

XSUNX INC
Form S-1/A
March 21, 2008

As filed with the Securities and Exchange Commission on March 20, 2008

File No. 333-148762

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549**

AMENDMENT NO. 2

TO

**FORM S-1
REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933**

XSUNX, INC.

(Exact Name of Issuer in Its Charter)

Colorado
(State of Incorporation)

3081
(Primary Standard Classification
Code)

84-1384159
(IRS Employer ID No.)

65 Enterprise
Aliso Viejo, CA 92656
(949) 330-8060
(Address and Telephone Number of Registrant's Principal
Executive Offices and Principal Place of Business)

Tom Djokovich, President
65 Enterprise
Aliso Viejo, CA 92656
(949) 330-8060
(Name, Address and Telephone Number of Agent for Service)

Copies of Communications to:

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Approximate date of commencement of proposed sale to the public: As soon as practicable after this Registration Statement becomes effective.

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If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, check the following box. x

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act of 1933, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. o

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act of 1933, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. o

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act of 1933, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting Company.

Large accelerated filer Accelerated filer Non-accelerated filer Smaller reporting company

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to be Registered	Amount to Be Registered⁽¹⁾	Proposed Maximum Offering Price Per Share⁽¹⁾⁽²⁾	Proposed Maximum Aggregate Offering Price⁽²⁾	Amount of Registration Fee⁽³⁾
Common Stock, no par value per share	48,650,000	\$ 0.48	\$ 23,352,000	\$ 917.73
Total:	48,650,000	\$ 0.48	\$ 23,352,000	\$ 917.73

(1) The shares of our Common Stock being registered hereunder are being registered for sale by the selling stockholders named in the Prospectus.

(2) Estimated solely for the purpose of computing the amount of the registration fee pursuant to Rule 457(c) under the Securities Act of 1933, as amended, based on the closing price of \$0.48 on the Over-the Counter Bulletin Board on February 20, 2008.

(3) This fee has previously been paid.

The Registrant hereby amends this Registration Statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this Registration Statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933 or until the Registration Statement shall become effective on such date as the commission, acting pursuant to said Section 8(a), may determine.

The information in this Prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the U.S. Securities and Exchange Commission is effective. This Prospectus is not an offer to sell these securities and we are not soliciting offers to buy these securities in any state where the offer or sale is not permitted.

XSUNX, INC.

48,650,000 Shares Of Common Stock

This Prospectus relates to the sale of up to 48,650,000 shares of our common stock of which (i) 40,000,000 shares may be sold by Fusion Capital Fund II, LLC and (ii) 8,650,000 shares may be sold by Cumorah Capital, Inc. Fusion Capital and Cumorah Capital are sometimes referred to in this Prospectus as the selling stockholders. The prices at which the selling stockholders may sell the shares will be determined by the prevailing market price for the shares or in negotiated transactions. We will not receive proceeds from the sale of our shares by Fusion Capital or Cumorah Capital.

Our common stock is registered under Section 12(g) of the Securities Exchange Act of 1934, as amended and quoted on the Over-the-Counter Bulletin Board under the symbol "XSNX". On February 20, 2008, the last reported sale price for our common stock as reported on the Over-the-Counter Bulletin Board was \$0.48 per share.

Investing in our common stock involves certain risks. See "Risk Factors" beginning on page 6 for a discussion of these risks.

Fusion Capital is an "underwriter" within the meaning of the Securities Act of 1933, as amended. Cumorah Capital may be deemed to be an "underwriter" within the meaning of the Securities Act of 1933, as amended.

Neither the U.S. Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this Prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

The date of this Prospectus is _____.

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PROSPECTUS SUMMARY

Business

We are a Colorado corporation. Our principal executive offices are located at 65 Enterprise, Aliso Viejo, California 92656. Our telephone number is (949) 330-8060. The address of our website is www.xsunx.com. Information on our website is not part of this Prospectus.

XsunX is a development stage company with no significant sources of revenue to date. We are a thin-film photovoltaic (“TFPV”) company that intends to grow its business by manufacturing TFPV amorphous solar modules and selling them into what we believe is a high growth solar market opportunity. Our decision to pursue this strategy is based on our three years of research in the design and use of technologies for the manufacture of TFPV solar cells utilizing amorphous silicon. During this time we have developed the technical capabilities, qualified core staff, and market understanding that we believe will be necessary to establish product manufacturing infrastructure and take our product to market.

We have designed a TFPV solar module which we believe will deliver an average of 125 peak watts. To produce solar modules in commercial quantities we intend to process glass substrates within a proprietary semiconductor manufacturing system which employs the design of a high-throughput, automated, continuous process. We believe that the design of our TFPV module and manufacturing system can deliver per watt costs significantly less than those of traditional crystalline silicon solar module manufacturers, and allow us to market TFPV modules that will be highly competitive with other thin film offerings.

Currently, we do not have a manufacturing facility. Our plan for growth is to build and operate a TFPV solar module manufacturing facility in the state of Oregon. Employing a phased roll-out of manufacturing capacities, we anticipate completing the assembly and installation of a small scale production research and development system and initiating construction of our first full scale 25 MW system in 2008. Barring assembly delays, we anticipate completing the assembly of and commissioning our first 25MW line between December 2008 and February 2009. Near the end of the 2008 calendar year, we plan to launch the build-out of the first of three additional 25 MW systems necessary to eventually bring our capacity to 100 MW by early 2010.

The Offering

On November 1, 2007, we entered into a Purchase Agreement with Fusion Capital, an Illinois limited liability company. Under the Purchase Agreement, Fusion Capital is obligated, under certain conditions, to purchase shares from us in an aggregate amount of \$21 million from time to time over a twenty-five (25) month period. We have sold 3,333,332 shares of common stock to Fusion Capital (together with 3,333,332 shares issuable under an immediately exercisable common stock purchase warrant that is not part of this offering) under the Purchase Agreement for total proceeds of \$1,000,000. Under the terms of the Purchase Agreement, Fusion Capital has received a commitment fee consisting of 3,500,000 shares of our common stock. As of February 20, 2008, there were 173,403,188 shares outstanding (155,443,288 shares held by non-affiliates) excluding the shares offered by Fusion Capital pursuant to this Prospectus which it has not yet purchased from us. If all of such 40,000,000 shares offered hereby by Fusion Capital were issued and outstanding as of the date hereof, the 40,000,000 shares would represent approximately 23% of the total common stock outstanding or 26% of the non-affiliates shares outstanding as of the date hereof. The number of shares ultimately offered for sale by Fusion Capital is dependent upon the number of shares purchased by Fusion Capital under the Purchase Agreement.

Under the Purchase Agreement and the Registration Rights Agreement we are required to register 6,833,332 shares which have already been issued and at least 20,000,000 shares which we may issue to Fusion Capital after this registration statement is declared effective. We have chosen to register an additional 13,166,668 shares more than we

are obligated to under the Purchase Agreement with Fusion in order to have additional shares available to sell under the Purchase Agreement so that the Company can raise funds to further implement its business plan. We are registering under the Securities Act 40,000,000 shares of our common stock, 6,833,332 shares which have already been issued and 33,166,668 shares (13,166,668 shares more than we are required to register under the agreements) which we may issue to Fusion Capital after this registration statement is declared effective under the Securities Act. All 40,000,000 shares are being offered pursuant to this Prospectus. Under the Purchase Agreement, we have the right but not the obligation to sell more than the 40,000,000 shares to Fusion Capital. As of the date hereof, we do not have any plans or intent to sell to Fusion Capital any shares beyond the 40,000,000 shares offered hereby. However, if we elect to sell more than the 40,000,000 shares (which we have the right but not the obligation to do), we must first register under the Securities Act any additional shares we may elect to sell to Fusion Capital before we can sell such additional shares, which could cause substantial dilution to our shareholders.

We do not have the right to commence any additional sales of our shares to Fusion Capital until the SEC has declared effective the registration statement of which this Prospectus is a part. After the SEC has declared effective such registration statement, generally we have the right but not the obligation from time to time to sell our shares to Fusion Capital in amounts between \$80,000 and \$1.0 million depending on certain conditions. We have the right to control the timing and amount of any sales of our shares to Fusion Capital. The purchase price of the shares will be determined based upon the market price of our shares without any fixed discount at the time of each sale. Fusion Capital shall not have the right or the obligation to purchase any shares of our common stock on any business day that the price of our common stock is below \$0.20. There are no negative covenants, restrictions on future fundings, penalties or liquidated damages in the Purchase Agreement or the Registration Rights Agreement. The Purchase Agreement may be terminated by us at any time at our discretion without any cost to us, however the agreement provides that neither party has the ability to amend the Purchase Agreement and the obligations of both parties are non-transferable.

We believe that, if we choose to sell up to all of the 33,166,668 shares offered hereby to Fusion Capital, we will have access to the remaining \$20 million of funding potentially available to us as payment for purchases of our shares pursuant to the Purchase Agreement. However, no assurance can be given as to what shares we will actually sell to Fusion Capital. The Company and Fusion Capital agreed to \$21 million because it was the maximum amount Fusion Capital would commit to the Company under the agreement and was based on arms-length negotiations between the parties. Based on the market price of our common stock as of February 20, 2008 (\$0.48), proceeds to us from the sale of the remaining 33,166,668 shares of common stock would only be approximately \$15,920,001. However, the market price of our common stock has been higher and lower than this amount during the past twelve months. We believe that as we execute on our business plan, the market price of our stock will increase and thereby allow us to realize the remaining \$20 million under the agreement by selling the 33,166,668 shares or possibly fewer shares. However, no assurance can be given that this will occur.

On January 16, 2008, Cumorah Capital purchased 8,650,000 shares of the Company's restricted common stock in a private transaction for total proceeds of \$2,500,000.00. The Company agreed to register the 8,650,000 shares purchased by Cumorah Capital in the accompanying registration statement. Cumorah Capital is a Nevada corporation and an "accredited investor" as such term is defined in Rule 501(a) of Regulation D as promulgated by the U.S. Securities and Exchange Commission ("SEC").

Common Stock Offered	48,650,000 shares by the selling stockholders
Offering Price	Market price
Common Stock Currently Outstanding	173,403,188 shares as of February 20, 2008
Use of Proceeds	We will not receive any proceeds of the shares offered by the selling stockholders. See "Use of Proceeds".
Risk Factors	The securities offered hereby involve a high degree of risk. See "Risk Factors".

Over-the-Counter Bulletin Board Symbol XSNX.OB

FORWARD-LOOKING STATEMENTS

This Prospectus contains forward-looking statements. Such forward-looking statements include statements regarding, among other things, (a) our projected sales and profitability, (b) our growth strategies, (c) anticipated trends in our industry, (d) our future financing plans and (e) our anticipated needs for working capital. Forward-looking statements, which involve assumptions and describe our future plans, strategies, and expectations, are generally identifiable by use of the words “may”, “will”, “should”, “expect”, “anticipate”, “estimate”, “believe”, “intend” or “project” or the negative words or other variations on these words or comparable terminology. This information may involve known and unknown risks, uncertainties, and other factors that may cause our actual results, performance, or achievements to be materially different from the future results, performance, or achievements expressed or implied by any forward-looking statements. These statements may be found under “Management’s Discussion and Analysis of Financial Condition and Results of Operations” and “Business” as well as in this Prospectus generally. Actual events or results may differ materially from those discussed in forward-looking statements as a result of various factors, including, without limitation, the risks outlined under “Risk Factors” and matters described in this Prospectus generally. In light of these risks and uncertainties, there can be no assurance that the forward-looking statements contained in this filing will in fact occur. In addition to the information expressly required to be included in this filing, we will provide such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

SUMMARY FINANCIAL DATA

The following table below sets forth certain financial information derived from the Company's audited consolidated financial statements and interim unaudited financial statements for the periods and at the dates indicated.

In 2003, the Company completed a Plan of Reorganization and Asset Purchase Agreement and changed the name of the Company from Sun River Mining, Inc. to XsunX, Inc. Due to the Company's change in primary focus in October of 2003 and the developing nature of the business opportunities, these historical results may not necessarily be indicative of results to be expected for any future period. As such, future results of the Company may differ significantly from previous periods. The historical trends reflect this change of primary focus and the associated research and development period of the development stage company. This change in primary focus is the largest factor in the comparability of this information over time.

The information presented below should be read in conjunction with "Management's Discussion and Analysis of Financial Condition and Results of Operations" and our consolidated financial statements and the related notes.

	Years Ended				Period Ended	
	Sept 30, 2007	Sept 30, 2006	Sept 30, 2005	Sept 30, 2004	Sept 30, 2003	Dec 31, 2007
<u>Statement of Operations Data:</u>						
Net Sales	6,880	8,000	-	-	-	0
Research and Development Expense	435,534	949,472	501,423	129,493	-	6,406
Loan Fees	-	628,834	115,000	-	-	89,300
Warrant Expenses	325,303	951,250	-	1,200,000	-	1,308,865
Income(Loss) from Continuing Operations	(1,289,497)	(3,441,940)	(1,400,839)	(1,509,068)	(145,868)	(1,914,928)
Income(Loss) from Continuing Operations per Common Share	\$ (0.01)	\$ (0.02)	\$ (0.02)	\$ (0.01)	\$ (0.02)	\$ (0.01)
<u>Cash Flow Data:</u>						
Net cash provided by (used in) operating activities	(843,416)	(1,942,278)	(1,049,650)	(236,630)	(27,372)	(392,623)
Net cash used in investing activities	(1,822,942)	(2,099,736)	(191,995)	(12,267)	(3)	(192,865)
Net cash provided by financing activities	135,000	8,171,250	1,380,170	1,483,895	29,721	1,000,000
<u>Balance Sheet Data:</u>						
Cash	1,773,748	4,305,105	175,869	37,344	2,346	2,188,260
Property Plant and Equipment, Net	499,868	397,626	165,831	2,270	-	472,035

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Note Receivable	1,500,000	-	-	-	-	1,500,000
Marketable Prototype	1,765,000	1,765,000	-	-	-	1,765,000
Total Assets	5,742,260	6,859,464	441,684	72,114	2,349	6,171,783
Accounts Payable	259,652	582,161	78,377	89,030	-	238,897
Note Payable	-	-	850,000	1,225	-	-
Total Liabilities	312,688	588,699	974,233	96,163	-	293,974
Total Stockholders Equity (Deficit)	5,429,572	6,270,765	(532,549)	(24,049)	2,349	5,877,809
Long Term Obligations	-	-	-	-	-	-
Cash Dividends Declared per Common Share	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -

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SUPPLEMENTARY FINANCIAL INFORMATION

The following table presents the Company's condensed operating results for each of the ten (10) fiscal quarters through the period ended December 31, 2007. The information for each of these quarters is unaudited. In the opinion of management, all necessary adjustments, which consist only of normal and recurring accruals, have been included to fairly present the unaudited quarterly results. This data should be read together with the Company's consolidated financial statements and the notes thereto, and Management's Discussions and Analysis of Financial Condition and Results of Operations.

	Three (3) Months Ended (In Thousands)									
	Dec 31, 2007	Sept. 30, 2007	June 30, 2007	Mar. 31 2007	Dec. 31, 2006	Sept. 30, 2006	June 30, 2006	Mar. 31, 2006	Dec 31, 2005	Sept. 30, 2005
Net Sales	0	0	0	7	0	0	0	0	8	0
Research and Development Expense	6	102	15	109	210	67	369	238	275	143
Loan Fees	89	0	0	0	0	0	0	0	213	115
Income (loss) from Continuing Operations	(106)	239	(496)	(448)	(584)	(174)	(1,121)	(551)	(1,596)	(749)
Income (loss) from Continuing Operations per common share	\$ (0.01)	\$ 0.002	\$ (0.003)	\$ (0.01)	\$ (0.003)	\$ (0.001)	\$ (0.008)	\$ (0.01)	\$ (0.013)	\$ (0.006)

WHERE YOU CAN FIND US

Our principal executive offices are located at 65 Enterprise, Aliso Viejo, California 92656. Our telephone number is (949) 330-8060 and our website is www.xsunx.com.

RISK FACTORS

An investment in our common stock involves a high degree of risk. You should carefully consider the risks described below and the other information in this Prospectus before investing in our common stock. If any of the following risks occur, our business, operating results and financial condition could be seriously harmed. Please note that throughout this Prospectus, the words “we”, “our” or “us” refer to the Company and not to the selling stockholders.

We Have Not Generated Any Significant Revenues And May Never Achieve Profitability.

We are a development stage company and, to date, have not generated any significant revenues. From inception through December 31, 2007, we had an accumulated deficit of \$13,426,778. We cannot assure you that we can achieve or sustain profitability in the future. Our operations are subject to the risks and competition inherent in the establishment of a business enterprise. There can be no assurance that future operations will be profitable. Revenues and profits, if any, will depend upon various factors, including whether our product development can be completed, and if it will achieve market acceptance. We may not achieve our business objectives and the failure to achieve such goals would have an adverse impact on us.

We expect that we will need to obtain significant additional financing to continue to operate our business, including significant capital expenditures to install our initial 25MW per annum production capacity, and financing may be unavailable or available only on disadvantageous terms.

We have in the past experienced substantial losses and negative cash flow from operations and have required financing, including equity and debt financing, in order to pursue the commercialization of products based on our technologies. We expect that we will continue to need significant financing to operate our business, including capital expenditures to install our planned production capacity.

On November 1, 2007, XsunX signed a \$21 million Purchase Agreement with Fusion Capital. Upon signing the agreement, XsunX received \$1,000,000 from Fusion Capital as an initial purchase under the \$21 million commitment in exchange for 3,333,332 shares of our common stock. Concurrently with entering into the Purchase Agreement, we entered into a registration rights agreement with Fusion Capital and we are registering under the Securities Act 40,000,000 shares of our common stock, 6,833,332 shares which have already been issued and 33,166,668 shares which we may issue to Fusion Capital after this registration statement is declared effective under the Securities Act. All 40,000,000 shares are being offered pursuant to this Prospectus. Under the Purchase Agreement, we have the right but not the obligation to sell more than the 40,000,000 shares to Fusion Capital. As of the date hereof, we do not have any plans or intent to sell to Fusion Capital any shares beyond the 40,000,000 shares offered hereby. However, if we elect to sell more than the 40,000,000 shares (which we have the right but not the obligation to do), we must first register under the Securities Act any additional shares we may elect to sell to Fusion Capital before we can sell such additional shares, which could cause substantial dilution to our shareholders.