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November 11, 1994

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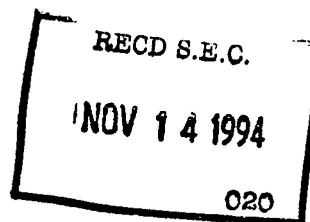

VIA FEDERAL EXPRESS

Division of Corporation Finance
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Re: Applicability of Section 16 to Former Foreign Private Issuers

Ladies and Gentlemen:

We represent several foreign companies that are "foreign private issuers" pursuant to the definition set forth in Rule 3b-4 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). We are submitting this letter to request that the Division of Corporation Finance Staff ("Staff") of the Securities and Exchange Commission ("Commission") concur with our views with respect to the applicability and interpretation of certain rules under Section 16 of the Exchange Act in circumstances where a foreign company has lost its foreign private issuer status.

BACKGROUND

Rule 3b-4 of the Exchange Act provides that a foreign private issuer is any foreign issuer other than a foreign government except an issuer meeting both of the following conditions: (1) more than 50 percent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents, (ii) more than 50 percent of the assets of the issuer are located in the United States, or (iii) the business of the issuer is administered principally in the United States. Each of our clients has satisfied at least one of the conditions in clause (2) of the Rule 3b-4 and, accordingly, will lose its foreign private issuer status when its U.S.-based shareholdings exceed 50 percent.

In accordance with the guidelines set forth in Reed, Elliott, Creech & Roth (March 30, 1993), each of our foreign company clients monitors its foreign private issuer status on the last day of each fiscal quarter, and immediately following (i) any purchase or sale by the issuer of its equity securities (other than in connection with an employee benefit plan or compensation arrangement, a conversion of outstanding convertible securities, or an exercise of outstanding options, warrants or rights); (ii) any purchase or sale of assets by the issuer other than in the ordinary course of business; and (iii) any purchase of equity securities of the issuer in a public tender or exchange offer by a person unaffiliated with the issuer.

Rule 3a12-3 of the Exchange Act provides that the securities registered by a foreign private issuer "shall be exempt from sections 14(a), 14(b), 14(c) and 16 of the [Exchange] Act." When a foreign private issuer loses that status, its securities (and its directors and officers) immediately become subject to Section 16 of the Exchange Act.

QUESTIONS PRESENTED

1. Should transactions by officers or directors of a foreign company that are effected *prior* to the foreign company's loss of foreign private issuer status be subject to Section 16?

2. Should directors of a foreign company be deemed to be disinterested persons for purposes of Rule 16b-3 if they have been disinterested since the date that the foreign company ceased to be a foreign private issuer?

ANALYSIS

Transactions Prior to Losing Foreign Private Issues Status -- Rule 16a-2(a)

In our view, transactions by officers and directors of a foreign company that are effected prior to the company's loss of foreign private issuer status should not be subject to Section 16.

Rule 16a-2(a) of the Exchange Act sets forth the only situation in which transactions by an officer or director *before* he or she is subject to Section 16 may be subject to reporting under Section 16(a) and short-swing liability under Section 16(b): an officer or director who becomes subject to Section 16 solely as a result of the issuer's registration of a class of equity securities pursuant to Section 12 of the Exchange Act will be subject to Section 16 with respect to transactions conducted during the six months prior to the first transaction requiring a Form 4 filing. The reason for treating officers and directors of new Section 12 registrants differently is stated in Release 34-24178 (August 18, 1989): "[I]nsiders of private

companies should be well aware of plans to register under Section 12 sufficiently in advance to take potential Section 16 responsibilities into account in buying and selling issuer securities."

Under a literal reading of Rule 16a-2(a), one could argue that the Rule simply does not apply to officers and directors of foreign private issuers because such persons become subject to Section 16 not because of a Section 12 registration but because the foreign company has lost its foreign private issuer status and, consequently, its Rule 3a12-3 exemption from Section 16. However, whether this literal interpretation is appropriate has not been addressed in releases or "no action" letters.

We believe that officers and directors of a foreign private issuer that loses such status should not be deemed to be in the situation that Rule 16a-2(a) was intended to address. Unlike officers and directors of a company that is about to go public, officers and directors of a foreign private issuer frequently do not control, and do not have significant advance notice of, their company's loss of foreign private issuer status.

In our experience, typically a foreign private issuer loses that status because its United States shareholdings exceed 50%. Absent a U.S. equity offering, a foreign private issuer has little control over migrations of its shareholder base to the U.S. For example, one of our foreign company clients recently experienced a very significant increase in its U.S. shareholder base following a small U.S. debt offering by a subsidiary and the release of two favorable analysts' reports by investment banking firms that previously had not reported on the company. Although monitoring a U.S. shareholder base on a quarterly basis may suggest that loss of foreign private issuer status will occur at an approximate time in the future if current migration trends continue, the officers and directors typically have little control over such trends or advance knowledge about the actual timing of the event.

We respectfully request that the Commission concur with our view that transactions by officers and directors that occur while the foreign company is a foreign private issuer should not be subject to Section 16.

"Disinterested Person" Status -- Rule 16b-3(c)(2)(i)

Rule 16b-3(c)(2)(i) provides a definition of "disinterested person" for purposes of determining whether a committee of two or more directors satisfies the disinterested administration requirements of Rule 16b-3. A "disinterested person" is a director who is not, during the one year prior to service as an administrator of a plan, or during such service, granted or awarded equity securities pursuant to the plan or any other plan of the issuer or any of its affiliates, subject to certain exceptions.

The Section 16 rules do not address transition considerations for determining

whether a director is a "disinterested person." In Cooley Godward Castro Huddleson & Tatum (July 17, 1991), the Staff agreed that in the case of a new Section 12 registrant, the plan administrators may qualify as disinterested persons if they have been disinterested since the effective date of the issuer's Section 12 registration. Our foreign company clients have previously registered equity securities under Section 12 of the Exchange Act. Thus, the interpretation set forth in the Cooley Godward letter is not directly on point.

The Staff has not been requested to provide similar transition guidelines in connection with a loss of foreign private issuer status.

Because of the operation of Rule 3a12-3, the date that a foreign private issuer loses that status is analogous to the effective date of a Section 12 registration. However, U.S. issuers that become subject to Section 16 because they register securities under Section 12 have the benefit of the guidance provided in the Cooley Godward letter. It would be inequitable to subject foreign private issuers to a different and more onerous standard.

Accordingly, we respectfully request that you concur with our view that a director of a foreign private issuer that subsequently loses that status will be deemed to be a disinterested person for purposes of Rule 16b-3 so long as he or she has been disinterested since the date that the foreign company ceased to be a foreign private issuer.

CONCLUSION

We request the issuance of a no action letter advising that the Staff concurs with our views that (i) transactions by officers or directors of a foreign company that are effected prior to the foreign company's loss of foreign private issuer status will not be subject to Section 16, and (ii) directors of a foreign company will be deemed to be disinterested for purposes of Rule 16b-3 so long as they are disinterested since the date that the foreign company ceased to be a foreign private issuer.

As requested by Securities Act Release No. 33-6269, seven copies of this letter are being submitted herewith.

If the Staff has any questions concerning this request or requires any additional information, please contact the undersigned at (415) 955-3101. If the Staff disagrees with any of the views expressed herein, we respectfully request an opportunity to discuss the matter with the Staff prior to any written response to this letter.

Very truly yours,

Michelle L. Johnson

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