

Forum for | **US Securities Lawyers** | in London

Annual Report 2008

## Introduction

The Forum for US Securities Lawyers in London (the “**Forum**”) is a trade association representing US-qualified lawyers and participants in the London capital markets. Membership includes US-qualified lawyers practicing at over 45 law firms and 30 financial institutions in the London capital markets, as well as market participants including securities exchanges, settlement systems and registrars. Founded in 2006, the Forum is an independent, self-funded organization dedicated to addressing issues of application of and compliance with US securities laws in London and international capital markets.

The Forum’s projects in 2007 included the submission of comment letters to the US Securities and Exchange Commission (the “**SEC**”) on its proposed amendments to Regulation D (October 2007) and Rule 144 (September 2007) under the Securities Act of 1933, as amended (the “**Securities Act**”), as well as publishing a set of procedures for the electronic settlement of Regulation S, Category 3 equity securities during the one-year period following the distribution compliance period (August 2007).

In 2008, in addition to legal updates and meetings, the Forum submitted comment letters to the SEC on its proposed amendments to Rule 12g3-2(b) (April 2008) under the Exchange Act of 1934, as amended (the “**Exchange Act**”), on its proposed amendments to the rules on cross-border tender and exchange offers, business combinations and rights offerings (the “**Cross-Border Tender Offer Rules**”) (June 2008) and on its recent proposals on exemptions for foreign broker-dealers (September 2008). The Forum also launched a website which contains legal updates and copies of our comment letters and other projects at [www.tffuslil.org](http://www.tffuslil.org).

## SEC Comment Letter — Exchange Act Rule 12g3-2(b) (April 2008)

In April 2008 the Forum submitted a comment letter to the SEC on its proposed changes to Rule 12g3-2(b), an exemption from reporting requirements under the Exchange Act available to foreign private issuers. The comment letter generally supported the SEC’s attempt to modernize the exemption regime under Section 12(g).

The letter included comments on the following issues:

- the ADTV Test combined with an affirmative act by an issuer;
- the permanence of an exemption or cure period;
- the impact on ADR facilities;
- the calculation of ADTV and off-market trades;
- safe harbor status for compliance in follow-on public offerings;
- the timing for the retention of documents;
- consideration of public statements of the use of the exemption; and
- mutual recognition.

The following law firms were signatories to this project: DLA Piper UK LLP, Dorsey & Whitney (Europe) LLP, Herbert Smith LLP, Kirkpatrick & Lockhart Preston Gates Ellis LLP, Lovells LLP, Simmons & Simmons and White & Case LLP.

Proposed Rule  
Comment Letter  
Final Rule

### **SEC Comment Letter — The Cross-Border Tender Offer Rules (June 2008)**

In June 2008 the Forum submitted a comment letter to the SEC on its proposed amendments to the Cross-Border Tender Offer Rules.

The letter included comments on the following issues:

- the possible increase of the maximum US ownership level from 10% to 15% for the Tier I exemption and Rules 801 and 802;
- the SEC's proposed change to make the announcement date the reference date for the calculation of US ownership to determine eligibility for Tier I and Tier II exemptions; and
- the two alternative tests suggested by the SEC in its proposal for use in measuring the US nexus of a transaction.

The following law firms were signatories to this project: DLA Piper UK LLP, Dorsey & Whitney (Europe) LLP, Kirkpatrick & Lockhart Preston Gates Ellis LLP, Lovells LLP, Mayer Brown International LLP, Orrick Herrington & Sutcliffe LLP and Simmons & Simmons.

Proposed Rule  
Comment Letter  
Final Rule

### **SEC Comment Letter — Exemptions for Foreign Broker-Dealers under Exchange Act Rule 15a-6 (September 2008)**

In September 2008, the Forum submitted a comment letter to the SEC on its proposed amendments to Rule 15a-6, which expanded the scope of activities that a foreign broker-dealer could conduct in the United States without the need for registration as well as the simplification of procedures and the increased direct access and interaction with US investors that the proposals envisaged.

The letter included comments on the following issues:

- clarification of the definition of “qualified investor” to replace the existing two categories (“[US institutional investors](#)” and “[major US institutional investors](#)”) to ensure that it includes hedge funds and other similar entities who may invest in, but not “own”, securities;
- the “foreign business” definition and 85% threshold under Exemption A(1) and the proposal of alternative tests based upon either (i) a primary listing of securities or (ii) a combined customer base and volume test; and
- commenting on the maintenance of books and records by a foreign broker-dealer under Exemption A(1) and the potential Data Protection Act 1998 issues under EU and UK law.

The following law firms were signatories to this project: DLA Piper UK LLP, Lovells LLP, Mayer Brown International LLP, Morrison & Foerster, Orrick Herrington & Sutcliffe LLP and Simmons & Simmons.

Proposed Rule

Comment Letter

NB: To date, the SEC has not released a final rule following the proposals.

### **US Securities Update — Revisions to Exchange Act Rule 12g3-2(b) (August 2008)**

On August 27, 2008 the SEC voted unanimously to update and modernize the disclosure requirements for foreign companies offering securities in the US markets.

The first set of amendments relate to Rule 12g3-2(b), which sets out the circumstances in which a foreign private issuer with a class of widely held equity securities may be exempt from registration of that class of securities under the Exchange Act. The SEC voted unanimously to eliminate the 40-year-old written, paper-based application process and the paper submission requirements previously required under Rule 12g3-2(b). The written exemption application process will be replaced with an automatic exemption for foreign private issuers from Section 12(g), provided that they meet specified conditions, such as maintaining a listing of their securities in their primary trading markets outside the United States.

Proposed Rule

Final Rule

## **US Securities Update — Foreign Issuer Reporting Enhancements (August 2008)**

The SEC's second set of amendments relate to the filing and disclosure requirements of foreign private issuers who report to the SEC on an ongoing basis. Prior to these amendments, these rules had not been comprehensively reviewed for over 20 years. Hence, in response to recent market developments, new technologies and changes in US securities regulations, the SEC unanimously voted to enact eight improvements to the content and timing of disclosure and to the determination of eligibility for foreign private issuer status.

Proposed Rule  
Final Rule

## **US Securities Update — SEC Adopts Amendments to Rules Relating to Cross-Border Business Transaction Exemptions (August 2008)**

The SEC's third set of amendments relate to the rules governing cross-border business transaction exemptions. In January 2000 the SEC put in place new rules to facilitate the inclusion of US investors in cross-border merger and acquisition transactions. As US investment in foreign companies has grown significantly, the SEC's recent amendments to these rules are important.

Generally, the new rules represent an expansion and refinement of the previous Tier I and Tier II exemptions applicable to cross-border business transactions, and in some areas, they codify relief previously granted only on an individual basis.

Proposed Rule  
Final Rule

## **US Securities Update — SEC Emergency Short Selling Rules (September/October 2008)**

In response to sudden changes in market conditions, the SEC adopted a host of measures designed to stabilize the financial markets. These included:

- new short selling rules, adopted September 17, 2008 and later revised on September 22, 2008 and October 17, 2008, such as (i) a hard T+3 close-out requirement; (ii) the repeal of the exception for options market-makers from short selling close-out provisions in Regulation SHO; and (iii) the Rule 10b-21 Short Selling Anti-Fraud Rule; and

- requiring disclosure of short selling positions by hedge funds and other institutional money managers through Form SH and pursuant to Rule 10a-3T.

Final Rules:

Disclosure of Short Sales for Institutional Investment Managers (Interim Final Temporary Rule)

Amendments to Regulation SHO

Naked Short-Selling Anti-Fraud Rule

## Conclusion

2008 was another active year for the Forum, which continued to sponsor projects that provided members of the Forum and other market participants with an opportunity to discuss and comment on significant US securities law issues affecting the London and international capital markets. As discussed above, among other organised events, we submitted three comment letters to the SEC on proposals relevant to the London market and sent out US securities updates on important rule proposals and final rule adoptions by the SEC.

We look forward to continuing with these projects and developing further ones in 2009.

For further information on the Forum please visit [www.tffuslil.org](http://www.tffuslil.org) or contact:

**Daniel K. Winterfeldt**

E: [daniel.winterfeldt@simmons-simmons.com](mailto:daniel.winterfeldt@simmons-simmons.com)

T: +44(0)20 7825 3212

**Katherine Mulhern**

E: [katherine.mulhern@lovells.com](mailto:katherine.mulhern@lovells.com)

T: +44 (0)20 7296 2000