



U.S. Securities Laws: Keeping Company Status as a Foreign Private Issuer

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A company classified as a “foreign private issuer” under the U.S. securities laws enjoys certain advantages in that it is easier to avoid certain registration and reporting requirements with the Securities and Exchange Commission (the “SEC”).

What is a “foreign private issuer?”

Under Rule 3b-4 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and Rule 405 of the Securities Act of 1933, as amended (the “Securities Act”), a “foreign private issuer” is defined as any non-U.S. company that has less than 50% of its issued and outstanding stock held by U.S. residents. If 50% or more of a non-U.S. company’s stock is held by U.S. residents, the company will still be classified as a foreign private issuer if it meets **none** of the following tests:

- The majority of the executive officers or directors are United States citizens or residents;
- More than 50 percent of the assets of the issuer are located in the United States; or
- The business of the issuer is administered principally in the United States

This test for foreign private issuer status is conducted on the last day of the company’s second fiscal quarter and is effective for the following fiscal year. For example, if a company with a fiscal year end of December 31st meets the foreign private issuer test as of June 30, 2012, the company will be qualified as a foreign private issuer for the entire year of 2013. The majority of Canadian companies can be classified as “foreign private issuers.”

Why is it important for a non-U.S. company to be classified as a foreign private issuer?

Companies classified as foreign private issuers are allowed to rely on certain exemptions from registration with the SEC and are not required to file periodic reports with the SEC. Under Rule 12g-1 of the Exchange Act, foreign private issuers with assets of \$10 million or less and that are not quoted in an automated inter-dealer quotation system are exempt from registration under Section 12(g) of the Exchange Act.

A second exemption is available under Rule 12g3-2(a) of the Exchange Act, providing that foreign private issuers that have fewer than 300 shareholders resident in the U.S. are exempt from registration under Section 12(g) of the Exchange Act. A third exemption is available for foreign private issuers under Rule 12g3-2(b) as long as the company:

- Is not otherwise required to file or furnish reports under Section 13(a) or Section 15(d) of the Exchange Act;
- Maintains a listing of the subject class of securities on one or more exchanges in a non-U.S. jurisdiction that either singly, or together with the trading of the same class in another non-U.S. jurisdiction constitutes the company's primary trading market (at least 55% of the trading in the subject class of securities on a worldwide basis during the issuer's most recently completed fiscal year); and
- Publishes in English, on its website or other electronic information delivery system generally available to the public in its primary trading market, information that, as of the first day of its most recently completed fiscal year:
 - Has been made public or been required to make public pursuant to the laws of the company's home jurisdiction;
 - Has filed or been required to file with the principal stock exchange in its primary trading market on which its securities are traded and which has been made public by that exchange; and
 - Has distributed or been required to distribute to its shareholders.

Many Canadian companies that have a class of stock trading in the U.S. easily meet the requirements of Rule 12g3-2(b) if they are listed on the Toronto Stock Exchange, TSX Venture, or Canadian National Stock Exchange.

Regardless of foreign private issuer status, a company will not be required to file a registration statement under the Exchange Act unless it has total assets of more than US\$10,000,000 and has either (i) a class of stock held by 2,000 or more persons or (ii) stock held by 500 persons or more who are not accredited investors. The benefit of having foreign private issuer status means that a foreign private issuer has two exemptions from SEC registration in addition to those exemptions available to U.S. companies.

A company that is classified as foreign private issuer and is subject to the reporting requirements under the Exchange Act, either by voluntary registration of a class of its shares or registration under the Securities Act, reaps certain benefits. These companies may file their periodic reports on Forms 20-F and 6-K, essentially wrapping around the reports required to be filed in the home jurisdiction. In addition, if a company prepares its financials using the International Financial Reporting Standards ("IFRS"), a company is not required to reconcile its financial statements with U.S. Generally Accepted Accounting Principles ("U.S. GAAP").

What happens if the company fails the foreign private issuer test?

If a non-U.S. company does not meet the foreign private issuer test, it may be required to register its shares under Section 12(g) and begin filing reports with the SEC. If a company has total assets of more than US\$10,000,000 and has either (i) a class of stock held by 2,000 or more persons or (ii) stock held by 500 persons or more who are not accredited investors, the company will be required to file a registration statement with the SEC under the Exchange Act. This will subject the company to filing periodic reports on Forms 10-K and 10-Q and subject it to the current report requirements of Form 8-K. From the last day of the company's second fiscal quarter, the company has six months before it will be required to file periodic reports with the SEC. For example, if a company's fiscal year end is December 31st, and as of June 30, 2012 the company fails to meet the foreign private issuer test and fails to meet the exemption from registration under Section 12(g), then as of January 1, 2013, the company would begin filing reports with the SEC. The Form 10-K for fiscal year end December 31, 2012 would be due, for a non-accelerated filer (public equity float under US\$75,000,000) on April 1, 2013.

For further inquiry regarding foreign private issuers, please contact Victoria Bantz or Theresa Mehringer at 303-796-2626 or ybantz@bfwlaw.com or tmehringer@bfwlaw.com. The firm's website is located at www.bfwlaw.com.