SECURITIES DISCLOSURE

Measuring Foreign Private Issuer Status

Given the significant accommodations afforded to foreign private issuers under U.S. securities laws, it is critical that a foreign company be able to evaluate with precision its status as a foreign private issuer. An understanding of the foreign private issuer definition and the associated determination dates will better enable a company to make informed business decisions that enable it to qualify, and thereafter continue to qualify, as a foreign private issuer.

By Ryan Dzierniejko, Andrew Brady, and Riccardo Leofanti

As part of its long-standing policy to facilitate the access of foreign companies to the U.S. capital markets, the United States Securities and Exchange Commission (SEC) historically has made significant regulatory accommodations to foreign companies that qualify as "foreign private issuers." However, not every company organized outside the United States is a foreign private issuer. Rather, a definitional test exists under U.S. securities laws to distinguish between foreign companies that are truly foreign in nature and foreign companies that are so closely associated with the United States that policy considerations dictate that they should be subject to the same registration and disclosure requirements applicable to domestic U.S. companies.

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As of December 31, 2012, there were 946 foreign private issuers registered and reporting with the SEC.[1] These companies accounted for approximately 10 percent of all registered and reporting issuers.[2] Given the significant accommodations afforded to foreign private issuers under U.S. securities laws, it is critical that these companies (and foreign companies that may in the future become SEC registrants) be able to evaluate with precision their status as foreign private issuers. Unfortunately, however, the SEC and its Staff have provided only limited (and generalized) guidance on how to apply the definitional foreign private issuer test. Likewise, third-party literature often glosses over the test itself, rarely focusing on nuances inherent in the test. As a result, foreign companies and their advisors are often left struggling to interpret a company's foreign private issuer status.

Determining Foreign Private Issuer Status

Definition of "Foreign Private Issuer"

The term "foreign private issuer" is defined in Rule 405 under the U.S. Securities Act of 1933 (Securities Act) and Rule 3b-4 under the U.S. Securities Exchange Act of 1934 as any issuer incorporated or organized under the laws of a foreign country, *except* an issuer meeting both of the following conditions:

(i) more than 50 percent of the outstanding voting securities of the issuer are directly or indirectly held of record by residents of the United States; *and*

(ii) *any one* of the following:

(a) the majority of the executive officers or directors of the issuer are United States citizens or residents; or

(b) more than 50 percent of the assets of the issuer are located in the United States; or

(c) the business of the issuer is administered principally in the United States.

Thus, the definition of "foreign private issuer" has two parts, one based on the foreign company's level of U.S. shareholdings (the shareholder test), and the other based on its contacts with the United States (the business contacts test). A foreign company that passes the shareholder test need not consider the business contacts test and vice versa. The purpose of these tests is to exclude from the definition of foreign private issuer those foreign companies that have sufficient contacts with the United States such that the SEC considers them to be "essentially U.S. issuers."[3] Any foreign company that claims foreign private issuer status must be able to support that determination should the Staff question that determination in connection with a review of any of the company's SEC filings. In practice, the Staff generally does not make its own analysis or question a foreign company's analysis of its foreign private issuer status unless an issue arises that suggests the issuer has not applied the definition correctly.

Application of the Shareholder Test

General method. In September 1999, the SEC adopted amendments to the definition of foreign private issuer that, in effect, changed the underpinnings of the shareholder test such that the test focused more closely on beneficial ownership of the foreign company's securities, as opposed to record ownership.[4] The SEC took the view that the increased prevalence of offshore nominees and custodial accounts made record ownership less meaningful for purposes of determining U.S. ownership. In the SEC's view, a test based more closely on beneficial ownership would give a better picture of whether a company incorporated outside the United States should be entitled to the accommodations afforded to foreign private issuers under U.S. securities laws.

As revised, the shareholder test is based on the method of calculation used in Rule 12g3-2(a) under the Exchange Act, which follows the definition of "securities held of record" in Rule 12g5-1 under the Exchange Act but requires the issuer to "look through" the record ownership of brokers, dealers, banks, or nominees holding securities for the accounts of their customers to determine the residency of those customers.[5] In recognition of the global nature of modern-day securities holdings and the potentially significant burden created by requiring a "look through" in jurisdictions where the likelihood of finding U.S. holders is small,[6] the "look through" provisions of Rule 12g3-2(a) are limited to a maximum of three jurisdictions: (1) the United States; (2) the foreign company's home jurisdiction; and (3) the primary trading market for the foreign company's securities, if different from the foreign company's home jurisdiction.[7] Limiting the "look through" provisions to these jurisdictions is intended to cover most of the trading volume for the foreign company's securities, and searches in these jurisdictions are likely to yield the greatest number of U.S. beneficial owners, thereby reducing the burden on foreign companies while still producing a reasonably accurate picture of whether the company is a foreign private issuer.

The response to these "look through" inquiries may produce additional layers of nominees. In these cases, the Staff's view is that the inquiry should continue with any newly identified nominees and terminate only when it becomes clear that responsive information is unavailable. In all instances, the foreign company is expected to make a good faith effort to obtain the information. The SEC has noted that even if a nominee refuses to provide detailed information such as the identity and residency of individual customer accounts, the nominee still may be willing to provide general information such as the total number of shares it holds as nominee and the percentage of those shares held by customer accounts with U.S. addresses. If, after reasonable inquiry, the foreign company is unable to obtain information about the nominee's customer accounts, including cases where the nominee's fee for supplying this

information would be unreasonable, the company may rely on a presumption that the customer accounts are held in the nominee's principal place of business.[8]

In applying the "look through" provisions to certain corporate or similar shareholders, foreign companies and their advisors must examine whether the shareholder is publicly or privately held. The Staff has advised informally that if the owner of a foreign company's securities is a publicly-held enterprise, the company need not inquire into the proportion of the enterprise's securityholders that reside in the United States.[9] Rather, it may treat the enterprise as one shareholder and its jurisdiction of organization or incorporation as its "residence." If the enterprise is private or closely held (*e.g.*, a private equity limited partnership), the Staff has informally advised that the "look through" provisions apply *only* where the facts and circumstances demonstrate that the underlying securityholders of the private or closely held entity would be deemed beneficial owners of the securities of the potential foreign private issuer.[10] Beneficial ownership, of course, is found where a person exercises either voting or investment control.[11] In the case where an underlying securityholder validly can disclaim beneficial ownership (*e.g.*, as a result of contractual limitations imposed on limited partners under a partnership agreement), the "look through" provisions will not reach such securityholder and their residence is not relevant to the determination of foreign private issuer status.

In addition to the nominee inquiries, the foreign company also must take into account information from two other sources. First, the foreign company must consider information regarding U.S. ownership derived from beneficial ownership reports that are provided to the company or filed publicly.[12] This inquiry is not limited to reports filed with the SEC (or the three jurisdictions mentioned above). Second, the foreign company must consider any "actual knowledge" that it has about its shareholders.

With respect to determining the "residency" of a company's shareholders, companies occasionally are faced with shareholders who, for example, reside half the year in the United States and half the year outside the United States. In recent discussions with the Staff, the authors have confirmed that a company in this situation should decide what criteria it will use in determining residency and then apply those criteria consistently. Whether the basis is tax residency, nationality, mailing address, or some other test, the criteria should be applied consistently and not changed in order to achieve a desired result.

The shareholder test and two-tiered share structures. An additional layer of complexity presents itself in the context of two-tiered share structures. In some countries, it can be common for public companies to have a two-tiered structure for their common equity, consisting of a class of subordinate voting shares and a class of multiple voting shares. The multiple voting shares are often held by the issuer's founders as a means of enabling them to retain control while also allowing the public to participate in equity ownership.[13] The question arises as to whether "outstanding voting securities" should be interpreted, in the context of a two-tiered share structure, as referring to the number of *shares* of the company or the number of *votes* attached to the shares of the company. This distinction can be pivotal in determining whether the company's level of U.S. shareholdings is greater than 50 percent, and consequently, whether foreign private issuer status can be obtained.

The definition of "foreign private issuer" in Rule 405 refers to "voting securities." It does not refer to votes attaching to the voting securities. A plain reading of the rule[14] would therefore suggest that one should measure the number of the securities and not the number of votes attached to those securities.

The instructions accompanying the definition of "foreign private issuer" in Rule 405 reinforce

the conclusion that "outstanding voting securities" refers to the number of securities of an issuer and not to the votes attached to the securities of the issuer. The instructions are as follows:

To determine the percentage of outstanding voting securities held by U.S. residents:

1. Use the method of calculating record ownership in Rule 12g3-2(a) under the Exchange Act, except that your inquiry as to *the amount of shares* represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in: (1) the United States, (2) your jurisdiction of incorporation, and (3) the jurisdiction that is the primary trading market for your voting securities, if different than your jurisdiction of incorporation.
2. If, after reasonable inquiry, you are unable to obtain information about the *amount of shares* represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.
3. *Count shares of voting securities* beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you. [emphasis added]

The first and second instructions to the definition reference an inquiry as to "*the amount of shares* represented by accounts of customers resident in the United States," and the third instruction directs one to "*[c]ount shares* of voting securities beneficially owned by residents of the United States." If the determination of whether more than 50 percent of a foreign company's outstanding voting securities are owned of record by residents of the United States required a count of the votes attached to the issuer's securities, the instructions should point to an inquiry into the "amount of votes" and direct one to "count the votes." Since that is not the case, the instructions of Rule 405 further support the focus of the shareholder test on the number of securities, not the number of votes attached to those securities.

Further, the conclusion that, in the context of a two-tiered share structure, "outstanding voting securities" refers to the number of securities of the company, as opposed to the number of votes attached to those securities, is supported from a policy perspective. A foreign company with the vast majority of its shares held in the United States should be regulated as a domestic issuer (assuming the other requirements to be classified as a domestic U.S. issuer are met), even if the remaining minority of shares outside of the United States hold the majority of the votes. Conversely, it would not be appropriate to regulate a foreign company as a domestic U.S. issuer where the public securities are overwhelmingly held by foreign persons, yet a small number of domestic residents possess the bulk of the votes.

Application of the Business Contacts Test

For foreign companies that have a majority of voting securities held of record (directly or indirectly) by U.S. residents, the business contacts test will be the determining factor in their status as a foreign private issuer. The test has three parts: (1) citizenship and residency; (2) location of assets; and (3) administration of business.

Citizenship and residency. This part of the test focuses on the residency and citizenship[15] of the foreign company's executive officers and directors. A foreign company will not pass this part of the test if: (1) a majority of its executive officers are United States citizens; or (2) a majority of its executive officers are residents of the United States; or (3) a majority of its directors are United States citizens; or (4) a majority of its directors are residents of the United States.

Rule 3b-7 under the Exchange Act and Rule 405 under the Securities Act define the term "executive officer" as a company's president, any vice president in charge of a principal business unit, division or function (such as sales, administration, or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the company. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform such policy making functions for the issuer.[16] Under this definition, the term "executive officer" refers to those members of senior management with significant policy-making functions. The definition is intended to *exclude* individuals whose job titles are consistent with those traditionally given to executive officers, but who do not participate in management decisions that steer the direction of the company. Further, the definition is intended to *include* individuals who do not have such job titles, but whose roles involve major management responsibilities or significant policy-making functions. Policy-making functions include both business and legal decisions. The SEC has noted that, "[p]olicy-making function' is not intended to include policy-making functions that are not significant."[17] A company should have a reasonable and objective basis for deciding which employees perform significant policy-making functions and are therefore considered to be executive officers, and the parameters of the group should not be changed in order to achieve a desired result.[18]

If a foreign company has more than one board of directors, it should determine which body performs functions most like those of a U.S.-style board of directors. If these functions are divided between both boards, the company may be permitted to aggregate the members of both boards for purposes of determining the outcome of this part of the business contacts test. A foreign company with dual boards of directors must apply this same functional analysis when it determines which directors must sign its Securities Act registration statements.[19]

Because a company presumably has significant control over the residency of its executive officers and directors, it should follow that it has greater flexibility to determine the outcome of this part of the business contacts test. There is no intent requirement in the test, and as long as individuals are not temporarily reassigned to influence the outcome of the test, the residency decisions are not likely to be second-guessed by the Staff.[20]

Location of assets. This part of the test focuses on the geographic location of the foreign company's assets and asks whether a majority of the company's assets are located in the United States. While there is no formal SEC guidance on measuring or determining the location of assets in applying this test, the Staff has confirmed that it is unlikely to object to a particular measurement or allocation methodology as long as it is rationally based and rigorously applied, without considering in advance what the likely result will be.[21]

As noted in correspondence between the International Practices Task Force and the Staff,[22] the following methodologies may be considered in performing the asset test:

Accounting approach. The accounting approach suggests that, in performing the asset test, the foreign company apply the measurement methodology used in its underlying financial statements prepared in accordance with generally accepted accounting principles in the United States (U.S. GAAP), or generally accepted accounting principles (GAAP) used in the primary financial statements, if the financial statements are reconciled to U.S. GAAP. Under the accounting approach, the location of the assets would be the same as that determined in financial reporting for purposes, such as segment information.

Full fair value approach. Under the fair value approach, the foreign company must compare the fair value of its assets in the United States to the

fair value of its assets outside the United States. This approach may be useful where a company with significant assets outside the United States acquires an entity with significant operations inside the United States, and records a considerable amount of goodwill in connection with the acquisition. In this instance, under the accounting approach, a disproportionate amount of assets may be associated with the U.S. operations relative to the fair value of the combined entity.

Historical cost basis approach. Under the historical cost basis approach, if a fair value measurement method is used under the GAAP of the primary financial statements, the historical cost basis permitted by that GAAP may be used for purposes of the asset test.

It is possible that the allocation methodology used by the foreign company in the asset test may differ from that underlying the presentation of segment assets or entity wide assets on a geographic basis under Statement of Financial Accounting Standards No. 131.[23] For instance, in connection with segment disclosure, the location of a tangible asset may be determined by reference to the physical location of the asset itself. However, in performing the asset test, there may be circumstances under which it is appropriate to allocate a portion of the value of the tangible asset to a location other than where the asset is physically located (*e.g.*, some companies may have an information system housed in one location, but used in multiple countries—in these situations, it may be reasonable to allocate the value of the assets according to their use). Likewise, in connection with segment disclosure, the location of an intangible asset may be the location of the entity that holds the asset. However, if an intangible asset such as a brand, patent, or trademark is used in more than one country, it may be appropriate in performing the asset test for the company to allocate the value of the asset to countries where it is used, in proportion with revenue or some other rational measure of the use of the asset.

It is possible that in applying certain of the above methodologies, a foreign company may use a GAAP other than that used in preparing the primary financial statements.[24] For example, a company that presents its financial statements under U.S. GAAP for purposes of filing a Form 20-F or Form 40-F, but reports its results in its home country GAAP locally, may use home country GAAP for purposes of the asset test.

Administration of business. The final part of the business contacts test focuses on whether the foreign company's business is "administered principally in the United States" and contemplates an analysis of the methods by which a company administers its business. In assessing whether its business is administered principally in the United States, a foreign company may consider the following:

- the location of the company's headquarters;
- the percentage of working days in a calendar year that the company's most influential executive officers (potentially a subset of all executive officers) spend in the United States;
- the percentage of meetings held in the United States in a calendar year by directors and by shareholders of the company;
- with respect to the company's various business functions, the percentage of those business functions that are located in the United States and, as evidence indicating the importance of non-U.S. business functions, the percentage of the company's annual revenues that are generated from outside the United States.[25]

Determination Date for Foreign Private Issuer Status

For new registrants, the determination of whether the registrant qualifies as a foreign private issuer is made as of a date within 30 days prior to the filing of its initial registration statement under the Securities Act or Exchange Act, as the case may be. Thereafter, a foreign private issuer is required to assess its status only once a year on the last business day of its second fiscal

quarter.[26] This is the same date used to, among other things, determine accelerated filer status under Rule 12b-2 under the Exchange Act.

If a company qualifies as a foreign private issuer on the last business day of its second fiscal quarter, it is immediately able to avail itself of the foreign private issuer accommodations, including the use of foreign private issuer forms under the Securities Act and reporting requirements under the Exchange Act. For example, a foreign company that reports as a domestic U.S. issuer but subsequently determines that it qualifies as a foreign private issuer as of the end of its second fiscal quarter would no longer need to continue reporting on Form 8-K and Form 10-Q for the remainder of that fiscal year. Instead, it could immediately begin furnishing reports on Form 6-K, and would file an annual report on Form 20-F or Form 40-F, as the case may be. A company need not provide notice to the market of its switch to foreign private issuer status from domestic U.S. issuer status. Practically, however, by furnishing a current report on Form 6-K rather than Form 8-K after it changes status, the company, in essence, will be providing notice that it has switched status.

If a foreign private issuer ceases to qualify as such on the last business day of its second fiscal quarter, it nonetheless remains eligible to use the forms and reporting requirements for foreign private issuers until the end of that fiscal year.[27] Put differently, the foreign company will not be required to comply with the reporting requirements and use of forms prescribed for domestic U.S. issuers until the beginning of the first day of the fiscal year following the determination date. By way of example, a calendar year issuer that does not qualify as a foreign private issuer as of June 30, the end of its second fiscal quarter in 2013, would not become subject to quarterly reporting on Form 10-Q during 2013. However, it would be required to file its annual report on Form 10-K in 2014 in respect of its 2013 fiscal year on the same timetable as a domestic U.S. issuer. It also would begin complying with U.S. proxy rules, the U.S. insider reporting and short-swing profit rules under Section 16 of the Exchange Act and the U.S. selective disclosure rules contained in Regulation FD, and become subject to reporting on Form 8-K and Form 10-Q, as of January 1, 2014. Once a foreign company fails to qualify as a foreign private issuer, it will be treated as a domestic U.S. issuer unless and until it re-qualifies as a foreign private issuer as of the last business day of its second fiscal quarter. Similar to the situation where a foreign company switches out of foreign private issuer status, there is no requirement for a company to notify the market if it has switched to domestic U.S. issuer status from foreign issuer status; however, by changing its applicable reporting forms, it effectively will be providing notice that it has switched status.

Significant Benefits Afforded to Foreign Private Issuers

As noted above, the SEC historically has made significant formal and informal accommodations to foreign private issuers. These accommodations include the following:

No requirement for quarterly reporting. Unlike domestic U.S. issuers, foreign private issuers are not required to file quarterly reports with the SEC on Form 10-Q. Although foreign private issuers are required to furnish to the SEC under cover of Form 6-K a copy of any material information they file, make public or disclose to shareholders outside the United States (including any reports containing quarterly or interim financial information), such reports on Form 6-K need not contain certifications pursuant to Section 302 or 906 of the Sarbanes-Oxley Act of 2002, as amended (Sarbanes-Oxley Act).

Not subject to accelerated filing. Under the accelerated filing rules, certain domestic U.S. issuers are required to file annual reports 60 days after the end of their fiscal year. Foreign private issuers are not subject to this accelerated filing, and may file annual reports on Form 20-F within four months after the end of their fiscal year.[28]

Exemption from U.S. proxy rules. Foreign private issuers are exempt from Section 14 of the Exchange Act and Regulations 14A and 14C.[29] Accordingly, foreign private issuers are not required to comply with SEC rules related to proxy solicitations in connection with shareholder meetings or follow SEC rules for presenting shareholder proposals.[30]

Exemption from insider trading reports. Officers, directors, and 10 percent shareholders of foreign private issuers are not required to file reports of beneficial ownership under Section 16(a) of the Exchange Act.[31] Note, however, that beneficial ownership reports on Schedule 13D or 13G may be required by Section 13 of the Exchange Act.

Exemption from short-swing profit recovery rules. Officers, directors, and 10 percent shareholders of foreign private issuers are exempt from the short-swing profit recovery rules under Section 16(b) of the Exchange Act.[32] Generally speaking, these rules require an insider to disgorge to the domestic U.S. issuer any profits from purchases and offsetting sales of the company's securities made within a six month period.

Exemption from Regulation FD. Foreign private issuers are not subject to Regulation FD, which prohibits the selective disclosure of material, non-public information.[33]

Exemptions from Regulation BTR and Regulation G. Although the Sarbanes-Oxley Act generally does not distinguish between domestic U.S. issuers and foreign private issuers, the SEC has adopted certain significant rule-based exemptions for the benefit of foreign private issuers. These exemptions cover areas such as: (1) black-out trading restrictions (Regulation BTR);[34] and (2) the use of non-GAAP financial measures (Regulation G).[35]

Limited executive compensation disclosures. Foreign private issuers are subject to more limited executive compensation disclosure requirements, and there is no requirement to disclose individual compensation unless it is disclosed publicly elsewhere.[36]

Ability to use U.S. GAAP, IFRS, or Local GAAP. Foreign private issuers are not required to apply U.S. GAAP to the issuer's primary financial statements. Rather, the financial statements may be prepared using U.S. GAAP, International Financial Reporting Standards (IFRS), or home-country generally accepted accounting principles (Local GAAP). In the case of foreign private issuers that use the English-language version of IFRS as issued by the International Accounting Standards Board (IASB), no reconciliation to U.S. GAAP is needed.[37] By contrast, if Local GAAP or non-IASB IFRS is used, the consolidated financial statements must generally include footnote reconciliation to U.S. GAAP.[38]

Flexibility on reporting currency. Foreign private issuers are permitted to choose the reporting currency used in presenting the issuer's financial statements.[39]

Exemption from Exchange Act registration and reporting. Foreign private issuers are eligible for a special exemption from Exchange Act registration and reporting if they have made no affirmative efforts to enter the U.S. capital markets.[40]

Non-public submissions to the SEC. Foreign private issuers are permitted to submit draft registration statements to the SEC on a confidential basis where the registrant is: (1) a foreign government registering its debt securities; (2) a foreign private issuer that is listed or is concurrently listing its securities on a non-U.S. securities exchange; (3) a foreign private issuer that is being privatized by a foreign government; or (4) a foreign private issuer that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.[41] Eligible foreign private issuers submit their draft registration statements through the same procedure as "emerging growth companies" under the Jumpstart our Business Startups Act.[42]

Ability to terminate U.S. registration and reporting requirements. In 2007, the SEC created an exemption that allows a foreign private issuer to *terminate* its registration and reporting requirements under the Exchange Act.[43] In contrast, domestic U.S. issuers are only permitted to *suspend* certain of their reporting requirements under the Exchange Act.

Ability to utilize the MJDS where the foreign private issuer is an eligible Canadian company. Certain foreign private issuers that are Canadian companies are eligible to use their Canadian disclosure documents to (1) satisfy their U.S. continuous reporting obligations and (2) register a public offering of securities in the United States, either alone or in conjunction with a Canadian public offering. The MJDS provides substantial time and cost savings to eligible companies by reducing the burden of complying with duplicative and sometimes conflicting Canadian and U.S. regulations, and can significantly improve a company's access to the U.S. capital markets.

Conclusion

Given the significant accommodations afforded to foreign private issuers under U.S. securities laws, it is critical that a foreign company be able to evaluate with precision its status as a foreign private issuer. An understanding of the foreign private issuer definition and the associated determination dates will better enable a company to make informed business decisions that enable it to qualify, and thereafter continue to qualify, as a foreign private issuer. For instance, a foreign company may wish to relocate personnel or assets in a manner that enables it to qualify as a foreign private issuer. In the experience of the authors, the SEC will generally not make its own assessment of a company's foreign private issuer status or challenge management's assessment of its foreign private issuer status unless something comes to the attention of the Staff suggesting that the company has not applied the definitional test correctly. In these circumstances, the company will bear the burden of supporting its determination that it is a foreign private issuer. Support provided to the SEC in this regard should include documentation demonstrating how the definitional tests were applied at the time the analysis was made. To this end, it is important that the foreign company develop an internal methodology for regularly testing its foreign private issuer status at the relevant determination dates.

Notes

1. SEC, *Number of Foreign Companies with the U.S. Securities and Exchange Commission December 31, 2012*, available at *http://www.sec.gov/divisions/corpfin/internatl/foreignsummary2012.pdf*.
2. SEC, *In Brief FY 2013 Congressional Justification*, available at *http://www.sec.gov/about/secfy13congbudgjust.pdf*.
3. Kinsey, Sandra F., "Foreign Private Issuers," *The Review of Securities & Commodities Regulation* (New York: Standard & Poor's Corporation), Volume 34, No. 8, April 25, 2001. In contrast, a company that is incorporated in a state, territory, or possession of the United States can never qualify as a foreign private issuer, regardless of the location of its shareholders, assets, or management.
4. SEC Release 33-7745 (Sept. 28, 1999), at Section II.E.
5. *See* Instruction A to paragraph (c)(1) of Rule 3b-4 under the Exchange Act.
6. SEC, *Accessing the U.S. Capital Markets—A Brief Overview for Foreign Private Issuers*, available at *http://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml* (last visited June 5, 2013).
7. If the primary trading market is a regional one, the inquiries should be directed to the clearance and settlement system associated with that market. *See* Kinsey, *supra* note 3.
8. *See* Instruction B to paragraph (c)(1) of Rule 3b-4 under the Exchange Act.
9. Kinsey, *supra* note 3.
10. We acknowledge that this interpretation is at odds with Kinsey, *supra* note 4. The Staff has informally indicated that the analysis presented in Kinsey, which suggests that the issuer look through the private enterprise in all cases, is not sufficiently nuanced.
11. *See* Rule 13d-3 under the Exchange Act.
12. *See* Instruction C to paragraph (c)(1) of Rule 3b-4 under the Exchange Act.
13. This is also a common structure in certain foreign regulated industries such as airlines or communications where a majority of votes must be held by residents.

14. *See Thouret v. Hudner*, 1996 WL 38824 (S.D.N.Y), which suggests that one should construe the language in the Exchange Act rules and instructions quite strictly.

15. Where long-time U.S. expatriates have retained their U.S. citizenship or have established dual citizenship, they would be counted as U.S. citizens, despite their residency.

16. *See* Rule 405 under the Securities Act and Rule 3b-7 under the Exchange Act.

17. Rule 16a-1(f) under the Exchange Act.

18. Kinsey, *supra* note 3.

19. Kinsey, *supra* note 3.

20. Kinsey, *supra* note 3.

21. *See* CAQ International Practices Task Force, November 20, 2007, Joint Meeting with SEC Staff, Discussion Document A.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Supra* note 7. *See also* SEC No-Action Letter, *Commodore Int'l Ltd.* (avail. Oct. 2, 1992).

26. *See* Rule 3b-4 under the Exchange Act; SEC Release 33-8959 (Sept. 23, 2008).

27. If a Canadian issuer eligible to use the U.S./Canada Multijurisdictional Disclosure System (MJDS) loses its foreign private issuer status as of the end of its second fiscal quarter, it will immediately lose the ability to use MJDS forms under the Securities Act, such as Form F-10, yet may continue to use non-MJDS foreign registration forms (Forms F-1, F-3, and F-4) through the remainder of the fiscal year.

28. MJDS-eligible foreign private issuers (larger Canadian companies) can file an annual report under cover of Form 40-F. The annual report on Form 40-F must be filed the same day as the annual information form due to be filed with any securities commission or equivalent regulatory authority in Canada.

29. Rule 3a12-3(b) under the Exchange Act.

30. Even where a foreign private issuer voluntarily chooses to file periodic reports on the forms designated for domestic U.S. issuers, that foreign private issuer *may not* file proxy or information statement under Section 14 of the Exchange Act. As such, a foreign private issuer that voluntarily files annual reports on Form 10-K may not incorporate the information required by Part III of Form 10-K by reference to a subsequently filed proxy statement. *See* SEC No-Action Letter, Proxy Materials of Foreign Private Issuers (avail. Mar. 10, 1992).

31. Rule 3a12-3(b) under the Exchange Act.

32. Rule 3a12-3(b) under the Exchange Act.

33. *See* Rule 100 under Regulation FD. Owing to restrictions in their home jurisdictions that overlap substantially with those found in Regulation FD, many foreign private issuers voluntarily comply (at least in part) with Regulation FD.

34. Pursuant to Section 306(a) of the Sarbanes-Oxley Act, the SEC adopted Regulation BTR, which makes it unlawful for directors and executive officers to trade in their issuer's equity securities during pension fund blackout periods if the director or executive officer acquired the security in connection with his or her service or employment as a director or executive officer. Regulation BTR applies to directors and executive officers of both domestic issuers and foreign private issuers. In the case of foreign private issuers, however, no blackout period will be deemed to have occurred unless the general requirements established in Regulation BTR are met, and either (i) the number of plan participants or beneficiaries located in the United States that are subject to the suspension exceeds 15 percent of the issuer's worldwide workforce or (ii) more than 50,000 participants and beneficiaries located in the United States are subject to the suspension. Upon losing its foreign private issuer status, an issuer would be required to comply with the terms of Regulation BTR without being able to rely on this more restricted definition of the term "black-out period".

35. Specifically, Regulation G does not apply to public disclosure by, or on behalf of, an issuer that is a foreign private issuer whose securities are listed outside the United States, if the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with U.S. GAAP and the disclosure is made by or on behalf of the foreign private issuer outside the United States, or is included in a written communication that is released by or on behalf of the foreign private issuer outside the United States. *See* Rule 100(c) under Regulation G.

36. *See* Item 6.B of Form 20-F.

37. Item 17(c) of Form 20-F. *See also* SEC Release 33-8879 (Dec. 21, 2007), at Section III.B.

38. Items 17, 18 of Form 20-F.

39. Rule 3-20 of Regulation S-X.

40. *See* Rule 12g3-2(b) under the Exchange Act.

41. SEC, *Non-Public Submissions from Foreign Private Issuers*, available at *http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm* (last visited June 5, 2013).

42. *Id.* Although foreign private issuers and emerging growth companies are granted confidentiality via the same submission process, emerging growth companies are required pursuant to Section 6(e) of the Securities Act to publicly file their initial confidential submission and all amendments thereto no later than 21 days prior to the commencement of a road show. In contrast, foreign private issuers are required to publicly file their initial confidential submission and all amendments thereto at the time they publicly file the registration statement, which may be later than 21 days prior to the commencement of a road show.

43. *See* Rule 12h-6 under the Exchange Act.