

Foreign Private Issuer Calculation Date for Calendar Year-End Foreign Issuers is June 30, 2017

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As a reminder to all foreign issuers that have a December 31 fiscal year end, the upcoming end of their second fiscal quarter, June 30, 2017, will be the calculation date for their status as a foreign private issuer (“FPI”) for purposes of both the United States Securities Act of 1933, as amended (the “Securities Act”) and the United States Securities Exchange Act of 1934, as amended (the “Exchange Act”). We recommend that issuers begin the analysis early to determine whether actions should be taken prior to the June 30th date to avoid an unintentional loss of FPI status. An early determination of the business nexus test (as described below) is also needed to know whether the issuer needs to request that their transfer agent and depositories provide U.S. resident beneficial shareholder information as of June 30, 2017.

As detailed below, the definition of an FPI has two parts, one based on the percentage of the issuer’s U.S. resident shareholdings (the shareholder test), and the other based on its connections with the United States (the business nexus test). As an issuer must meet both of the two parts of the test to lose FPI status, it is often beneficial for an issuer to consider the business nexus test prior to considering the shareholder test. Because many issuers will not meet any of the three elements of the business nexus test (as discussed below), there would be no need to go through the time-consuming and often difficult process of determining the percentage of voting shares held by U.S. resident shareholders.

The term “foreign private issuer” is defined by Rule 3b-4 under the Exchange Act and Rule 405 under the Securities Act as any non-U.S. issuer, other than a foreign government, *except* any issuer meeting the following conditions:

- (a) more than 50% of the outstanding voting securities of such issuer are, directly or indirectly, held of record by residents of the United States; and
- (b) any one of the following:

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- (i) the majority of the executive officers or directors are U.S. citizens or residents, or
- (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.

While the FPI test is a seemingly straightforward calculation, the application of the test in certain circumstances can be challenging. The SEC staff has recently issued guidance that clarifies the application of the tests in certain circumstances and provides comfort for the application of reasonable methodologies that are consistently applied. Our prior blog post on the clarifications can be found here: crossbordercounselor.com/sec-provides-clarification-of-foreign-private-issuer-calculation/.

In evaluating the citizenship and residency of executive officers and directors, each test must be separately applied to executive officers as a group and directors as a group.

In determining the location from which a business is administered, an issuer must assess, on a consolidated basis, the location from which the issuer's officers, partners, or managers direct, control, and coordinate the issuer's business activities.

Issuers may look to the geographical segment information determined in the preparation of financial statements for purposes of calculating the location of assets. Alternatively, an issuer may apply any other reasonable methodology on a consistent basis to determine location of assets.

If an issuer fails one or more of the business nexus tests, a calculation of the issuer's U.S. shareholdings is required. For purposes of the shareholder test, each holder identified on the record of security holders counts as a record holder. However, the issuer must look through the record ownership of institutional custodians, such as Cede & Co, CDS, and other commercial depositories, by obtaining the list of accounts for which the securities are held by the depository. In addition, under applicable SEC rules, an issuer must "look through" the record ownership of brokers, dealers, banks, or nominees to the beneficial holders who hold securities through such institutions. The "look through" provisions of these rules are limited to 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.

Foreign private issuer status is of considerable benefit to foreign issuers that access the U.S. markets. Issuers that are in danger of a change in status may find that the recent SEC guidance gives them some additional flexibility in satisfying the FPI test. For those issuers, careful advance planning may make it possible to avoid the loss of the FPI benefits.