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SEC Guidance on Definition of "Foreign Private Issuer"

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On December 8, 2016, the staff of the U.S. Securities and Exchange Commission (SEC) updated its Compliance and Disclosure Interpretations (C&DIs) to provide further guidance on the definition of "foreign private issuer" under Rule 405 under the *Securities Act of 1933*, as amended (Securities Act), and Rule 3b-4(c) under the *Securities Exchange Act of 1934*, as amended (Exchange Act).

Background

Securities Act Rule 405 and Exchange Act Rule 3b-4(c) each define "foreign private issuer" as any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

- more than 50% of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and
- any of the following: (i) the majority of the executive officers or directors are U.S. citizens or residents; (ii) more than 50% of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

Updated Staff Guidance

Determining percentage of U.S. residents holding voting securities when the issuer has multiple voting classes:

An issuer that has multiple classes of voting stock with different voting rights may choose one of two methods to determine whether more than 50% of the issuer's outstanding voting securities are directly or indirectly owned of record by residents in the United States: (i) the issuer may look to whether more than 50% of the voting power of those classes on a combined basis is directly or indirectly owned of record by residents of the United States; or (ii) the issuer may make the determination based on the number of voting securities. An issuer should be consistent in applying its methodology.

Determining percentage of voting securities held by U.S. residents:

For the purpose of determining whether 50% of the issuer's outstanding voting securities are held of record by U.S. residents, a person who has permanent resident status in the United States is presumed to be a U.S. resident. Other individuals without permanent resident status may also be U.S. residents. In these circumstances, an issuer must decide what criteria it will use to determine residency and apply them consistently without changing them to achieve a desired result. Examples of factors an issuer may apply include tax residency, nationality,

mailing address, physical presence, the location of a significant portion of their financial and legal relationships, and immigration status.

Determining percentage of U.S. executive officers and directors:

For the purpose of determining whether a majority of the executive officers or directors are U.S. citizens or residents, each group of persons must be treated separately. In effect, the issuer must make four determinations: the citizenship status of executive officers, the residency status of executive officers, the citizenship status of directors and the residency status of directors. If the issuer has two boards of directors, the issuer must make the determination with respect to the board that performs the functions closest to those undertaken by a U.S.-style board of directors. If those functions are divided between the two boards, the issuer may aggregate the members of both boards for the purpose of calculating the majority.

Determining percentage of assets located outside the United States:

For the purpose of determining whether more than 50% of the assets of an issuer are located outside the United States, an issuer can use the geographic segment information determined in the preparation of its financial statements. Alternatively, an issuer may apply on a consistent basis any other reasonable methodology in assessing the location and amount of its assets for the purpose of this determination.

Determining whether the issuer's business is administered principally in the United States:

There is no single factor or group of factors that is determinative of whether an issuer's business is principally administered in the United States. The issuer must assess on a consolidated basis the location from which its officers, partners or managers primarily direct, control and coordinate the issuer's activities. Holding an annual or special meeting of shareholders or occasional meetings of the issuer's board of directors in the United States would not necessarily result in a determination that the issuer's business is administered principally in the United States.

If you have any questions regarding the foregoing, please contact Jeffrey Nadler (212.588.5505) in our New York office.

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