

Alert to Foreign Issuers: Upcoming Date to Measure Your SEC Reporting Status as a Foreign Private Issuer

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Client Advisory

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In our February 2, 2009 Client Advisory covering Recent Changes for Foreign Private Issuer Filings on 20-F and 40-F, we discussed the revised SEC annual eligibility tests for determining foreign private issuer ("FPI") reporting status. Prior to the adoption of the 2008 rules, a foreign issuer had to measure its SEC status as a FPI at several times and upon the occurrence of certain events during each fiscal year, and the FPI was often uncertain how to conduct the measurement. This Client Advisory explains the new timing for the measurement and its components and suggests steps in taking the measurement.

Measurement Date

Now the eligibility measurement is taken just once each year- on the last business day of the foreign issuer's second fiscal quarter. For calendar year issuers, the measurement date under the revised rules is June 30, 2009. June 30 is also the day calendar year issuers will separately determine their status as large accelerated filers, accelerated filers or non-accelerated filers.

Multijurisdictional Disclosure System ("MJDS") issuers also must test their eligibility to use the MJDS forms for Exchange Act filings (such as Form 40-F) at the end of their fiscal year. MJDS eligibility for registration statements under the Securities Act is tested at the time of filing.

FPI Definition

A FPI is a company formed or organized outside of the U. S. that either: (a) has 50% or less of its outstanding voting securities held of record by U. S. residents or (b) has more than 50% of its outstanding voting securities held of record by U. S. residents but does not have any of the following: (i) a majority of its executive officers or directors are U. S. citizens or residents, or (ii) more than 50% of its assets are located in the U. S. or (iii) its business is principally administered in the U. S.

A foreign issuer that fails the "holders" test and any one of the "location" tests would become subject to SEC reporting as a U. S. issuer as of the following fiscal year; however, a MJDS issuer that fails these tests would also immediately not be able to use the MJDS forms for its Securities Act offerings. These issuers would regain FPI status upon meeting the FPI eligibility tests on a subsequent annual measurement date, as discussed below.

"Holder" Test- Nominee Holdings

A major problem in administering the "holders" test has been how to conduct the "look through" examination in counting "street" name shares, that being shares held by brokers, dealers, banks or other nominees for a customer. The new rules include instructions that clarify this examination.

The “look through” is limited to nominees with addresses in (i) the U. S., (ii) the jurisdiction of the issuer’s incorporation or (iii) the jurisdiction of the principal trading market for the issuer’s securities, if different from the other two. For example, a Canadian issuer with the Toronto Stock Exchange as the principal market for its voting securities would just examine nominees with addresses in the U. S. or Canada. Shares shown in the name of nominees with addresses outside of the U. S. and Canada would be presumed not to be held of record by U. S. residents. One SEC instruction provides that if after reasonable inquiry of the nominee holders the issuer is unable to obtain information about the amount of shares represented by accounts of customers resident in the U. S., the issuer may assume that the customers are resident of the jurisdiction in which the nominee has its principal place of business.

The SEC rules do not define “resident.” At law, “resident” has different definitions depending upon the purpose of the law- such as tax law and voting law. Here, the approach should be to deem a holder as a resident of the jurisdiction shown on the transfer agent’s records or the nominee’s records, unless the issuer knows the holder holds himself out as a resident of a different jurisdiction.

The first step in undertaking the measurement of the record holders is arranging to receive the stockholder list of record holders of the voting securities as well as “street name” lists, such as the CEDE list for U. S. nominees and non-objecting beneficial owner (NOBO) list as of June 30, 2009. The issuer also should obtain nominee lists prepared in its jurisdiction of formation and of its principal trading market. For example, a Canadian issuer would obtain the CDS list. Most transfer agents can provide breakdowns of record holders by country address. However, the required reasonable inquiry contemplates a further examination of the nominee holdings.

Based upon the CEDE list, the CDS list and any other applicable nominee list, the issuer can learn the names of the participating nominees that are holding the issuer’s shares for their customers and the number of shares held. The next step would be sending a letter or otherwise inquiring of those nominees located in the countries of the issuer’s formation and its principal trading market requesting the number of shares they are holding for the account of customers who are shown as U. S. residents on the nominee’s records. The FPI holders test goes to the number of shares held by U. S. residents, not to the number of holders who are U. S. residents. The number of U. S. resident holders is used as a measurement for other SEC tests, such as becoming a reporting company and terminating the reporting status.

Another SEC instruction explains that when a holder of the issuer’s securities has filed a report of beneficial ownership (such such a Schedule 13D or 13G), the issuer should determine the holder’s resident by the information given in his report.

“Location” Test

If a FPI “busts” the 50% U. S. holders test, then it takes the “location” test. The first component of the “location” test covers the citizenship or residency of the issuer’s executive officers and directors. Guidance as to who would be an executive officer is given in Exchange Act Rule 3b-7. This Rule looks at the issuer’s president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or other person who performs similar policy making functions for the issuer. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform any policy making functions for the issuer.

In this age of mobility, an executive officer or director may have dual citizenship or multiple residences. Absent any specific factors or knowledge, the general rule would be to treat a person with dual U. S. and other country citizenship as a U. S. citizen, and a person with multiple residences as a resident of the country considered by him as his primary residence.

The location of the issuer’s assets should be self-evident. However, certain assets, such as cash, cash equivalents, debt instruments, investment securities and intangible property rights may require specific examination as to their location for this test.

A reporting issuer should be able to use the location shown on its latest SEC filing as its “principal executive offices,” unless the actual administration of the business takes place elsewhere.

When Eligibility is Lost

If a calendar-year SEC reporting foreign issuer fails to meet the FPI eligibility tests as of June 30, it would continue reporting as a FPI for the balance of that year, but beginning as of the first day of the subsequent calendar year, it would be subject to filing reports and registration statements required of U. S. issuers, and also would be subject to the SEC proxy rules and Exchange Act Section 16 (insider reporting and short-swing profit disgorgement). The annual report for the year in which the FPI tests were not met would be filed in the beginning of the subsequent year on a Form 10-K, rather than a Form 20-F or 40-F, and on an earlier filing schedule. If such issuer also files under the MJDS, upon determining the failure to meet the FPI tests it would immediately not be able to use the MJDS forms for its Securities Act offerings. However, upon the foreign issuer meeting the FPI tests on a subsequent June 30, it would immediately be able to use the FPI forms and reporting requirements, and cease reporting as though it were a U. S. issuer.

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