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Time to Assess “Foreign Private Issuer” Status – 2023

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It is time to assess “foreign private issuer” status. Foreign public and private issuers enjoy the benefits of significant exemptions and exclusions from registration under U.S. federal securities laws based on whether they are “foreign private issuers” as defined under the U.S. federal securities laws. The determination of whether issuers satisfy the definition must be run on June 30, 2023 for issuers with a December 31 fiscal year end.

The treatment under U.S. federal securities laws of issuers organized in a jurisdiction outside the United States depends upon whether such issuers (both public and private) are considered “foreign private issuers” under the U.S. definition. This determination will govern, among other things: (1) whether issuers have a U.S. public reporting obligation, and if so, whether they report on foreign forms or domestic forms; and (2) the manner in which they offer their securities both inside and outside the United States.

In most circumstances, under U.S. federal securities laws, issuers must assess their “foreign private issuer” status ***as of the last business day of their most recently completed second fiscal quarter***. For many companies with a December 31 fiscal year end, their “foreign private issuer” assessment date falls on Friday, June 30, 2023.

The definition of “foreign private issuer” has two parts, and an issuer must fail both parts to not be deemed a “foreign private issuer.” One part of the definition is easier to evaluate, namely whether ***all of the following are true***:

1. A majority of the executive officers ***and*** a majority of the directors of the issuer are ***not*** U.S. citizens or residents;

2. More than 50% of the assets of the issuer are ***not*** located in the United States; ***and***

3. The issuer’s business is ***not*** administered principally in the United States.

If all of the above are true, then the analysis ceases, and an issuer retains its “foreign private issuer” status.

If any of the above ***are not true***, then the issuer must move to the second part of the test, which requires the issuer to confirm that more than 50% of its outstanding voting securities are not directly or indirectly owned of record by residents of the United States. Although this determination is based on record ownership, an issuer must look through the record ownership of brokers, dealers, banks, and nominees in the United States, its jurisdiction of

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incorporation, and its primary trading market to the underlying holders to determine whether its U.S. ownership exceeds 50%. This determination generally requires a U.S. and foreign geographic survey to be run as of the last business day of the second fiscal quarter. If more than 50% of the outstanding voting securities are owned of record (determined as described above) by U.S. residents, then “foreign private issuer” status would be lost, and the significant ramifications of losing such status must be considered.

It is important that such analysis be run as of the last business day of the second fiscal quarter because, for example, Broadridge (which conducts the geographic surveys in Canada and the United States) cannot run its analysis retroactively.

If you have any questions about the test or need assistance in running such test, please contact Tom Rose at 757.687.7715, Shona Smith at 206.371.2357, or Nick Dowdle at 617.204.5142.

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