

The Importance of Monitoring Your Foreign Private Issuer Status

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by Christopher L. Doerksen

Being a “foreign private issuer” is very important to a Canadian company’s treatment under U.S. securities laws. If a Canadian company ceases to qualify as a foreign private issuer under the rules of the U.S. Securities Exchange Commission (SEC), it must generally:

- Change the way in which it offers and sells its own securities to persons in Canada and other non-U.S. jurisdictions, including the imposition of U.S. legends regardless of the jurisdiction of the purchaser,
- Begin reporting with the SEC unless its securities are held by a sufficiently small number of persons, and
- Report with the SEC on U.S. domestic forms rather than the more liberal forms that apply to most Canadian companies that report with the SEC.

In addition, its directors, executive officers and 10% shareholders may become subject to the reporting and liability provisions of Section 16 of the U.S. Securities Exchange Act, which is a significant inconvenience and may require restructuring some of the company’s benefit plans and practices.

A company incorporated under the laws of Canada or any Canadian province will be a foreign private issuer unless, as of the last business day of its most recently completed second fiscal quarter:

- More than 50% of the outstanding voting securities of the company are directly or indirectly owned of record by residents of the United States (Part 1), and
- Any of the following (Part 2):
 - The majority of the company’s executive officers or directors are U.S. citizens or residents,
 - More than 50% of the assets of the company are located in the United States, or
 - The business of the company is administered principally in the United States.

Because the result under Part 2 is often easier to determine, many companies will first assess the results of Part 2 in order to determine whether analysis of security ownership

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under Part 1 is necessary. If analysis under Part 1 is necessary, a company may generally rely on the address of a securityholder as set forth in properly maintained securityholder records; however, it must generally “look through” the ownership of commercial depositaries such as CDS and Cede & Co., and other nominees such as brokers and banks that hold securities for the account of their customers. In addition, it must generally take into account information set forth in beneficial ownership reports, and cannot give credence to a structure established to evade the U.S. securities laws. The test set forth in Part 1 therefore generally requires, for a publicly traded company, a review of beneficial ownership reports and the company’s securityholder records and the commissioning of a beneficial ownership search through a service such as Broadridge.

Companies that determine they are majority owned by U.S. residents may find themselves able to maintain foreign private issuer status by ensuring that they do not satisfy any of the criteria in Part 2 – by ensuring that their board and executive officers include a sufficient number of persons that are not U.S. citizens or residents, that their business is primarily administered outside the United States, and that a majority of their assets are located outside the United States.

We frequently assist Canadian companies with assessing and maintaining their status as a foreign private issuer and, where appropriate, complying with the new regulations to which they are subject when they lose such status.