SECURITIES SUBJECT TO CERTAIN UNITED STATES SECURITIES LAWS

Summary

This Market Integrity Notice provides guidance relating to a transfer of securities into Canada from the United States in reliance on Rule 904 under *Regulation S - Rules Governing Offers and Sales Made Outside the United States Without Registration Under the Securities Act of 1933* (“Regulation S”).

Background

A Participant may be asked by a client to facilitate the sale into Canada of a security that was privately placed in the United States and is listed, quoted or traded on a marketplace in Canada. Such a security is subject in the United States to the jurisdiction of the United States Securities and Exchange Commission (“SEC”). A Participant may transfer such a security into Canada where the Participant complies with all relevant United States and Canadian securities laws.

In Regulation S, the SEC has set out a regime whereby certain securities offered and sold outside the United States need not be registered with the SEC. A Participant may rely on Regulation S when facilitating the sale of a security on a marketplace in Canada from the United States. In conducting such a sale, the Participant must ensure compliance with Regulation S and all other relevant United States securities laws.

Sale into Canada as an “Offshore Transaction” under Rule 904 of Regulation S

One of the general conditions of Rule 904 under Regulation S is that an offer, sale or resale of the securities must be made in an “offshore transaction”. An “offshore transaction” can be, among other things:

- a transaction where no offer is made to a person in the United States and the transaction is executed through the facilities of a "designated offshore securities market" where neither the seller nor any person acting on its behalf knows that the transaction has been prearranged with a buyer in the United States; or
- a transaction where no offer is made to a person in the United States and where the buyer must be outside the United States or the seller and any person acting on its behalf must reasonably believe the buyer is outside the United States.

As of February 17, 2006, the Toronto Stock Exchange (“TSX”) and the TSX Venture Exchange (“TSXV”) are the marketplaces in Canada that qualify as a “designated offshore securities market” for the purposes of Regulation S. A Participant may satisfy the requirements for an “offshore transaction” by facilitating the sale into Canada of a security through the facilities of the TSX or TSXV if:

- neither the Participant nor the selling client “knows that the transaction has been prearranged with a buyer in the United States”; or
- the Participant follows the procedure set out in Market Integrity Notice 2005-028 - *Sale of Securities Subject to Transfer Restrictions Only in the United States*.

However, if the sale is completed through the facilities of a marketplace in Canada that **does not qualify as a “designated offshore securities market”**, RS is of the view that the Participant **must** comply with the procedure set out in Market Integrity Notice 2005-028 and ensure that the order is entered on the marketplace as:

- part of an intentional cross at a price between the best ask price and the best bid price when the Participant knows that the purchaser is outside the United States and complies with any other restrictions on ownership; or
- a Special Terms Order that is subject to the condition that the purchaser be outside the United States and complies with any other restrictions on ownership.

If the Participant enters the order on the Canadian marketplace as a Special Terms Order at a price below the best bid price, the Participant must contact each Participant and Access Person who has entered orders disclosed in a consolidated market display at a better price than the price of the Special Terms Order and offer to satisfy their orders up to the volume of the Special Terms Order provided the Participant or Access Person is a purchaser outside the United States and complies with any other restrictions on ownership. If each Participant or Access Person with a better-priced order is either unwilling or unable to acquire the security, the Special Terms Order may be executed at an inferior price with a party that is able to acquire the security.

It is the responsibility of the Participant to ensure compliance with all relevant aspects of Regulation S including, but not limited to, the offshore transaction requirement. In particular, a Participant must ensure that the sale into Canada is *bona fide* and not, for example, for the purpose of “washing off” a legend with resale restrictions imposed on “restricted securities” under Rule 144A under the *Securities Act of 1933* (United States) to facilitate the immediate re-sale of the securities into the United States. ***If a Participant is unsure of any of its obligations under United States securities laws, including sales pursuant to rules under Regulation S other than Rule 904, RS recommends that the Participant consult with United States legal counsel.***

Order Marking on a Canadian Marketplace

As set out in Market Integrity Notice 2005-028, if a Participant is asked to facilitate the sale into Canada of a security that is subject to resale restrictions in the United States, for example, by virtue of having been acquired under Rule 144A or Regulation D under the *Securities Act of 1933*, then an order to sell that security entered on a Canadian marketplace will generally be considered to be a “short sale” for the purposes of the definition under Rule 1.1 of UMIR. However, as the restriction will “disappear” upon the execution of a trade in Canada that complies with requirements of securities legislation in the United States, the sell order may be

marked in accordance with Rule 6.2(1)(b)(ix) as “short exempt” on those marketplaces and facilities that permit that marker (and otherwise marked “short” if the “short exempt” marker is not supported) if the Participant effects the trade for “regular delivery” and the Participant would need to borrow free-trading securities to complete settlement while arranging for the removal of any restrictive legend. If the trade is completed as a Special Terms Order with “delayed delivery” to allow time before settlement for the removal of any restrictive legend, the sale will be considered to have been made from a “long” position and will not be marked as “short”.

Questions / Further Information

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