

September 2008

SECURITIES LAW ALERT

SEC ADOPTS AMENDMENTS TO RULE 12g3-2(b) TO FACILITATE TRADING BY FOREIGN PRIVATE ISSUERS IN THE OVER-THE-COUNTER MARKET WITHOUT REGISTRATION UNDER THE EXCHANGE ACT.

In September 2008, the Securities and Exchange Commission ("SEC") adopted significant amendments to Rule 12g3-2(b) under the Securities Exchange Act of 1934 as amended (the "Exchange Act"). Rule 12g3-2(b) exempts a foreign private issuer that is otherwise subject to Exchange Act registration from having to register a class of equity securities under Section 12(g) of the Exchange Act based on the submission to the SEC of certain information published by the issuer outside the United States. This Rule, which is frequently relied upon by issuers establishing Level I ADR (American Depository Receipt) programs, allows a foreign private issuer to have its equity securities traded in the U.S. over-the-counter market without registration under Section 12(g). However, issuers must continue to register their securities under the Exchange Act to have them listed on a national securities exchange or traded on the OTC Bulletin Board.

The amendments will eliminate the current written application and paper submission requirements under Rule 12g3-2(b) by automatically exempting from Exchange Act Section 12(g) a foreign private issuer that meets specified conditions. The effective date of the amendments is October 10, 2008, subject to certain transition periods that are discussed below.

The amendments will enable a foreign private issuer to claim the Rule 12g3-2(b) exemption, without having to submit a written application to the Commission, as long as the issuer:

- currently maintains a listing of the subject class of securities on one or more exchanges in its primary trading market, which is defined to mean, that:
 - at least 55 percent of the trading in the subject class of securities on a worldwide basis took place in, on or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during the issuer's most recently completed fiscal year; and
 - if a foreign private issuer aggregates the trading of its subject class of securities in two foreign jurisdictions for the purpose of meeting the 55 percent test, the trading for the issuer's securities in at least one of the two foreign jurisdictions is greater than the trading in the United States for the same class of the issuer's securities;
- the issuer is not required to file or furnish reports under Exchange Act Section 13(a) or 15(d); and
- unless claiming the exemption upon or following a recent Exchange Act deregistration, the issuer has published in English specified non-U.S. disclosure documents, from the first day of its most recently completed fiscal year, on its

**Recent Amendments
to Rule 12g3-2(b) will
make it easier for
foreign private issuers to
rely on this exemption
from Exchange Act
registration**

(Please see next page for more information.)

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Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market. Generally, an issuer may provide an English summary for a non-U.S. disclosure document if such a summary would be permitted for a document submitted under cover of Form 6-K or Exchange Act Rule 12b-12(d)(3).

In order to claim the Rule 12g3-2(b) exemption, an issuer must have published in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, certain specified information that, from the first day of its most recently completed fiscal year, it:

- has made public or been required to make public pursuant to the laws of the country of its incorporation, organization or domicile;
- has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and
- has distributed or been required to distribute to its security holders.

The information required to be published electronically is information that is material to an investment decision regarding the subject securities, such as information concerning:

- Results of operations or financial condition;
- Changes in business;
- Acquisitions or dispositions of assets;
- The issuance, redemption or acquisition of securities;
- Changes in management or control;
- The granting of options or the payment of other remuneration to directors or officers; and
- Transactions with directors, officers or principal security holders.

The amendments provide that at a minimum, a foreign private issuer shall electronically publish English translations of the following documents if in a foreign language:

- Its annual report, including or accompanied by annual financial statements;
- Interim reports that include financial statements;
- Press releases; and
- All other communications and documents distributed directly to security holders of each class of securities to which the exemption relates.

The amendments will require an issuer to maintain the Rule 12g3-2(b) exemption by electronically publishing the specified non-U.S. disclosure documents for subsequent years. An issuer will lose the exemption if it:

- fails to publish electronically the required non-U.S. disclosure documents;
- no longer meets the foreign listing/primary trading market condition; or
- incurs Exchange Act reporting obligations, such as by registering a class of its securities under the Exchange Act or by effecting a registered public offering of securities.

Compensatory stock options for which the underlying securities are in a class exempt under Rule 12g3-2(b) are also exempt under that rule.

While the amendments do not include a grandfathering provision, there is a three-year transition period to provide sufficient time for any current Rule 12g3-2(b)-exempt issuer, which will no longer qualify for the exemption under the rule amendments, either to comply with all of the conditions of amended Rule 12g3-2(b) or register under the Exchange Act. There is also a three-month transition period following the effectiveness of the amendments during which the SEC will accept and process any non-U.S. disclosure documents submitted in paper by Rule 12g3-2(b)-exempt issuers. Thereafter, the SEC will no longer process paper Rule 12g3-2(b) submissions.

1 A "foreign private issuer" means any issuer (other than a foreign government) incorporated or organized under the laws of a jurisdiction outside of the United States unless:

- more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents; and
- any of the following applies:
 - the majority of its executive officers or directors are US citizens or residents;
 - more than 50% of its assets are located in the United States; or
 - its business is administered principally in the United States.

2 A foreign private issuer must register a class of securities under the Exchange Act if that class will be listed on a US national securities exchange (such as the NYSE or American Stock Exchange) or quoted on the OTC-BB. In addition, if a foreign private issuer has assets in excess of \$10 million and a class of equity securities held by at least 500 shareholders (of whom at least 300 are resident in the United States) it must register those securities, unless it can claim the benefit of the exemption from registration provided by Exchange Act Rule 12g3-2(b).

3 A foreign private issuer that was previously subject to Exchange Act reporting obligations that has suspended its reporting obligations upon the filing of Form 15, pursuant to Rule 12g-4 or 12h-3, or Form 15F, pursuant to Rule 12h-6, will satisfy the non-reporting requirement upon the effectiveness of its deregistration, assuming that it has not otherwise incurred additional Exchange Act reporting obligations. Similarly, a foreign private issuer that has suspended its reporting obligations pursuant to the statutory terms of Section 15(d) will satisfy the non-reporting condition immediately upon its determination that it had less than 300 shareholders as of the beginning of its most recent fiscal year.

We are available to provide counsel and guidance concerning these issues, as well as other Securities Law concerns not discussed in this Legal Alert. For additional information on the issues discussed here and other issues arising under federal law, please contact us.

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