Foreign Private Issuers

Here's the Deal:

- A foreign private issuer ("FPI") is generally any foreign issuer (other than a foreign government) incorporated or organized under the laws of a jurisdiction outside of the United States that meets certain specified conditions.
- An FPI seeking to raise capital publicly for the first time in the United States must register its securities, and subsequently must file with the Securities and Exchange Commission ("SEC") annual and periodic reports, similar to a domestic issuer, but subject to certain disclosure and other accommodations.
- Under Rule 12g3-2(b) of the Securities Exchange Act of 1934, as amended, (the "Exchange Act"), certain FPIs are exempt from the Exchange Act's reporting obligations, provided certain conditions are met.
- Directors and officers of FPIs may still incur liability under U.S. securities laws.
- Officers, directors, and shareholders of an FPI are not subject to the short-swing provisions of Section 16 of the Exchange Act. However, directors, officers, and certain beneficial owners of an FPI are subject to the disclosure requirements of Section 13 of the Exchange Act.
- If an FPI no longer wishes to comply with ongoing reporting requirements, an FPI can deregister its securities by filing a Form 15F with the SEC.
- If an FPI determines that it no longer qualifies as an FPI, it is generally required to comply with rules for U.S. domestic companies beginning on the first day after the end of its fiscal year.

What's the Deal?

Foreign companies enjoy a number of benefits by becoming U.S. public companies. These benefits include increased visibility, access to the U.S. capital markets, and the ability to offer equity-based compensation instruments to key employees.

However, companies may encounter obstacles when accessing capital in the United States. Becoming and remaining a U.S. public company is expensive and time-consuming and may require changing a company's operations in ways that a company would not necessarily choose absent U.S. requirements. Registering as an FPI affords foreign companies the ability to strike a healthy balance by providing access to the U.S. capital markets, while at the same time permitting foreign companies to benefit from certain disclosure, reporting, and corporate governance accommodations.

Assessing FPI Status

The federal securities laws define a "foreign issuer" as any issuer that is a foreign government, a foreign national of any foreign country or a corporation, or other organization incorporated or organized under the laws of any foreign country.

An FPI is any foreign issuer (other than a foreign government) incorporated or organized under the laws of a jurisdiction outside of the United States, unless more than 50% of the issuer's outstanding voting securities are held directly or indirectly of record by residents of the United States, and any of the following applies:

- the majority of the issuer's executive officers or directors are U.S. citizens or residents,
- more than 50% of the issuer's assets are located in the United States, or
- the issuer's business is administered principally in the United States.

Calculating Outstanding Voting Securities. The percentage of outstanding voting securities held of record by a broker, dealer, bank, or nominee for the accounts of customers residing in the United States is based on the number of separate accounts for which the securities are held in the United States. In addition, any shares reported as beneficially owned by a U.S. resident in a filing made under Section 13(d) of the Exchange Act, or any comparable reporting provision of another country, shall be treated as owned of record by U.S. residents. If an FPI has multiple voting classes and wants to determine the percentage of its voting stock held by U.S. residents, it can either calculate the voting power of those classes on a combined basis or simply calculate the number of voting securities.

A person who has permanent resident status (i.e., a Green Card holder) is presumed to be a U.S. resident. The SEC Staff has explained that even individuals without permanent resident status may be deemed U.S. residents (for purposes of Rule 405 and Rule 3b-4(c)) based on tax residency, nationality, mailing address, physical presence, the location of a significant portion of the person's financial and legal relationships, or immigration status. The SEC Staff has not directed use of any one specific criteria when determining who is a U.S. resident. Rather, the SEC requires that the FPI determine the criteria it will use and apply them consistently.

Assessing whether an FPI's Executive Officer or Directors are U.S. Citizens or Residents. To determine whether a majority of an FPI's executive officers or directors are U.S. residents or citizens under Rule 405 and Rule 3b-4(c), the following factors must be assessed for each officer and director:

- the citizenship status of its executive officers,
- the residency status of its executive officers,
- the citizenship status of its directors, and
- the residency status of its directors.

Assessing an FPI's Assets. When determining if more than 50% of an FPI's assets are located in the United States, an FPI can either use the geographic segment information determined in the preparation of its financial statements or apply, on a consistent basis, any other reasonable methodology in assessing the location and amount of its assets.

Assessing Whether an FPI's Business is Administered Principally in the United States. There is no determinative factor to evaluate whether an FPI's business is administered principally in the United States. Rather, an FPI must analyze where its officers, partners, or managers primarily direct, control, and coordinate its activities. An FPI must review its status as an FPI on the last business day of its most recently completed second fiscal quarter. If an FPI no longer satisfies the required criteria for FPI status, it will become subject to U.S. domestic reporting requirements on the first day of its fiscal year immediately succeeding such determination.

FPI Becoming Subject to U.S. Reporting Requirements

An FPI will be subject to the reporting requirements under U.S. federal securities laws if it:

- registers with the SEC the public offer and sale of its securities under the Securities Act of 1933, as amended (the "Securities Act"),
- lists a class of its securities on a U.S. securities exchange, or
- within 120 days after the last day of its first fiscal year in which the issuer had total assets that exceed $10 million and a class of equity securities held of record by either: (1) 2,000 or more persons or (2) 500 persons who are not accredited investors in the United States (or, in the case of an FPI that is a bank holding company or a savings and loan holding company, had total assets that exceeded $10 million and a class of equity securities held of record by either 2,000 or more persons).

Going Public in the United States

An FPI seeking to raise capital in the United States publicly for the first time must register its shares on Form F-1. A registration statement on Form F-1 is similar to a Form S-1 filed by U.S. domestic issuers and requires extensive disclosure about the FPI's business and operations.

Once an FPI has been subject to the U.S. reporting requirements for at least 12 calendar months, it generally may use Form F-3 to offer securities publicly in the United States. Form F-3 is a short-form registration statement (analogous to Form S-3 for U.S. domestic issuers) and may be used by an FPI if the FPI meets both the form's registrant requirements and the applicable transaction requirements. Form F-3 permits an FPI to disclose minimal information in the prospectus included in the Form F-3 by incorporating by reference the more extensive disclosures already filed with the SEC under the Exchange Act, primarily in the FPI's most recent Annual Report on Form 20-F and its Forms 6-K. The scope of the prospectus will generally depend on marketing needs as determined by the FPI and its investment bankers.

An FPI may offer any type of securities that a U.S. domestic issuer is permitted to offer.

Reporting Obligations of an FPI Once it Becomes a Reporting Company

As a reporting company, an FPI must comply with the SEC's reporting and disclosure requirements, including the periodic reporting requirements.

ANNUAL REPORT ON FORM 20-F

General. Form 20-F is unique to an FPI and can be used as an Annual Report similar to an Annual Report on Form 10-K filed by U.S. domestic issuers. The information required to be disclosed in a Form 20-F includes, but is not limited to:

- operating results,
- liquidity and capital resources,
- trend information,
- consolidated financial statements and other financial information,
- significant business changes,
- risk factors,
- history and development of the registrant,
- business overview, and
- organizational structure.

A Form 20-F is also required to contain a description of the FPI's corporate governance practices and a statement regarding those corporate governance practices that conform to its home-country requirements and not those of the U.S. securities exchange on which its securities are listed. An FPI must also disclose information relating to changes in, and disagreements with, the FPI's certifying accountant. An FPI may also be required to disclose specialized information. For example, an FPI must provide specified information if it, or any of its subsidiaries, are engaged in oil and gas operations that are material to its business operations or financial position.

Following the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), an FPI that operates a mine in the United States is required to disclose certain specified information in its Form 20-F about mine health and safety, including any violations or orders issued under the U.S. Federal Mine Safety and Health Act of 1977. An FPI that operates mines outside of the United States is not subject to the disclosure requirements with respect to such mines. However, to the extent mine safety issues relating to non-U.S. mines are material, disclosure may otherwise be required under the SEC Rules.

The Dodd-Frank Act also requires disclosure by domestic issuers and FPIs regarding "conflict materials" originating from the Democratic Republic of Congo or an adjoining country, and disclosures regarding payment made to U.S. or non-U.S. governments in connection with commercial development of oil, natural gas, or minerals. Companies are required to provide conflict minerals disclosure on Form SD. All affected companies are required to file the form for each calendar year, regardless of their fiscal year end, no later than May 31 of the following year.

A Form 20-F may also be filed as a registration statement when an FPI is not engaged in a public offering of its securities but is still required to be or chooses to be registered under the Exchange Act (for example, when it reaches the holder of record threshold under Section 12(g) of the Exchange Act, and there is no other exemption available). In addition, an FPI may undertake a direct listing and list a class of its securities on a U.S. securities exchange without raising capital by filing a Form 20-F and becoming subject to the Exchange Act. Given the SEC policy permitting issuers, including FPIs, to submit a Form 20-F for confidential review, it is now easier to undertake a direct listing.

An FPI has four months to file a Form 20-F as an annual report. However, if the Form 20-F is to be used as a registration statement in connection with a listing of an FPI's securities, or if the financial statements in the Form 20-F are to be incorporated by reference in a Form F-3 for an offering, the last year of audited financial statements may not be older than 15 months at the time of the offering or listing (defined as the time when the registration statement is declared effective). The impact of this requirement is to push an FPI to file its Form 20-F within three months of the end of its fiscal year rather than four months, particularly if the FPI is engaged in frequent or continuous offerings of its securities since it would be precluded from using its shelf registration statement for 30 days. Further, for issuers with affiliated broker-dealers, market-making resales of the issuer's securities by those dealers would no longer be registered. In the view of the SEC, the Section 4(a)(3) exemption is not available for market-making resales of an issuer's securities by an affiliated broker-dealer.

In addition, an FPI may incorporate by reference information previously filed with the SEC into any item of its Form 20-F annual report, subject to certain limitations set forth under the Exchange Act Rule 12b-23. An FPI that elects to incorporate such information by reference must, however, identify with specificity the information that is being incorporated by reference.

Financial Reporting Requirements. An FPI is required to make significant disclosures regarding its financial condition under Items 8 and 18 of its Annual Reports on Form 20-F. Item 8 of Form 20-F sets forth the financial information that must be included, as well as the periods covered and the age of the financial statements. In addition, Item 8 obligates an FPI to disclose any legal or arbitration proceedings involving a third party that may have, or may have recently had, a significant impact on the FPI's financial position or profitability, as well as any significant changes since the date of the annual financial statements (or since the date of the most recent interim financial statements).

An FPI that prepares its financial statements in accordance with the English language version of International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB") in its filings with the SEC does not have to reconcile those financial statements with U.S. generally accepted accounting principles ("GAAP"). This exemption from reconciliation to U.S. GAAP applies only to IFRS as issued by IASB and not to any other accounting practices. If reconciliation is required, under Item 17, an FPI must either: (1) provide a statement of cash flows that is prepared in accordance with U.S. GAAP or IAS No. 7, or (2) furnish, in a note to the financial statements, a quantified description of the material differences between cash or fund flows reported in the primary financial statements and cash flows that would be reported in a statement of cash flows prepared in accordance with U.S. GAAP.

The above U.S. GAAP reconciliations may not be necessary where the financial statement information is for either:

- a business an FPI has acquired or plans to acquire,
- a less-than-majority-owned investee, or
- a joint venture.

If the target's or less-than-majority-owned investee's financial information is not prepared in accordance with U.S. GAAP, then such target or investee must account for less than 30% of an FPI's assets or income in order to avoid U.S. GAAP reconciliation. If, however, the target's or less-than-majority-owned investee's financial information is prepared in accordance with IFRS as issued by IASB (even if the issuer's financial statements are not prepared in accordance with U.S. GAAP or IFRS as issued by IASB), the FPI is not obligated to reconcile such financial statements with U.S. GAAP, regardless of the significance of the entity to the FPI's operations.

In the case of a joint venture, if an FPI prepares financial statements on a basis of accounting that allows proportionate consolidation for investments in joint ventures that would be accounted for under the equity method pursuant to U.S. GAAP, it may omit differences in classification or display that result from using proportionate consolidation in the reconciliation to U.S. GAAP. In order to avail itself of such omissions, the joint venture must be an operating entity, the significant financial operating policies of which are, by contractual arrangement, jointly controlled by all parties having an equity interest in the entity. Financial statements that are presented using proportionate consolidation must provide summarized balance sheet and income statement information and summarized cash flow information resulting from operating, financing, and investing activities relating to its pro rata interest in the joint venture.

Item 18 of Form 20-F requires that an issuer provide all information required by U.S. GAAP and Regulation S-X, as well as the reconciling information for line items specified in Item 17(c) of Form 20-F. However, Item 18(b) of Form 20-F grants a limited exemption to the reconciliation requirement:

- for any period in which net income has not been presented on a basis as reconciled to U.S. GAAP,
- for the financial statements provided pursuant to Rule 3-05 of Regulation S-X in connection with a business acquired or to be acquired, or
- for the financial statements of a less-than-majority-owned investee.

In March 2017, the SEC made available an XBRL taxonomy for IFRS financial statements. As a result of the availability of the taxonomy, FPIs that prepare their financial statements under IFRS as issued by the IASB must file their financial statements in XBRL for fiscal years ending on or after December 15, 2017.

Subsidiaries. Where an FPI guarantees securities of its non-FPI subsidiary, the parent FPI (as guarantor) and non-FPI subsidiary (as issuer) may use an F-Series registration statement to register the offering of the securities under the Securities Act and use Form 20-F with respect to any reporting obligations, as long as certain requirements are satisfied.

Where the parent-guarantor and subsidiary-issuer are eligible to present condensed consolidated financial information in the parent-guarantor's filings, and the parent qualifies as an FPI, the parent-guarantor and its subsidiaries may use:

- an F-Series registration statement to register an offering of guarantees and guaranteed securities that are issued by a subsidiary (either domestic or foreign) that does not itself qualify as an FPI, and
- a Form 20-F with respect to any reporting obligations associated with the F-Series registration statement.

An FPI's wholly owned subsidiary may omit certain information under General Instruction I(2) (to Form 10-K) from its Form 20-F annual report, as long as the registrant includes a prominent statement on the Form 20-F's cover page:

- that it satisfies the conditions set forth under General Instruction I(1)(a) and (b) to Form 10, and
- is therefore filing the Form 20-F with a reduced disclosure format.

REPORTS ON FORM 6-K

In addition to an Annual Report, an FPI must furnish Forms 6-K to the SEC from time to time. Generally, a Form 6-K contains information that is material to an investment decision in the securities of an FPI and may include press releases, shareholder reports, and other materials that an FPI publishes in its home country in accordance with home-market law or custom, as well as any other information that the FPI may want to make publicly available.

Reports on Form 6-K generally take the place of Quarterly Reports on Form 10-Q (which include financial reports) and Current Reports on Form 8-K (which include disclosure relating to the occurrence of material events) that U.S. domestic issuers are required to file. Unlike Form 10-Q or Form 8-K, there are no specific disclosures required by Form 6-K.

Information provided in an FPI's Form 6-K is deemed "furnished" for purposes of the U.S. federal securities laws and is therefore not automatically incorporated by reference into an FPI's registration statement on Form F-3. If an FPI wants to incorporate a Form 6-K into its registration statement on Form F-3, it must specifically provide for its incorporation by reference in the registration statement and in any subsequently submitted Forms 6-K.

CERTIFICATION REQUIREMENTS

The principal executive officer(s) and the principal financial officer(s) (or persons performing similar functions) of an FPI are obligated to make certain certifications in a company's periodic reports. These certifications must be included in an FPI's Form 20-F. Other reports filed or furnished by an FPI, such as reports on Form 6-K, are not subject to the certification requirements because they are not considered "periodic" (unlike, for example, a Form 10-Q) and not made in connection with any securities offerings. Form 20-F requires the following certifications (although certain of the certifications with respect to internal control over financial reporting are not made until the issuer has been a reporting company for at least a year):

- the signing officer has reviewed the report of the issuer,
- based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by the report,
- based on the officer's knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition, results of operations, and cash flows of the issuer as of and for the periods presented in the report,

- the issuer's other certifying officer(s) and the signing officer are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the issuer and have:
    - designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under their supervision, to ensure that material information relating to the issuer, including its consolidated subsidiaries, is made known to such officers by others within those entities, particularly during the period in which the report is being prepared,
    - designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles,
    - evaluated the effectiveness of the issuer's disclosure controls and procedures and presented in the report their conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by the report based on such evaluation, and
    - disclosed in the report any change in the issuer's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.
- the registrant's certifying officer(s) and the signing officer have disclosed, based on their most recent evaluation of internal control over financial reporting, to the issuer's auditors and the audit committee of the issuer's board of directors (or persons performing the equivalent functions):
    - all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting that are reasonably likely to adversely affect the issuer's ability to record, process, summarize, and report financial information, and
    - any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal control over financial reporting.

An FPI's obligation to comply with the internal control certification requirements does not begin until it is either required to file an annual report pursuant to Section 13(a) or 15(d) of the Exchange Act for the prior fiscal year or had filed an annual report with the SEC for the prior fiscal year.

An FPI that is not required to comply with Items 15(b) and (c) must include a statement in the first annual report that it files in substantially the following form:

> "*This annual report does not include a report of management's assessment regarding internal control over financial reporting or an attestation report of the company's registered public accounting firm due to a transition period established by rules of the Securities and Exchange Commission for newly public companies.*"

The Exchange Act requires that each periodic report filed under the Exchange Act, including Form 20-F, must include the internal control certifications and must be signed by the issuer's chief executive officer and chief financial officer. Item 15 of Form 20-F contains the internal control certification requirements applicable to an FPI. Under Item 15(b), an FPI must disclose:

- a statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the FPI,
- a statement identifying the framework used by management to evaluate the effectiveness of the FPI's internal control over financial reporting,
- management's assessment of the effectiveness of the FPI's internal control over financial reporting as of the end of its most recent fiscal year, including a statement on whether the internal control over financial reporting is effective, and
- a statement that the registered public accounting firm that audited the financial statements included in the annual report has issued an attestation report on management's assessment of the FPI's internal control over financial reporting.

Further, under Item 15(c) of Form 20-F, every registered public accounting firm that prepares or issues an audit report on an FPI's annual financial statement must attest to, and report on, the assessment made by management. Such attestation must be made in accordance with standards for attestation engagements issued or adopted by the Public Company Accounting Oversight Board, and cannot be the subject of a separate engagement of the registered public accounting firm. However, the universal practice is for the auditors to audit management's internal control over financial reporting, and not actually attest to management's assessment.

Special Accommodations for Reporting FPIs

FPIs benefit from special accommodations that are intended to reduce their reporting burdens.

ANNUAL AND QUARTERLY REPORTS

As discussed above, an FPI must file an Annual Report on Form 20-F within four months after its fiscal year ends. By contrast, a domestic issuer must file an Annual Report on Form 10-K between 60 and 90 days following the end of its fiscal year, depending on its capitalization and other factors. Similarly, an FPI is not required to file public quarterly reports, subject to certain exceptions. Companies with a class of listed securities must file semi-annual unaudited financial information under cover of a Form 6-K within six months following the end of the second fiscal quarter. By contrast, U.S. domestic issuers are required to file unaudited financial information quarterly using Form 10–Q.

PROXY SOLICITATIONS

An FPI is not required under U.S. federal securities laws or the rules of the U.S. securities exchanges to file proxy solicitation materials on Schedule 14A or 14C in connection with annual or special meetings of its shareholders.

AUDIT COMMITTEE

As discussed below, there are numerous accommodations to the nature and composition of an FPI's audit committee or permitted alternative.

INTERNAL CONTROL OVER FINANCIAL REPORTING

Both an FPI and a U.S. domestic issuer must annually assess their internal control over financial reporting and in many instances provide an independent auditor's audit of the effectiveness of such internal control. U.S. domestic issuers are also obligated to assess changes in their internal control over financial reporting on a quarterly basis.

EXECUTIVE COMPENSATION

FPIs are generally exempt from the detailed disclosure requirements regarding executive compensation required by the SEC. However, an FPI is required to make certain disclosures regarding executive compensation on an individual basis, unless its home-country laws do not require such disclosures and provided the information is not otherwise publicly disclosed by the FPI. In addition, an FPI must file as exhibits to its public filings individual management contracts and compensatory plans if required by its home-country regulations or if it previously disclosed such documents.

DIRECTORS/OFFICERS EQUITY HOLDINGS

Directors and officers of an FPI do not have to report their equity holdings and transactions under Section 16 of the Exchange Act, subject to certain exceptions. However, shareholders, including directors and officers, may have filing obligations under Section 13(d) of the Exchange Act.

IFRS-NO U.S. GAAP RECONCILIATION

An FPI may prepare its financial statements in accordance with IFRS as issued by the IASB without reconciliation to U.S. GAAP.

CONFIDENTIAL SUBMISSIONS FOR CERTAIN FOREIGN ISSUERS

Certain foreign issuers that are registering for the first time with the SEC may submit their registration statements on a confidential basis to the SEC Staff.

EXCHANGE ACT SECTION 16

Insiders of an FPI are not subject to the short-swing profit limits set forth in Section 16(b), nor are they required to comply with the Section 16(a) reporting requirements.

EASY TERMINATION OF REGISTRATION/DEREGISTRATION

An FPI, regardless of the number of its U.S. shareholders, may terminate its registration of equity securities under the Exchange Act and cease filing reports with the SEC, subject to certain conditions. This rule allows a U.S.-listed FPI to exit the U.S. capital markets with relative ease and terminate its reporting duties under Section 15(d) of the Exchange Act.

Disclosure Obligations by Beneficial Owners

When an FPI becomes a reporting company, its shareholders become subject to certain reporting obligations under the Exchange Act.

EXCHANGE ACT SECTION 13

Under Sections 13(d) and 13(g) of the Exchange Act and the SEC's related rules, if a beneficial owner controls more than 5 percent of a certain class of equity securities, it must deliver a statement to the issuer of the security and to each exchange on which the security is traded. Delivery to each exchange can be satisfied by making a filing on the SEC's Electronic Data-Gathering, Analysis, and Retrieval system ("EDGAR"). In addition, the beneficial owner must file with the SEC a statement containing certain information, as well as any additional information that the SEC may deem necessary or appropriate in the public interest or for the protection of investors.

EXCHANGE ACT RULE 13D-1

Rule 13d-1 mandates that a beneficial owner of a class of registered equity security must file a statement containing the information required by Schedule 13D with the SEC, within 10 business days. Schedule 13D requires certain information about shareholders, including (but not limited to):

- the identity of the shareholder,
- how many shares of the company the shareholder owns and how the shares are owned,
- the source of the funds used to buy the shares, and
- the shareholder's purpose for owning the shares.

Alternatively, certain holders of securities of an FPI may be permitted to report their beneficial ownership on Schedule 13G, pursuant to Rule 13d-1(b) of the Exchange Act. The disclosures under Schedule 13G are considerably less detailed than those required by Schedule 13D. Rule 13d-1 contemplates the filing of a Schedule 13G in lieu of a Schedule 13D in the case of a passive investor that owns less than 20 percent of a company (but more than 5 percent) and did not acquire its shares for the purpose, or with the effect, of changing or influencing control of the company. Schedule 13G requires the following disclosures:

- the identity of the shareholder,
- how many shares of the company the shareholder owns and how the shares are owned, and
- certification that the shareholder is a passive investor.

FPIs as Emerging Growth Companies

Title I of the Jumpstart Our Business Startups Act (the "JOBS Act"), adopted in April 2012, established a new category of issuer called an emerging growth company ("EGC"). An EGC is defined as an issuer with total gross revenues of under $1.07 billion (adjusted from $1 billion in March 2017, and subject to inflationary adjustment by the SEC every five years) during its most recently completed fiscal year. A company remains an EGC until the earlier of five years or:

- the last day of the fiscal year during which the issuer has total annual gross revenues in excess of $1.07 billion (subject to inflationary indexing),

- the last day of the issuer's fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act,
- the date on which such issuer has, during the prior three-year period, issued more than $1 billion in nonconvertible debt, or
- the date on which the issuer is deemed a "large accelerated filer."

The phrase "total annual gross revenues" means total revenues as presented on the income statement under U.S. GAAP or IFRS, as issued by the IASB, if used as the basis of reporting by an FPI. If the financial statements of an FPI are presented in a currency other than U.S. dollars, total annual gross revenues for purposes of determining whether an FPI is an EGC should be calculated in U.S. dollars using the exchange rate as of the last day of the most recently completed fiscal year.

Under Title I of the JOBS Act, an FPI may not qualify as an EGC "if the first sale of common equity securities of such issuer pursuant to an effective registration statement under the Securities Act occurred on or before December 8, 2011." According to the SEC, the phrase "first sale of common equity securities" in the JOBS Act is not limited to a company's initial primary offering of common equity securities for cash, and may also include offering common equity pursuant to an employee benefit plan (for example, pursuant to Form S-8), as well as a selling shareholder's secondary offering on a resale registration statement.

If an FPI had a registration statement declared effective on or before December 8, 2011, it can qualify as an EGC (provided the other requirements of the definition are satisfied) so long as the first sale of common equity securities occurs after December 8, 2011. An FPI that is a public company outside of the United States may also qualify as an EGC provided it meets the EGC requirements set forth above.

For FPIs that are EGCs, the JOBS Act allows for a streamlined IPO "on-ramp" process in order to phase-in some of the more comprehensive and costly disclosure requirements. For instance, an EGC has the option to do the following:

- *Confidential Submissions.* An EGC is permitted to submit a draft registration statement on Form 20-F or Form F-1, as well as any amendments, to the SEC for confidential, nonpublic review prior to the public filing, provided that the initial confidential submissions and all amendments are filed with the SEC no later than 15 days prior to the issuer's commencement of the roadshow (note: this 15-day period is not required under the SEC's confidential filing policy solely applicable to FPIs).
- *Testing-the-Waters.* An EGC is permitted to engage in oral or written communications with qualified institutional buyers, or QIBs, and institutional accredited investors in order to gauge their interest in a proposed IPO, either prior to or following the initial filing of the IPO registration statement.
- *Research Report.* A broker-dealer is permitted to publish or distribute a research report about an EGC that it proposes to register or that is in registration. The research report will not be deemed an "offer" under the Securities Act regardless of whether the broker-dealer intends on participating, or is currently participating, in the offering.

- *Audited Financials.* An EGC is required to present only two years of audited financial statements (as opposed to three years) in connection with its IPO registration statement. In any other registration statement or periodic report, an EGC need not include financial information within its selected financial data or in its Management Discussion and Analysis disclosure for periods prior to those presented in its IPO registration statement.
- *Auditor Attestation Report on Internal Control.* An EGC is exempt from the requirement to obtain an attestation report on internal control over financial reporting from its registered public accounting firm.

While the JOBS Act does not explicitly allow an FPI that is an EGC to take advantage of the disclosure accommodations, in the SEC Staff's JOBS Act FAQs, the Staff stated that it will not object to an FPI that opts to take advantage of such exemptions, provided it qualifies as an EGC.

Other Confidential Filing Processes

In its guidance from December 2011 that was updated in May 2012, the SEC Staff announced that it would review initial registration statements of a foreign issuer on a confidential basis only if such issuer is:

- a foreign government registering its debt securities,
- an FPI that is listed or is concurrently listing its securities on a non-U.S. securities exchange,
- an FPI that is being privatized by a foreign government, or
- an FPI that can demonstrate that the public filing of an initial registration statement would conflict with the laws of an applicable foreign jurisdiction.

Foreign issuers that are shell companies, blank-check companies, and issuers with no, or substantially no, business operations are not permitted to confidentially submit their initial registration statements. In addition, the SEC Staff has stated that there may be circumstances in which the Staff will request that a foreign issuer publicly file its registration statement even though it comes within the general parameters of the policy. Examples of these circumstances include a competing bid in an acquisition transaction or publicity about a proposed offering or listing.

Throughout 2012, the SEC sought to harmonize the confidential submission process for FPIs and EGCs. Since October 2012, both FPIs and EGCs are required to submit draft registration statements and response letters to Staff comments through EDGAR. When the FPI or EGC publicly files its registration statement, all previously submitted draft registration statements will become publicly available and all Staff comment letters and issuer response letters will be posted on EDGAR in accordance with Staff policy. However, unless the FPI is seeking to be treated as an EGC, it will not be required to publicly file its registration statement (and the prior confidential submissions) at least 15 days before commencement of the roadshow for the offering.

As of July 2017, the SEC announced that it will accept draft registration statements from all companies for confidential review. As is the case for EGC IPO issuers, any issuer that avails itself of the confidential submission process for its IPO must publicly file its registration statement at least 15 days before the date on which the issuer conducts a roadshow.

An FPI may elect to submit a draft registration statement for confidential review in accordance with these expanded procedures, those available to EGCs, or the May 2012 guidance.

Exempt Offerings in the U.S. Capital Markets

There are a number of alternatives an FPI can use to raise capital that do not require registration with the SEC, such as private placements under Section 4(a)(2) of the Securities Act and Rule 144A offerings.

PRIVATE PLACEMENTS

Under Section 4(a)(2) of the Securities Act, the registration and related prospectus delivery requirements under Section 5 of the Securities Act do not apply to "transactions by an issuer not involving any public offering." The statute itself provides little guidance as to the types of transactions that fall within the scope of Section 4(a)(2). However, judicial and regulatory interpretations have produced a flexible, fact-specific analysis of the types of transactions that could be deemed private offerings, based on the following elements:

- a limited number,
- of financially sophisticated offerees,
- given access to information relevant to their investment position,
- that have some relationship to each other and to the issuer, and
- that are offered securities in a manner not involving any general advertising or solicitation.

It is important to note that the Section 4(a)(2) exemption is available only to the issuer of the securities. This exemption is not available for the resale of securities purchased by investors in a private placement. The issuer claiming the Section 4(a)(2) exemption has the burden of establishing that the exemption is available for the particular transaction. If securities are sold without a valid exemption from registration, Section 12(a)(1) of the Securities Act gives the purchaser the right to rescind the transaction for a period of one year after the sale. The rescission right may be exercised against anyone involved in the sale of the security, including the issuer and any broker-dealer that may have acted as the financial intermediary or placement agent in connection with the offering. Further, any transaction that is not deemed exempt under Section 4(a)(2) will be treated as an unregistered public offering, and the issuer may be subject to liability under U.S. federal securities laws.

RULE 144A OFFERING

Rule 144A provides a nonexclusive safe harbor from the registration and prospectus delivery requirements of Section 5 of the Securities Act for certain offers and sales of qualifying securities by certain persons other than the issuer of the securities. The safe harbor is based on two statutory exemptions from registration under Section 5 of the Securities Act: Section 4(a)(1) and Section 4(a)(3). In summary, Rule 144A provides that:

- for sales made under Rule 144A under the Securities Act by a reseller, other than the issuer, an underwriter, or a broker-dealer, the reseller is deemed not to be engaged in a "distribution" of those securities and, therefore, not to be an "underwriter" of those securities within the meaning of Section 2(a)(11) and Section 4(a)(1) of the Securities Act, and

- for sales made under Rule 144A under the Securities Act by a reseller that is a dealer, the dealer is deemed not to be a participant in a "distribution" of those securities within the meaning of Section 4(a)(3)(C) of the Securities Act and not to be an "underwriter" of those securities within the meaning of Section 2(a)(11) of the Securities Act, and those securities are deemed not to have been "offered to the public" within the meaning of Section 4(a)(3)(A) of the Securities Act.

A Rule 144A offering usually is structured so that the issuer first sells the newly issued restricted securities to an "initial purchaser," typically a broker-dealer, in a private placement exempt from registration under Section 4(a)(2) or Regulation D. Rule 144A then permits the broker-dealer to immediately reoffer and resell the restricted securities to a category of the largest and most sophisticated investors known as qualified institutional buyers ("QIBs") or to persons and entities that the issuer reasonably believes are QIBs.

Corporate Governance

The primary sources for U.S. corporate governance rules are:

- the Securities Act,
- the Exchange Act,
- the rules, regulations, and other guidance issued by the SEC, and
- the listing standards and rules for listed companies published by U.S. securities exchanges.

An FPI registered in the United States may also continue to follow certain corporate governance practices in accordance with its home-country rules and regulations. The SEC and the U.S. securities exchanges acknowledge the disparities between domestic and foreign governance practices and the potential cost of conforming to U.S. standards. Accordingly, an FPI may choose to rely on exemptions from certain corporate governance requirements and rely on its home-country governance practices (particularly with respect to audit committee and compensation committee requirements).

AUDIT COMMITTEES

The SEC provides exemptions to its independence requirement for Audit Committee members in order to accommodate the following global practices:

- *Employee representation:* If a non-management employee is elected or named to the board of directors or audit committee of an FPI pursuant to the FPI's governing law or documents, an employee collective bargaining or similar agreement, or other home-country legal or listing requirement, he or she may serve as a committee member.
- *Two-tiered board systems:* A two-tiered system consists of a management board and a supervisory/non-management board. The SEC treats the supervisory/non-management board as a "board of directors" for purposes of Rule 10A-3(b)(1) of the Exchange Act. As such, an FPI's supervisory/non-management board can either form a separate audit committee or, if the supervisory/non-management board is independent, the entire supervisory/non-management board can be designated as the audit committee.

- *Foreign government representation:* In some instances, a foreign government may be a significant shareholder or own special shares that entitle the government to exercise certain rights related to an FPI. The SEC permits a representative of a foreign government or foreign governmental entity to be an audit committee member, subject to certain conditions.
- *Board of auditors:* The SEC permits auditor oversight through a board of auditors, subject to certain conditions.

The U.S. securities exchanges, such as the New York Stock Exchange ("NYSE") and Nasdaq, also impose rules and regulations governing audit committee composition and disclosures for companies that list on their exchanges. Like the SEC, each exchange provides exemptions for an FPI that wishes to follow its home-country practices in lieu of the U.S. securities exchange rules. For example, under Nasdaq rules, an FPI opting to follow its home-country audit committee practices is required to submit a letter from home-country counsel certifying its practice is not prohibited by home-country law. An FPI is required to submit such a letter only once, either at the time of initial listing or prior to the time the FPI initiates a nonconforming audit committee practice. Similarly, under the NYSE Listed Companies Manual, an FPI may follow its home-country audit committee practice, provided it:

- discloses how its corporate governance practices differ from those of domestically listed companies,
- satisfies the independence requirements imposed by Section 10A-3 of the Exchange Act,
- certifies to the NYSE that the FPI is not aware of any violation of the NYSE corporate governance listing standards, and
- submits an executed written affirmation annually or an interim written affirmation each time a change occurs to the FPI's board or any of its committees, and includes information, if applicable, indicating that a previously independent audit committee member is no longer independent, that a member has been added to the audit committee, or that the FPI is no longer eligible to rely on, or has chosen not to continue to rely on, a previously applicable exemption to the audit committee independence rules.

COMPENSATION COMMITTEES

Form 20-F requires an FPI to disclose information regarding its compensation committee, including the names of the committee members and a summary of the terms under which the committee operates. Similar to audit committees, both the NYSE and Nasdaq permit an FPI to follow home-country practices with respect to its compensation committee.

Liability Under U.S. Securities Laws

SECURITIES ACT SECTION 11

Directors and officers of an FPI who sign a registration statement filed in connection with a securities offering are subject to the liability provisions of Section 11 of the Securities Act. Section 11 of the Securities Act creates civil liability for misstatements or omissions in a registration statement at the time it becomes effective. Any person that acquired a security registered under a registration statement and that did not have knowledge of the misstatement or omission at the time of the acquisition of the security can bring suit against: (1) every person who signed the registration statement, including the issuer, (2) every director of the issuer at the time of the filing of the registration statement, whether or not such director signed the registration statement, (3) experts who consent to the registration statement, but only with respect to those sections which they have "expertized," and (4) underwriters. In addition, Section 15 of the Securities Act permits a plaintiff in an action for damages under Section 11 to assert claims against any person who controls any of the foregoing persons, including controlling shareholders who are not also officers and directors of the issuer, by or through the ownership of stock or an agency relationship.

Section 11 is a strict liability provision. Therefore, a plaintiff is not required to prove intent or knowledge with respect to a misstatement or omission in a registration statement. In addition, a plaintiff bringing a cause of action under Section 11 does not have to show reliance on a misstatement or omission. However, reliance must be established if the plaintiff purchased the securities after the publication of an earnings statement covering a 12-month period after the effective date of the registration statement.

Section 11(e) limits the amount of recoverable damages to the difference between the price paid (not to exceed the public offering price) and (1) the value of the security as of the time the suit was brought, (2) the price at which the security would have been disposed of in the open market before the suit, or (3) the price at which the security would have been disposed of after the suit but before judgment, if the damages would be less than the damages representing the difference between the amount paid for the security (not to exceed the public offering price) and the value of the security at the time the suit was brought, subject to certain exceptions. Section 11, however, also provides that defendants may reduce the amount of damages by proving that the market depreciation of the securities was due to factors other than the misstatement or omission.

In the case of private placements, an FPI may be subject to liability under Section 11 and Section 12 (discussed below) of the Securities Act if the court determines that the "private placement" was actually a public offering and that the registration requirements of the Securities Act were not satisfied.

SECURITIES ACT SECTIONS 12 AND 13

Section 12 of the Securities Act assigns liability to any person who offers or sells a security in violation of Section 5 of the Securities Act (pursuant to Section 12(a)(1)), or by means of a prospectus or oral communication that includes a misstatement or omission of material fact (pursuant to Section 12(a)(2)). Plaintiffs bringing a claim under Section 12 are afforded rescission rights, if they still have ownership of the securities, or damages, if they no longer own the security.

Note that no action under Section 11 or Section 12(a)(1) may be brought more than three years after the bona fide public offering of a security, or, in the case of Section 12(a)(2), more than three years after the actual sale of a security.

EXCHANGE ACT RULE 10b-5

Rule 10b-5 of the Exchange Act prohibits: (1) the use of any device, scheme, or artifice to defraud, (2) the making of any untrue statement of a material fact or the omission of a material fact necessary to make the statements made not misleading, or (3) the engaging in any act, practice, or course of business that would operate to deceive any person in connection with the purchase or sale of any securities. To bring a successful cause of action under Rule 10b-5, the plaintiff must prove (i) that there was a misrepresentation or failure to disclose a material fact, (ii) that was made in connection with plaintiffs' purchase or sale of a security, (iii) that defendants acted with "scienter," or the intent or knowledge of the violation, (iv) that plaintiffs "relied" on defendants' misrepresentation or omission, and (v) that such misrepresentation or omission caused plaintiffs' damages.

An FPI may also be subject to liability under Section 10b-5 for material misstatements and omissions made in connection with a private placement.

EXCHANGE ACT REGULATION M

An FPI is subject to Regulation M under the Exchange Act. Regulation M prohibits any participant in a distribution of securities from purchasing any security or securities of the same class or series until the participant has completed its participation in the distribution. Regulation M is designed to prevent market priming or stock price manipulation in a distribution of securities. Potential participants covered under Regulation M include the issuer, underwriters, placement agents, brokers, dealers, control persons, selling shareholders, and officers and directors. Regulation M does allow for certain exemptions, and the SEC may grant additional exemptions upon request.

Losing FPI Status

If a reporting FPI determines that it no longer qualifies as an FPI, it must come into compliance with the registration and reporting requirements of U.S. domestic companies beginning on the first day of the next fiscal year. Under those circumstances, the FPI could typically continue using the registration and reporting forms for FPIs until the end of its fiscal year.

If, however, an FPI no longer meets the definition of an FPI because it incorporates in a U.S. jurisdiction, then it must immediately begin filing reports under the Exchange Act as a U.S. company.

The NYSE generally provides for a six-month transition period for most of its FPI accommodations when a company loses its FPI status. Nasdaq does not specify a transition period.

Deregistering Securities

Complying with the ongoing reporting obligations imposed by the Exchange Act is both expensive and labor intensive. FPIs who elect to deregister securities may save time and money by removing requirements imposed by the Exchange Act and The Sarbanes-Oxley Act of 2002. Deregistration can be done by filing a Form 15F with the SEC.

Upon deregistering securities, an FPI must also delist any securities listed on an exchange. Rule 12d2-2 of the Exchange Act permits an FPI to withdraw a class of securities from being listed on a U.S. securities exchange and/or from registration under Section 12(b) of the Exchange Act. To delist a security from a national exchange, an FPI must file an application to withdraw from listing on the exchange via Form 25. Such application will become effective 10 days after the form is filed with the SEC. An application to withdraw registration of a class of securities under Section 12(b) will become effective within 90 days after the form is filed.

An FPI must also provide notice of its intention to deregister either before or on the date it files a Form 15F. Notice must be published "through a means reasonably designed to provide broad dissemination of the information to the public in the United States." The FPI must also submit a copy of the notice to the SEC, via Form 6-K before or at the time of filing of the Form 15F, or as an exhibit to the filed Form 15F.

Checklist of Key Questions

- ✓ How does an issuer qualify as a FPI?
- ✓ How can an FPI offer securities publicly in the United States?
- ✓ What type of securities can an FPI offer in the United States?
- ✓ What Exchange Act filings must an FPI make with the SEC?
- ✓ When can an FPI follow its home-country rules with respect to corporate governance?
- ✓ How can an FPI raise capital through exempt offerings?
- ✓ When is an FPI exempt from Exchange Act reporting requirements?
- ✓ In what ways can directors and officers of an FPI be subject to liability under U.S. federal securities law?
- ✓ How can an FPI deregister its securities?
- ✓ What reporting obligations are imposed on directors, officers, and significant security holders of an FPI?
- ✓ How can an FPI come into compliance with reporting requirements for domestic companies if it loses its status as an FPI?