U.S. SECURITIES LAW FOR FOREIGN COMPANIES — ARE YOU A FOREIGN PRIVATE ISSUER?

March 18, 2013 By: Karen A. Monroe

On February 20, 2013, the U.S. Securities and Exchange Commission (SEC) issued "Accessing the U.S. Capital Markets — A Brief Overview for Foreign Private Issuers" including a summary of eligibility, registration, and ongoing reporting obligations, exemptions, and the use of American Depositary Receipts. In my view, the U.S. is realizing it needs to be more "foreign investor" friendly. Compatibility with the securities laws of other jurisdictions is a good thing if the U.S. wants to maintain its position as an attractive country for capital raising because there is today much more competition internationally.

As part of our ongoing efforts to simplify complex securities issues and provide creative solutions based on our 30+ years of experience this is the first in a series of brief summaries on U.S. securities laws for foreign companies; in particular, foreign private issuers.

Are you a "foreign private issuer?"
Not all non-U.S. issuers are "foreign private issuers." Because any sale or other transfer of securities in the U.S. and certain securities activities outside the U.S. are governed by the U.S. and state securities laws, U.S. securities laws can and do govern non-U.S. issuers of securities. Non-U.S. issuers are, of course, also subject to the securities laws of the non-U.S. issuer's home jurisdiction. Here we address only U.S. securities laws and not other countries' securities laws.

Is your company a foreign private issuer and why is this important?
If a non-U.S. company is a foreign private issuer, the non-U.S. company is subject to reduced prospectus disclosure in connection with securities offerings such as IPOs (initial public offerings) and reduced disclosure in connection with its periodic reporting. If a non-U.S. company does not qualify as a foreign private issuer, the non-U.S. issuer is subject to the same registration and disclosure requirements as a U.S. company.

What are the tests or requirements for determining foreign private issuer status?
There are two tests and to qualify as a foreign private issuer the non-U.S. company must meet the requirements of one of them.

Test 1
1. Is your company a non-U.S., non-governmental company?
2. Are 50% or less of your company's voting shares held by shareholders who are resident in the U.S.?
If your company can answer "Yes" to questions 1 and 2; that is, it is a non-U.S., non-governmental, entity and 50% or less of the voting shares are held by U.S. residents then your company qualifies as a foreign private issuer.

Test 2

1. Are you a non-U.S., non-governmental company and 50% or more of your voting shares are held by U.S. residents? If the answer is "Yes" then:

(a) Are the majority of your officers and directors not U.S. citizens or resident in the U.S? AND

(b) Are 50% or more of your assets (tangible and intangible) located outside the U.S.? AND

(c) Is the company managed primarily outside the U.S.?

If your company answers "Yes" to question 1, and can answer "Yes" to (a), (b), AND (c); that is, if your company is a non-U.S., non-governmental entity, and more than 50% of your company's voting shares are held by U.S. residents and you answer Yes to 1(a), (b), and (c), your company qualifies as a foreign private issuer.

When to take the test?

The "test" is initially taken on the last business day of your company's most recently completed fiscal quarter and is retaken on the last business day of each second fiscal quarter thereafter. If a foreign private issuer loses its foreign private issuer status under either of the above tests, it must follow the securities laws for U.S. issuers starting with the first day of its next fiscal year after the loss of status. Essentially, this provides the company with six months until it must start to follow the disclosure procedures for U.S. issuers.

What are some of the advantages of being a foreign private issuer rather than a U.S. issuer?

In addition to reduced disclosure and reporting, foreign private issuers:

(a) Have a choice to submit financial statements according to GAAP (generally accepted accounting principles), IFRS (international financial reporting standards), or home country accounting standards, although home country accounting standards must be reconciled to GAAP;

(b) Are exempt from the SEC's proxy rules;

(c) Officers and directors are exempt from filing beneficial ownership reports under Section 16(a) (Forms 3, 4, and 5) and are exempt from short-swing trading rules under Section 16(b);

(d) Are exempt from disclosure requirements of Regulation FD, regarding disclosure of non-public information;

(e) Can use registration forms and reporting forms specially designed for foreign private issuers;

(f) Are entitled to an automatic exemption allowing its equity securities to be traded in the U.S. over-the-counter market without registration under Section 12(g) if the foreign private issuer maintains a listing of its equity securities in its primary non-U.S. trading market and publishes electronically and in English specified non-U.S. disclosure documents; and

(g) Limited confidentiality.

Additional information about the exemptions will be covered in future articles, except that a short mention is made here with respect to confidentiality which, we have found, is generally important to non-U.S. companies.

Confidentiality

In the past, foreign private issuers were able to file their initial registrations first with the SEC on a confidential basis. This benefit was removed for most foreign private issuers on December 8, 2011 (updated May 30, 2012) except for two important exceptions: (i) for a foreign private issuer already or to be concurrently listed with the U.S. listing on a non-U.S. securities exchange, or (ii) if a foreign private issuer can persuade the SEC that a public filing of its initial registration statement would conflict with the laws of a non-U.S. jurisdiction to which it is subject. Other exceptions are for foreign governments registering debt securities or for a foreign private issuer being privatized by a non-U.S. government.

JOBS Act and foreign private issuer confidentiality
In addition, under the Jumpstart Our Business Startups Act (JOBS Act) foreign private issuers that qualify as "emerging growth companies" may be able to take advantage of the confidential registration review procedures under the JOBS Act.

The SEC's February 20, 2013, report can be accessed in full here:
http:/ / www.sec.gov/ divisions/ corpfin/ cfforeignissuers.shtml

For more information, or if you have any questions, please contact Karen A. Monroe at kmonroe@wilkauslander.com (Geneva); Jonathan Bender at jbender@wilkauslander.com or Joel Frank at jfrank@wilkauslander.com (New York).