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1 hot issues

New Law for Foreign Issuers Regarding U.S. Retail Shareholders

The Securities and Exchange Commission (SEC) voted unanimously on August 27th, 2008 to update and modernize the disclosure requirements for foreign companies offering securities in U.S. markets.

In the past, Canadian public issuers may have **inadvertently** become subject to the reporting requirements of the U.S. Securities Exchange Act of 1934 (the "Exchange Act"). Pursuant to the Exchange Act Section 12(g) and Rule 12g, it imposed an "inadvertent" registration and Edgar reporting requirements, including applicable Sarbanes-Oxley obligations on foreign private issuers if:

1. equity securities were held beneficially by more than 300 persons resident in the U.S.
2. equity securities were held by 500 or more persons worldwide
3. assets exceeded US\$10 million

Of the three sets of rule amendments made on August 27th, 2008 one that is particularly relevant is:

The amendments to the **Exchange Act Rule 12g3-2(b)**, which exempts a foreign private issuer (a foreign private issuer is defined as any issuer incorporated or organized outside the U.S., as long as no more than 50% of its outstanding voting securities are owned by U.S. residents¹) from registering a class of equity securities based on submission to the SEC of certain information published outside the U.S. The exemption allows a foreign private issuer to have its equity securities traded in the U.S. over-the-counter (OTC – pink sheets) market without registration under Section 12(g). The adopted rule amendments will eliminate the current written application and paper submission requirements under Rule 12g3-2(b) by automatically exempting a foreign private issuer from Section 12(g) provided they meet specified conditions.

The Material Aspects of the Final Rule are:

- Any foreign private issuer may claim the rule 12g3-2(b) **exemption automatically** without having to submit an application to the SEC, as long as the:
 - Issuer's securities are listed on one (i) or more exchanges in a foreign jurisdiction and such jurisdiction constitutes the primary trading market for those securities. Primary trading market means that for the issuer's most recently completed fiscal year, at least 55% of the trading volume took place in that jurisdiction.
 - The issuer has published promptly in English on its Internet Web Site or through an electronic information delivery system (generally available to the public, like Sedar) from the first day of its most recently completed fiscal year information that it:
 - a) has made public or been required to make public pursuant to the laws of the country of incorporation, organization or domicile
 - b) has filed or been required to file with the principal stock exchange in its primary trading market where the securities are traded and which has been made public by that exchange; and
 - c) has distributed or been required to distribute to security holders (Collectively referred to as "Electronic Publishing Requirement)

In summary, foreign private issuers can now solicit their shares to U.S. retail clients without the worry of exceeding the 300 beneficial shareholder threshold.

Blue Sky Laws

U.S. state level securities laws are often referred to as Blue Sky laws. Without secondary trading compliance at the state level (or Blue Sky exemption), retail brokers are unable to solicit their clients about your company. In addition, issuers are unable to market themselves to the retail communities in most states without state registration or manual exemption.

Manual Exemption

Manual exemption has been a long standing viable solution for many small to medium sized companies who wish to broaden their exposure to retail market in the U.S. but who do not want to pursue an inter-listing.

¹ If more than 50% of the issuer's outstanding voting securities are owned by U.S. residents, the issuer still qualifies as a foreign private issuer if (i) less than 50% of its assets are located in the U.S., (ii) its business is administered principally outside the US; and (iii) a majority of its executive officers and directors are non-US citizens.

Manual exemption is a feature of most U.S. Blue Sky laws. With manual exemption; companies are exempt from costly filing requirements in various jurisdictions provided that an up-to-date description of the company is published in a recognized securities manual such as *Standard & Poor's Corporation Records*.

U.S. brokers widely rely on this exemption to facilitate secondary trading of stocks of non - U.S. listed companies such as Toronto Stock Exchange and TSX Venture Exchange issuers. With manual exemption, U.S. brokers are permitted to proactively discuss and recommend/solicit the company's stock within particular jurisdictions.

Break down your access barriers to the U.S. retail market

For companies listed on the Toronto Stock Exchange and TSX Venture Exchange considering offering secondary trading of their shares in the U.S., they might consider inter-listing on AMEX, NASDAQ or NYSE. However for most companies these costs associated with inter-listing are prohibitive.

The Standard and Poors (S&P) Market Access Program is used by TSX and TSX Venture companies who want to reach U.S. investors without the significant costs associated with a U.S. inter-listing or registration in each individual state by:

- Increasing U.S. retail investor awareness, positioning and potential shareholders of their stock.
- Enabling the proactive positioning and solicitation of their stock by tens of thousands of U.S. brokers & financial advisors
- Utilizing S&P's extensive proprietary distribution to reach their U.S. retail target audience; and
- Providing a third party reference profile from a highly credible independent information source

Overall S&P Market Access is a dynamic visibility service for small to medium sized capped Canadian companies.

The S&P/TSX Market Access Offer

The new S&P/TSX Market Access exclusive offer provides issuers with a further discounted publication option while still providing the value that S&P provides with its Market Access Program. The S&P/TSX Market Access offering provides:

- S&P Corporation Records Coverage
- Free Access to your S&P profile on your website and key industry websites & financial portals
- Coverage on Standard & Poor's Advisor Insight Platform
- Entry into the Standard & Poor's Stock Guide Database
- The potential to obtain Blue Sky/manual exemption privileges in up to 38 U.S.* states (see below)
- A showcase of your company to 200,000+ financial professionals, compliance officers, fund managers, registered reps and research analysts
- The guarantee of your company's presence in one of the industry's most well respected and widely used reference tools

Here are the details of the program being offered by the TSX /TSX-V

The web page is up http://www.tsx.com/en/listings/products_services/market_access_program.html

On this page there is a registration page. Initial costs (as of November 2008) are about \$5,700 (for publication within 25 business days of approval) and annual fees are \$3,995.

There are up to 38 states* that recognize S&P Corporation Records for manual exemption. The current list of 38 states is as follows:

Alaska	DC	Iowa	Mississippi	New Mexico	Rhode Island	West Virginia
Arizona	Florida	Kansas	Missouri	North Carolina	South Carolina	Wyoming
Arkansas	Guam	Maine	Nebraska	North Dakota	South Dakota	
Colorado	Hawaii	Maryland	Nevada	Ohio	Texas	
Connecticut	Idaho	Massachusetts	New Hampshire	Oklahoma	Utah	
Delaware	Indiana	Michigan	New Jersey	Oregon	Washington	

* It is recommended that an issuer consult legal counsel before relying on a particular exemption.

For questions regarding S&P Market Access or the S&P/TSX Market Access exclusive offer, contact your TSX Relationship Manager:

Western Canada: Arne Gulstene, arne.gulstene@tsx.com, (604) 602-6970

Quebec and Eastern Canada: Matthew Fireman, matthew.fireman@tsx.com, (514) 788-2419

Ontario: Emily Chen, emily.chen@tsx.com, (416) 947-4372

International: Loui Anastasopoulos, loui.anastasopoulos@tsx.com, (416) 947-4717

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