On September 24, 2008, the U.S. Securities and Exchange Commission (the “SEC”) published the text of the final set of recently approved amendments to rules affecting foreign private issuers. The amendments: (i) enable foreign issuers to test annually (as opposed to continuously) whether they meet the criteria to qualify as a foreign private issuer, shorten the deadline for filing annual reports on Form 20-F, and enhance disclosure requirements; (ii) allow for automatic exemption from registration of certain securities issued by a foreign private issuer; and (iii) expand cross-border exemptions to make it easier for U.S. security holders to participate in certain business combination transactions, tender offers, and rights offerings relating to foreign private issuers.

Foreign Private Issuer Reporting

Below are key changes to the reporting and disclosure requirements for foreign private issuers:

- Reporting foreign issuers will determine on the last business day of their second fiscal quarter whether they meet the criteria for foreign private issuer status. Prior to the amendments, a foreign issuer needed to continuously meet foreign private issuer status throughout a fiscal year in order to take advantage of the forms and more lenient disclosure requirements available to foreign private issuers under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). Under the new rules, if a foreign issuer qualifies for foreign private issuer status at the end of its second fiscal quarter, such issuer will be

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1 A foreign private issuer is defined as an issuer that: (1) is organized outside the United States; (2) has non-U.S. citizens or residents constituting the majority of its directors and executive officers; (3) has at least 50 percent of its assets outside of the United States; (4) has its business primarily managed outside the United States; and (4) has at least 50 percent of its voting securities beneficially owned by non-residents of the United States.
able to utilize the forms and rules applicable to foreign private issuers through the end of the subsequent fiscal year, even if such issuer would not otherwise continue to qualify as a foreign private issuer during this period.

- Foreign private issuers will have a four-month deadline after the end of their fiscal year to file an annual report on Form 20-F. This shortens the current filing deadline by two months. These amendments become effective for annual reports filed for fiscal years ending on or after December 15, 2011.

- There are additional disclosure requirements for annual reports filed on Form 20-F. Specifically, a foreign private issuer must disclose: (i) a change of accountants and any disagreements with its former accountant relating to a material event or transaction; (ii) fees and charges related to its American Depositary Receipts; and (iii) as already required under NYSE and Nasdaq rules, any significant differences between the corporate governance practices of a foreign private issuer following its home country practice and the corporate governance practices otherwise required for U.S. domestic issuers.

- The amendments require foreign private issuers to include segment data on its financial statements reported on Form 20-F even when reconciling such financial statements to U.S. GAAP. In addition, those foreign private issuers that choose to reconcile their financial statements into U.S. GAAP will have to do so following the more detailed instructions of Item 18 on Form 20-F. These requirements will become effective for reports filed for fiscal years ending on or after December 15, 2011.

**Rule 12g3-2(b) Exemption from Registration**

Rule 12g3-2(b) of the Exchange Act provides certain foreign private issuers with an exemption from the reporting requirements of the Exchange Act if their securities are primarily traded on a non-U.S. exchange. The amendments to Rule 12g3-2(b) allow for an automatic exemption from registration (without the need to make a formal application) of a class of securities issued to more than 300 U.S. record holders if the issuer:

- has at least 55 percent of such class of securities traded on one or two non-U.S. exchanges during its most recent fiscal year; provided, however, that if this percentage is met using two foreign exchanges, one of those foreign exchanges must trade a greater volume of such securities than that which is traded on a U.S. exchange;

- is not otherwise subject to the Exchange Act reporting requirements; and

- publishes electronically in English (e.g., on its website) certain disclosure materials made public in its primary trading market or country of organization or otherwise distributed to its security holders.
Cross-Border Transactions

Currently, there are certain exemptions from the U.S. tender offer rules and registration requirements for cross-border transactions based on the level of U.S. ownership of the subject securities in such transactions. Tier I transactions (where U.S. holders beneficially own less than 10 percent of the subject securities) are exempt from: (i) most of the disclosure and procedural requirements for tender offers under the Exchange Act; (ii) registration requirements of Section 5 of the Securities Act of 1933, as amended (the “Securities Act”); and (iii) the additional requirements for “going private” transactions. Tier II transactions (where U.S. holders beneficially own more than 10 percent but less than 40 percent of the subject securities) are exempt from certain U.S. tender offer rules that conflict with the home country rules of the issuer. Below are various highlights of the approved amendments as they apply to cross-border transactions:

- In determining whether a cross-border transaction qualifies as a Tier I or Tier II transaction, the foreign issuer or party acquiring the target foreign securities will be able to determine U.S. beneficial ownership using a three-step process. This addresses the inability, due to restricted access to information concerning beneficial ownership, that some offerors faced in “looking through” to determine U.S. beneficial ownership under the current 30-day test (i.e., determining U.S. beneficial ownership 30 days before the commencement of the tender offer). First, the offeror may determine U.S. beneficial ownership 60 days before or 30 days after the announcement—as opposed to commencement—of a tender offer (for a rights offering, the record date is substituted for the announcement date in determining beneficial ownership). Second, if the offeror is unable to determine U.S. beneficial ownership using the 60/30 test, the offeror may pick any date up to 120 days before or 30 days after the announcement of such tender offer to determine U.S. beneficial ownership. Finally, offerors unable to use either the 60/30 or 120/30 tests may now satisfy the “look-through” test by relying on a comparison of the average daily trading volume in the U.S. with worldwide trading volume over a specific period of time in determining whether the transaction qualifies for the Tier I or Tier II exemption.

- Target securities owned by 10 percent security holders will be included when calculating the percentage of U.S. beneficial ownership to qualify for the Tier I or Tier II exemption.

- The Tier II exemption is expressly expanded to include a broader class of tender offers (i.e., those subject only to Regulation 14E under the Exchange Act).

- An offeror may use the Tier II exemption in the case of multiple non-U.S. offers made in parallel with its U.S. offer.
- All exchange offers using the Tier II exemption may commence the offering on the date of the filing of a registration statement with the SEC rather than the date the registration statement is declared effective by the SEC.

- The U.S. beneficial ownership reporting rules will allow certain foreign institutions to file beneficial ownership reports on Schedule 13G (as is the case for domestic financial institutions) as opposed to the more detailed Schedule 13D.

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