

# LEGAL UPDATE

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## **SEC PROVIDES AUTOMATIC EXEMPTION FROM EXCHANGE ACT SECTION 12(g) FOR FOREIGN PRIVATE ISSUERS**

The Securities and Exchange Commission (“SEC”) has adopted, effective October 10, 2008, amendments to the rule that exempts a foreign private issuer from having to register a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 (“Exchange Act”) based on the submission of certain information published by the issuer outside the United States. The exemption allows for the trading of the equity securities of a foreign private issuer in the United States over-the-counter market without registration under Section 12(g).

The rule amendments to the exemption 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 (i) maintains a listing of its equity securities in its primary trading market located outside of the United States, (ii) is not required to file or furnish reports under Section 13(a) or 15(d) of the Exchange Act; and (iii) publishes on its website (or through another electronic delivery system) on an ongoing basis information it has made public or is required to make public under the laws of its jurisdiction of incorporation, organization or domicile, pursuant to its non-U.S. stock exchange filing requirements, or that it has distributed or is required to distribute to its security holders (“Non-U.S. Disclosure Documents”).

The recently adopted rule amendments now enable a foreign private issuer to rely on the Rule 12g3-2(b) exemption, without having to submit a written application to the SEC as in the past, provided the issuer:

- currently maintains a listing of its securities on one or more exchanges in its primary trading market (which generally means that at least 55 percent of the trading in its 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 the issuer aggregates the trading of its securities in two foreign jurisdictions, 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, collectively, the “Primary Trading Market Condition”);
- is not required to file or furnish reports under Exchange Act Section 13(a) or 15(d) (note that the rule amendments eliminated the prohibition against making the exemption available to a foreign private issuer that during the previous 18 months had a class of securities registered under Section 12 or a reporting obligation under Section 15(d)); and
- unless claiming the exemption upon its recent Exchange Act deregistration, has published, in English, on the Internet or other electronic delivery system that is generally available, the Non-U.S. Disclosure Documents from the first day of its most recently completed fiscal year. At a minimum, a foreign private issuer must publish English translations of 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.

An issuer can maintain its Rule 12g3-2(b) exemption by electronically publishing the Non-U.S. Disclosure Documents for subsequent years notwithstanding the fact that its number of record holders of its securities exceeds 500, the number of U.S. residents holding its securities exceeds 300 and its total assets exceed \$10 million. However, an issuer will lose the ability to claim the exemption if it (i) fails to publish electronically the required disclosure documents on an ongoing basis, (ii) no longer meets the Primary Trading Market Condition, or (iii) becomes subject to Exchange Act reporting obligations.

The SEC is providing a three-year transition period for issuers that currently rely on the Rule 12g3-2(b) exemption but who may no longer qualify for the exemption under the rule amendments. If such issuers are unable to meet all of the amended rule's conditions they will have to register under the Exchange Act within three years of the effective date of the rule amendments.

The SEC has adopted the rule amendments because it believes that enabling a qualified foreign private issuer to rely on the Rule 12g3-2(b) exemption automatically without filing a written submission, and without regard to the number of its U.S. shareholders, will encourage more foreign private issuers to rely on the exemption. Such increased reliance, combined with the electronic publication in English of the Non-US Disclosure Documents, should lead to increased efficiency in the trading of a foreign private issuer's securities through the U.S. over-the-counter market.

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*The foregoing is merely a discussion of the newly adopted SEC rules and is not intended to provide legal advice. If you have any questions regarding the new rules, please contact an attorney in Pryor Cashman's Securities and Corporate Finance Group.*

## ABOUT THE AUTHORS



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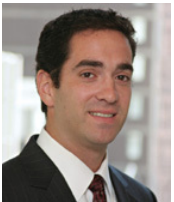
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John J. Crowe joined Pryor Cashman's Corporate Group in 1989 and has been a partner with the firm since 1997. John's practice focuses on merger and acquisitions, corporate financing transactions, including equity and debt, securities and commercial transactions. John advises clients on joint ventures, strategic alliance, business formation, general corporate and limited liability counseling.

John also advises clients, including start-up ventures, on corporations, limited liability companies, partnerships and joint ventures. In addition, John has wide experience in the private equity and venture capital areas for both established and newly-formed businesses.

John's practice includes representing clients in a variety of industries, including media, technology, apparel, publishing, medical, retail, restaurants, entertainment and advertising.

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Prior to joining Pryor Cashman, Robert worked as an analyst with the Emory University Endowment where he was responsible for reviewing and tracking investments in private equity partnerships, hedge funds, and real estate investment trusts.

Robert is a 2007 graduate of Emory University School of Law, where he was a member of the Moot Court Society, and the Goizueta Business School, where he earned a Master of Business Administration in finance in addition to his law degree.