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Foreign Private Issuer Status

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Client Advisory
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The foreign integrated disclosure system of the U.S. Securities and Exchange Commission (the "SEC") makes important accommodations for foreign private issuers. Attached as Schedule A is a list of those benefits. Issuers must test their eligibility for foreign private issuer status on the last day of their second fiscal quarter, typically June 30. Set forth below are the relevant tests and related material to help you make that determination.

A. What is a Foreign Private Issuer?

A foreign private issuer ("FPI") is defined in Rule 3b-4(c) under the Securities Exchange Act of 1934 as an issuer formed or organized outside of the U.S. (other than a foreign government and its political subdivisions) 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 one 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.

B. When Foreign Private Issuer Status Is Determined

Each issuer must test its eligibility to use the forms and rules available to foreign private issuers once a year, i.e., status as a foreign private issuer is determined on the last day of its second fiscal quarter, typically June 30.

C. Counting Method: Modified "Look Through"

To determine the percentage of outstanding voting securities held by U.S. residents under the test above, the issuer must "look through" record ownership. First, the issuer must count each person identified as the owner of its securities in its shareholders of record list (maintained properly and in the ordinary course). Second, for voting securities held of record by broker-dealers, banks, depositaries (e.g., DTC) and other nominees located in: (i) the United States, and (ii) the issuer's home jurisdiction and (iii) the jurisdiction of the primary trading market for the issuer securities, the issuer must inquire and count the amount of voting securities they each hold in accounts of U.S. residents.

The issuer must make a good faith effort to obtain this information. If, after reasonable inquiry, the issuer cannot obtain information from the nominee about the amount of voting securities represented by accounts of U.S. residents, including where a nominee's charge for supplying this information would be unreasonable, the issuer may presume, that the customers are residents of the jurisdiction where the nominee has its principal place of business.

Last, the issuer must count shares of voting securities as beneficially owned by U.S. residents as stated in any beneficial ownership reports provided to it or filed publicly (such as 13D or 13G), as well as any beneficial ownership information otherwise provided to it (i.e., information of which it should have actual knowledge).

D. Change in Status

If the issuer no longer qualifies as a foreign private issuer on the last business day of its second fiscal quarter, it must comply with the reporting requirements and use the forms for U.S. companies beginning on the first day of the fiscal year following the determination date, i.e., January 1, 2013. Accordingly, if the issuer fails to qualify as a foreign private issuer as of the end of its second fiscal quarter in 2012, it would file a Form 10-K in 2013 for its 2012 fiscal year. The issuer would also begin to comply with the proxy rules and Section 16 (insider reporting), and would become subject to reporting on Forms 8-K and 10-Q, on the first day of 2013. This gives the issuer six months advance notice to transition to the U.S. forms and reporting requirements.

If the issuer later requalifies as a foreign private issuer on a later determination date, it would be able to avail itself of the accommodations permitted to foreign private issuers, as described in Schedule A, including use of the foreign private issuer forms and reporting requirements, beginning on the date on which it establishes its eligibility as a foreign private issuer. For example, the issuer would then be eligible to file its annual report for that fiscal year on Form 20-F, would be required to provide reports on Form 6-K, and would not need to continue to provide reports on Forms 8-K and 10-Q for the remainder of that fiscal year and its stockholders cease being subject to Section 16 reporting.

There is no specific requirement that the issuer notify the market if a change in its foreign private issuer status were to occur.

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Schedule A

Benefits of Foreign Private Issuer Status

Foreign private issuers ("FPIs") receive the following accommodations that are not available to U.S. issuers:

A. The Securities Act

1. Confidential submission of registration statement to the SEC for first-time, by issuers whose securities are listed in their home country.

2. Ability to use U.S. generally accepted accounting principles ("U.S. GAAP"), International Financial Reporting Standards ("IFRS") or local GAAP (reconciled to U.S. GAAP).

3. Ability to resell Regulation S equity securities without Rule 905 (i.e., Regulation D type) resale restrictions.

4. Exemptions from registration for certain cross-border rights offers, exchange offers and business combinations.

B. The Exchange Act

1. Filing of annual reports on Form 20-F rather than on Form 10-K:

a. Later filing deadlines.

b. Less demanding executive compensation disclosure. A FPI is exempt from the detailed disclosure requirements regarding individual executive compensation and compensation philosophy and analysis, as required by the SEC.

c. Home country GAAP reconciled to U.S. GAAP or IFRS.

d. Less extensive disclosure for related parties.

e. Less Demanding filing requirements for employment or compensation plans with management or directors as exhibits.

2. No Form 10-Q quarterly reporting or Form 8-K current reporting obligations; instead Form 6-K is used, which is a "wrapper" or cover page for home country disclosure.

3. No Section 16 shareholder reporting or liability for short-swing profits.

4. No Section 14 proxy and information statement requirements.

5. Audit committee independence accommodations for certain FPIs unable to fully comply with the audit committee independence requirement in Rule 10A-3 under the Exchange Act.

6. FPIs are exempt from the obligation to assess changes in their internal control over financial reporting quarterly.

7. A FPI registered in the United States may continue to follow certain corporate governance practices in accordance with its home-country rules and regulations.

8. Deregistration provisions under the Exchange Act are less onerous.

9. Exemptions are available under cross-border tender offer rules.

related professionals

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