

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 public disclosures that must be made. 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 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 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

Scaled SEC disclosure accommodations are also available to 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 5th 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:

Determining SEC Accelerated Filing Status	
<i>(For issuers for which the revenue tests for smaller reporting companies are unavailable.)</i>	
Status	Public Float
Non-accelerated filer	Less than US\$75 million (an issuer that does not meet the definition of accelerated filer or large accelerated filer)
Accelerated filer	US\$75 million or more, but less than US\$700 million
Large accelerated filer	US\$700 million or more

FPIs must make this assessment for the coming fiscal year based on the issuer's public float as of the last business day of the most recently completed second fiscal quarter. For example, for fiscal year 2025, an issuer with a December 31 fiscal year end would determine its accelerated status based on its public float as of June 28, 2024, the last business day of the most recently completed second fiscal quarter.

For an FPI, the principal consequence of an issuer's filing status is that non-accelerated filers are not required to provide the SOX-mandated annual auditor attestation on management's report on the issuer's internal control over financial reporting. An FPI that is an accelerated filer or a large accelerated filer must provide such disclosure, unless such an issuer is also an EGC or another exemption is potentially available to it.

Generally speaking, once an issuer determines its filing status, it will retain that status until it determines at a future status assessment that its public float meets the thresholds set out below.

Determining SEC Accelerated Status After Initial Assessment		
<i>(For issuers for which the revenue tests for smaller reporting companies are unavailable.)</i>		
Initial Assessment	Subsequent Public Float	Subsequent Status
Large accelerated filer	US\$560 million or more	Large accelerated filer
	Less than US\$560 million, but US\$60 million or more	Accelerated filer
	Less than US\$60 million	Non-accelerated filer

Accelerated filer	US\$700 million or more	Large accelerated filer
	Less than US\$700 million but US\$60 million or more	Accelerated filer
	Less than US\$60 million	Non-accelerated filer
Non-accelerated filer	US\$700 million or more	Large accelerated filer
	Less than US\$700 million, but US\$75 million or more	Accelerated filer
	Less than US\$75 million	Non-accelerated filer

Evaluating MJDS Eligibility

For Canadian issuers, another status to track is eligibility for the SEC's multijurisdictional disclosure system (MJDS). The MJDS allows eligible Canadian issuers to register securities and make regular disclosures using materials mostly prepared according to Canadian requirements. Eligible issuers can use the Form F-10 securities registration statement and the Form 40-F annual report, both of which largely serve to "wrap" their Canadian disclosures under an SEC submission.

To be eligible to use the MJDS, an issuer generally must:

- Be incorporated or organized under the laws of Canada or any Canadian province or territory;
- Be a foreign private issuer;
- Have been reporting for the preceding 12 months with Canadian securities regulatory authorities;
- Be currently in compliance with such reporting obligations; and
- Have an aggregate market value of the public float of its outstanding equity shares of at least US\$75 million.

Eligibility to use the MJDS Forms F-10 and 40-F must be determined based on the public float in the issuer's principal market^[2] for such shares within 60 days prior to the date of the filing. That is, so long as the issuer's public float is more than US\$75 million as of any date within 60 days of the filing of the Form F-10 or Form 40-F, such forms may be used.

Substantial U.S. Market Interest

Whether an FPI has substantial U.S. market interest (SUSMI) will affect the way in which a securities offering can be made *outside* the U.S. in reliance on Regulation S under the Securities Act.

SUSMI for an issuer's equity securities^[3] occurs if, during the issuer's past fiscal year, one of the following two criteria is met:

- The U.S. securities exchanges and inter-dealer quotation systems constituted, in the aggregate, the largest

market for the securities; or

- Twenty percent or more of all trading in the securities took place via the U.S. securities exchanges and inter-dealer quotation systems and less than 55% of all trading in the securities took place via another country's securities markets.

If an FPI has SUSMI, certain requirements apply to offers and sales of securities of that FPI that are made outside the U.S., which include the requirement to observe a specified distribution compliance period following the offering during which the securities must not be offered or sold to a U.S. person or for the account or benefit of a U.S. person (other than a distributor). This situation may also potentially impact the manner in which an underwriter or placement agent for an offering of securities for such issuer may be able to or willing to conduct an offering of securities for such issuer as well.

Conclusion

Should you require any assistance in assessing your SEC status under any of the rules applicable to foreign private issuers, please contact [Thomas Rose](#), [Shona Smith](#), or [Nicole Edmonds](#).

[1] “Public float” means the aggregate worldwide market value of the issuer’s voting and non-voting common equity held by non-affiliates. An affiliate is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with the issuer. In determining SEC accelerated filing status, “affiliates” typically includes an issuer’s executive officers, directors, and shareholders owning 10% or more of the issuer’s common equity. Public float is measured as of the last business day of the issuer’s most recently completed second fiscal quarter and computed by multiplying the aggregate worldwide number of shares of its voting and non-voting common equity held by nonaffiliates by the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity.

[2] Determining “public float” for purposes of determining MJDS eligibility is different than for determining SEC accelerated filing status. For MJDS eligibility “public float” is the aggregate market value held by anyone who beneficially owns, directly or indirectly, or exercises control or direction over, more than 10% of the issuer’s outstanding equity shares. The determination of an issuer’s affiliates shall be made as of the end of the issuer’s most recent fiscal year. The market value of the public float is computed by use of the price at which such shares were last sold, or the average of the bid and asked price of such shares, in the principal market for such shares as of any one date within 60 days prior to the filing date.

[3] “Substantial U.S. market interest” exists for an issuer’s debt securities occurs if:

- the issuer’s debt securities are held of record by 300 or more U.S. persons;

- US\$1 billion or more of the outstanding principal amount of the issuer's debt securities are held of record by U.S. persons; or
- 20% or more of the outstanding principal amount of the issuer's debt securities are held of record by U.S. persons.

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