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Foreign Private Issuers: Have You Assessed Your Status Under US Securities Laws?

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For foreign private issuers registered with the U.S. Securities and Exchange Commission (SEC), there are several filing statuses that affect the content of various disclosures that must be made public. Foreign private issuers filing periodic reports with the SEC must at least annually assess their status to determine which SEC requirements are applicable to them. This alert explores these various SEC statuses as applicable to foreign private issuers.

Assessing Status as a Foreign Private Issuer

Foreign private issuers enjoy the benefits of significant disclosure accommodations under U.S. federal securities laws. The determination of whether an issuer satisfies the definition of "foreign private issuer" (FPI) must generally be made annually on the last business day of an issuer's second fiscal quarter (the last business day in June for issuers with a December 31 fiscal year end). For more information on assessing FPI status, see our alert detailing how to perform this important assessment.

Qualifying as an Emerging Growth Company as an SEC Reporting Issuer

Scaled SEC disclosure accommodations are also available to U.S. reporting issuers that are emerging growth companies (EGCs). One of the most significant of these accommodations exempts EGCs from the requirement to provide the burdensome annual auditor attestation of the issuer's management's report on internal control over financial reporting under the Sarbanes-Oxley Act of 2002, as amended (SOX). In addition, EGCs may defer compliance with certain changes in accounting standards. FPIs are permitted to take advantage of the disclosure accommodations available to EGCs.

An issuer qualifies as an EGC if it has total annual gross revenues of less than US$1.235 billion (periodically adjusted for inflation) during its most recently completed fiscal year end, and as of December 8, 2011, had not sold common equity securities under a registration statement filed under the Securities Act of 1933, as amended (Securities Act). However, an issuer of equity securities cannot retain EGC status indefinitely. An issuer may retain EGC status for the first five years after completing its first U.S. equity offering, with the status being lost on the last day of the issuer's fiscal year following the fifth anniversary of the date of the first sale of common equity securities pursuant to an effective Securities Act registration statement. Additionally, EGC status will be retained until the earliest of (1) the last day of the fiscal year in which the issuer has annual gross revenues exceeding US$1.235 billion (periodically adjusted for inflation), (2) the date on which the issuer issues more than US$1 billion in nonconvertible debt securities during the previous three years, (3) the date on which the issuer becomes a "large accelerated filer" (see "Determining SEC Accelerated Filing Status" below for more details), and (4) the last day of the fiscal year after the fifth anniversary of the date of the first sale of common equity securities under an effective Securities Act registration statement. Once EGC status is lost, it cannot be regained while an issuer is an SEC reporting issuer.

Determining SEC Accelerated Filing Status

With certain limited exceptions, all SEC reporting issuers, including FPIs, have a filing status based on the size of an issuer's public float.[1] These categories include non-accelerated filer, accelerated filer, and large accelerated filer. Upon their initial registration of securities with the SEC, all issuers are classified as non-accelerated filers, as a 12-month reporting history and at least one annual report is required to be an accelerated or large accelerated filer. After the first 12 months of reporting history and first annual report, an issuer must make its initial assessment as to its filing status.

The following table sets forth the relationship between filing status and an issuer's public float: