Foreign Private Issuers – Reporting Requirements and Other Select Items

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Two of the most important U.S. federal securities laws applicable to FPIs:

- **Securities Act of 1933 (the “Securities Act”)**
  - Companies that intend to offer and sell securities in the U.S. must register the transaction with the Securities and Exchange Commission (the “SEC”) under the Securities Act or follow the requirements of an exemption from the registration requirements.

- **Securities Exchange Act of 1934 (the “Exchange Act”)**
  - Companies must register classes of equity securities under the Exchange Act in order to list these securities on a national securities exchange in the U.S., or if certain asset and shareholder thresholds are exceeded.
  - Companies are required to make periodic filings with the SEC to disclose information about their business operations, financial condition, and management.

This presentation focuses primarily on the reporting requirements for FPIs under the Exchange Act.
Determination of FPI Status

Timing:
• Status must be determined annually, as of the last business day of the relevant issuer’s second fiscal quarter

Two-Part Test to Determine FPI Status:
• Shareholder Test
  - Relates to the relative degree of U.S. share ownership
• Business Contacts Test
  - Relates to level of U.S. business contacts

Note: An issuer organized in the U.S., or incorporated in a territory or possession thereof (collectively, the “U.S.”), can never qualify as an FPI.
Shareholder Test

• A foreign company qualifies as an FPI if 50% or less of its outstanding voting securities are held by U.S. residents.

• **Upshot:** If a foreign company qualifies as an FPI under the Shareholder Test, then it qualifies as an FPI regardless of the outcome of the Business Contacts Test (*i.e.*, there is no need to apply the Business Contacts Test).

• For purposes of the Shareholder Test, foreign companies must “look through” the record ownership of brokers, dealers, banks, or nominees holding securities for the accounts of their customers, and also consider any beneficial ownership reports or other information available to the company.

• Foreign companies are only required to examine voting securities held of record in three jurisdictions:
  - the U.S.;
  - the company’s home jurisdiction; and
  - the location of the primary trading market for the company’s voting securities, if different from the company’s home jurisdiction.

• If, after reasonable inquiry, the company is not able to obtain information about the location of the record holders’ accounts, it may rely on the presumption that such accounts are held at the principal place of business of the broker, dealer, bank, or nominee.
**Business Contacts Test**

• Only applicable if a foreign company fails to qualify as an FPI under the Shareholder Test

• If a foreign company fails the Shareholder Test (i.e., more than 50% of its voting securities are held by U.S. residents) and **any** of the below factors are true, then the company will fail to qualify as an FPI:
  - the majority of the company’s executive officers or directors are U.S. citizens or residents; or
  - more than 50% of the company’s assets are located in the U.S.; or
  - the company’s business is administered principally in the U.S.
Business Contacts Test Factor #1 - Are the majority of the company’s executive officers or directors U.S. citizens or residents?

- A foreign company must analyze the citizenship and residency of each of its executive officers and directors separately.
- Due to varying definitions of the terms “executive officer” and “director” in jurisdictions outside of the U.S., foreign companies should refer to the definition of “executive officer” contained in Securities Act Rule 405 and Exchange Act Rule 3b-7 (a person or position involved in performing policy making functions for the company) to determine the individuals for whom the analysis should be performed.
- When analyzing this factor for “directors,” foreign companies should consider individuals who perform the functions generally performed by a board of directors of a U.S. company.
Business Contacts Test Factor #2 – Are more than 50% of the foreign company’s assets located in the U.S.?

- A foreign company must consider the location of both tangible and intangible assets.

Business Contacts Test Factor #3 – Is the foreign company’s business administered principally in the U.S.?

- A foreign company should consider certain factors, including, but not limited to, the locations of the following:
  - principal business segments or operations;
  - board and shareholder meetings;
  - headquarters; and
  - the most influential key executives or subset of all executives.
Summary of the Exchange Act Reporting Obligations for FPIs

FPIs may file annual reports on Form 20-F and meet their other reporting obligations on Form 6-K.

- Both of these forms are designed, in scope and timing requirements for filing, with reference to international disclosure standards. Most FPIs opt to file under Form 20-F and Form 6-K instead of the forms available to domestic issuers.

Other general notes:

- FPIs that are “large accelerated filers” or “accelerated filers” must comply with both Sections 404(a) (management’s assessment of internal control over financial reporting) and 404(b) (attestation report of independent auditors) of Sarbanes-Oxley. FPIs that are neither “large accelerated filers” nor “accelerated filers” (and those that are emerging growth companies) are only required to provide the Section 404(a) assessment.
  - A company need not comply, however, until it either has been required to file an annual report pursuant to Exchange Act Section 13(a) or 15(d) (i.e., file a Form 20-F) for the prior fiscal year or has filed an annual report with the SEC for the prior fiscal year.
- Unlike domestic issuers, FPIs are not required to file quarterly reports.
- FPIs are exempt from the proxy rules under Rule 3a12-3(b) of the Exchange Act.
- FPI insiders are exempt from filing the beneficial ownership reports required by Section 16(a) of the Exchange Act and are not subject to the short-swing trading rules under Section 16(b) of the Exchange Act.
- FPIs are exempt from the disclosure requirements of Regulation FD.
- FPIs may use a special exemption from registration under Section 12(g) the Exchange Act.
- FPIs may generally present financial statements pursuant to U.S. generally accepted accounting principles (“GAAP”), International Financial Reporting Standards (“IFRS”) as issued by the International Accounting Standards Board (“IASB”), or home-country accounting standards with a reconciliation to U.S. GAAP.
Consequences of Disqualification from FPI Status

- Must re-determine FPI status annually at the end of the second fiscal quarter

- A registrant that determines it no longer meets the definition of FPI becomes subject to the more onerous reporting requirements for a U.S. domestic issuer beginning on the first day of the next fiscal year.
  - For example, a foreign company that determines on June 30, 2017 that it no longer qualifies as an FPI would file an annual report on Form 10-K in 2018 for its 2017 fiscal year.
  - In addition, the foreign company would also be subject to the following on the first day of the 2018 fiscal year, among other items:
    - Proxy rules
    - Section 16 reporting requirements under the Exchange Act
    - Form 8-K reporting requirements
    - Form 10-Q reporting requirements
Form 20-F is the primary disclosure document for FPIs, and its disclosure requirements are similar to those required of U.S. domestic issuers in their annual reports on Form 10-K.

• **Timing** – must be filed *within four months* of the end of each fiscal year

• **Dual Purpose** – can also be used to register classes of securities under the Exchange Act

• **Practice Point** – Subject to certain exceptions, the last year of audited financial statements used in connection with an offering cannot be more than 15 months old at the time of the offering. Thus, if the Form 20-F financial statements are to be incorporated by reference in a Form F-3 for an offering, the FPI should consider filing the Form 20-F *within three months* of the end of the fiscal year to avoid being precluded from using the shelf registration for a 30-day period.
• The information required to be included in a Form 20-F includes, but is not limited to, the following:
  - Operating results
  - Liquidity and capital resources
  - Trend information
  - Off-balance sheet arrangements
  - Consolidated financial statements and other financial information
  - Significant business changes
  - Selected financial data
  - Risk factors
  - History and development of the registrant
  - Business overview
  - Organizational structure

• Must also include a description of corporate governance and disclose any corporate governance practices that conform to home-country requirements rather than those of the U.S. national securities exchange on which the relevant FPI’s securities are listed
• **Key differences between disclosure on Form 20-F and disclosure requirements of U.S. domestic issuers** –

- Financial statements may be prepared in accordance with U.S. GAAP, IFRS as issued by the IASB, or home-country accounting standards that comprise a comprehensive basis of accounting.

- If financial statements are prepared pursuant to home-country accounting standards or non-IASB IFRS, the FPI must also provide a reconciliation to U.S. GAAP.

- Any reconciliation must include a discussion of, and quantify, the material differences between the financial statements presented and the requirements of U.S. GAAP.

- May disclose executive compensation on an aggregate basis and are not required to supply a Compensation Discussion & Analysis, as is required for domestic issuers
  - **However**, to the extent that an FPI discloses more extensive executive compensation information (such as on an individual basis) pursuant to home market requirements or voluntarily, such information must also be disclosed on Form 20-F.

- An FPI must file as exhibits to its public filings individual management contracts and compensatory plans if required by its home-country regulations or if previously disclosed.

- Topic 6 of the SEC Division of Corporation Finance’s [Financial Reporting Manual](#) includes informal, non-authoritative guidance on financial reporting matters specific to FPIs.
Other Reporting Requirements – Reports on Form 6-K

• FPIs are required to disclose on Form 6-K the material information that the FPI:
  − makes or is required to make public pursuant to the law of its domicile, incorporation, or organization;
  − files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange; or
  − distributes or is required to distribute to its security holders.

• Generally, information material to an investment decision must be reported on Form 6-K if otherwise made publicly available.

• **Timing** – FPIs must file a Form 6-K promptly after the information contained in the report is made public, as required by the home-country laws and regulations, or by a foreign securities exchange with which the FPI has filed the information.

• The information an FPI discloses on Form 6-K is deemed to be “furnished” for purposes of U.S. federal securities laws. Thus, it is not automatically incorporated by reference into the FPI’s registration statement on Form F-3.
  − To incorporate a Form 6-K into a Form F-3, an FPI must specifically provide for its incorporation by reference in the registration statement and in any subsequently submitted Forms 6-K.
The general areas of disclosure referred to in Form 6-K include the following:

- changes in business;
- changes in management or control;
- acquisitions or dispositions of assets;
- bankruptcy or receivership;
- changes in registrant’s certifying accountants;
- the financial condition and results of operations;
- material legal proceedings;
- changes in securities or in the security for registered securities;
- defaults upon senior securities;
- material increases or decreases in the amount outstanding of securities or indebtedness;
- the results of the submission of matters to a vote of security holders;
- transactions with directors, officers or principal security holders;
- the granting of options or payment of other compensation to directors or officers; and
- any other information which the FPI deems of material importance to security holders.
Other Reporting Requirements – Form 6-K Flowchart

Information made or required to be made public under the law of FPI’s domicile, incorporation or organization?

No, Yes

Information filed or required to be filed with a securities exchange on which FPI’s securities are traded, and information has been made public by the exchange?

No, Yes

Information distributed or required to be distributed to FPI’s security holders?

No, Yes

Is the information material to the FPI and its subsidiaries and relates to any of the areas referred to in the previous slide?

No, Yes

Submit Form 6-K promptly to the SEC

No Form 6-K submission required
Certain Beneficial Ownership Disclosure Obligations for Exchange Act-Registered FPIs

• Certain beneficial ownership reporting requirements apply to an investor in an Exchange Act-registered FPI once any such investor becomes, either directly or indirectly, the beneficial owner of more than 5% of a certain class of equity securities of the FPI after acquiring, directly or indirectly, the beneficial ownership of such class of equity securities.

• These requirements are the same for FPIs as for U.S. issuers.

• Sections 13(d) and 13(g) of the Exchange Act, and Regulation 13D-G under the Exchange Act, establish a reporting system for information relating to an issuer’s beneficial ownership, which is defined generally as the direct or indirect ability to vote or dispose of voting equity securities registered under Exchange Act Section 12.
Non-GAAP Financial Measures – Application of Regulation G and Item 10(e) of Regulation S-K to FPIs

Regulation G

• Generally requires public companies that disclose or release non-GAAP financial measures to include, in that disclosure or release, a presentation of the most directly comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure

Item 10(e) of Regulation S-K (“Item 10(e)”)  

• Governs SEC filings made under the Securities Act and the Exchange Act
• In general, proscribes the presentation of non-GAAP financial measures in financial statements or the accompanying notes and on the face of any pro forma financial information required to be disclosed pursuant to Regulation S-X
  - Generally applies to the Summary of Financial Information, Selected Historical Financial Information, MD&A and any other sections of prospectuses or reports that contain non-GAAP financial measures.

Note: For purposes of Regulation G and Item 10(e), “GAAP” generally means U.S. GAAP. With regard, however, to an FPI that prepares its primary financial statements according to IFRS or home-country accounting standards, “GAAP” means the accounting principles under which the financial statements were prepared, unless the measure in question is derived from U.S. GAAP (in which case GAAP means U.S. GAAP).

Regulation G and Item 10(e) include certain exemptions for FPIs.
Limited Exemption Under Regulation G

- **Regulation G does not apply to public disclosure of a non-GAAP financial measure by, or on behalf of, an FPI if:**
  - the securities of the FPI are listed or quoted on a securities exchange or inter-dealer quotation system outside the U.S.;
  - 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 FPI outside the U.S., or is included in a written communication that is released by or on behalf of the FPI outside the U.S.

- **This exemption continues to apply to any disclosure of non-GAAP financial measures even where any one or more of the following circumstances exist:**
  - the FPI releases a written communication in the U.S. as well as outside the U.S., so long as the communication is released in the U.S. contemporaneously with or after the release outside the U.S. and is not otherwise targeted at persons located in the U.S.;
  - foreign journalists, U.S. journalists or other third parties have access to the information;
  - the information appears on one or more websites maintained by the FPI, so long as the websites, taken together, are not available exclusively to, or targeted at, persons located in the U.S.; or
  - following the disclosure or release of the information outside the U.S., the information is included in a submission to the SEC made under cover of a Form 6-K.
Limited Exemption under Item 10(e)

• FPIs are permitted to use in Form 20-F a non-GAAP financial measure otherwise proscribed by Item 10(e) so long as the measure:
  - relates to home-country accounting standards that comprise a comprehensive basis of accounting or IFRS;
  - is required or “expressly permitted” by the standard-setter responsible for establishing the home-country accounting standards; and
  - is included in the annual report prepared by the FPI for use in its home-country jurisdiction for distribution to security-holders

• What is “expressly permitted”?
  - Any financial measure will be considered to be “expressly permitted” if either of the following is true:
    ▪ the applicable standard-setter clearly and specifically identifies the measure as acceptable; or
    ▪ the primary securities regulator in the FPI’s home-country jurisdiction or market explicitly accepts a presentation, including by publication of such views by the regulator or its staff or by letter to the FPI from the regulator or its staff indicating such acceptance.
Corporate Governance

• Though the SEC and U.S. national securities exchanges generally govern corporate governance practices in the U.S., FPIs registered in the U.S. are granted exemptions from certain U.S. standards if they instead follow certain corporate governance practices under home-country rules and regulations.

• FPIs must, however, follow certain NYSE corporate governance rules related to audit committees and disclosure of corporate governance practices.
Audit Committee

- FPI audit committees generally must satisfy the requirements of Exchange Act Rule 10A-3, but are exempted from the independence requirements thereof if:
  - The FPI has a board of auditors (or similar body), or statutory auditors, established and selected pursuant to home-country legal or listing provisions expressly requiring or permitting such a board or similar body (referred to herein as a “home-country auditing board”);
  - The home-country auditing board is required under home-country legal or listing requirements to be either:
    - Separate from the board of directors; or
    - Composed of one or more members of the board of directors and one or more members that are not also members of the board of directors;
  - The home-country auditing board is not elected by management of the FPI, and no executive officer of the FPI is a member of such home-country auditing board;
Audit Committee (continued)

- Home-country legal or listing provisions set forth or provide for standards for the independence of such home-country auditing board from the FPI or its management;

- The home-country auditing board, in accordance with any applicable home-country legal or listing requirements or the FPI’s governing documents, is responsible, to the extent permitted by law, for the appointment, retention and oversight of the work of any registered public accounting firm engaged (including resolution of disagreements regarding financial reporting between the FPI’s management and the auditor) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the FPI; and

- The requirements of Exchange Act Rule 10A-3 regarding complaints, engagement of advisers, and funding apply to the home-country auditing board, to the extent permitted by law.

In addition, among other select exemptions, a non-executive FPI employee is exempt from the independence requirements of Exchange Act Rule 10A-3 if elected or named to the FPI's board of directors or audit committee pursuant to the FPI’s governing law or documents, an employee collective-bargaining or similar agreement or other home-country legal or listing requirements.
Audit Committee (continued)

- In addition, an FPI following home-country audit committee practices must:
  - Disclose how its corporate governance practices differ from those of U.S. companies;
  - Satisfy the independence requirements imposed by Exchange Act Section 10A-3 (subject to the exemption described in previous slides);
  - Certify to the NYSE that it is not aware of any violation of the NYSE corporate governance listing standards; and
  - Submit an executed written affirmation annually, or an interim written affirmation each time a change occurs to its board of directors, or any committee thereof.

- Such affirmation must include information, to the extent applicable, indicating that a previously independent audit committee member is no longer independent, that a member has been added to the audit committee, or that the FPI is no longer eligible to rely on, or has chosen not to continue to rely on, a previously applicable exemption to the audit committee independence rules.
NYSE Disclosure of Corporate Governance Practices

- Must disclose any significant ways in which corporate governance practices differ from those followed by U.S. domestic companies under NYSE listing standards
  - Required to provide only a brief, general summary of the significant differences, not a detailed, item-by-item analysis

- The statement of significant differences must be included in the Form 20-F.
Corporate Governance Considerations and NYSE Requirements for FPIs (continued)

Other Notable NYSE Requirements

- Must disclose reliance on certain exceptions from Exchange Act Rule 10A-3 and disclose an assessment of whether, and if so, how, such reliance would materially adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of Exchange Act Rule 10A-3.
- Semi-annual Reports on Form 6-K
  - Must, at a minimum, submit to the SEC a Form 6-K that includes (i) an interim balance sheet as of the end of the FPI’s second fiscal quarter and (ii) a semi-annual income statement that covers its first two fiscal quarters.
  - Must be submitted no later than six months following the end of the FPI's second fiscal quarter.
  - The financial information included must be presented in English, but does not have to be reconciled to U.S. GAAP.
- The CEO of an FPI must promptly notify the NYSE in writing after any executive officer of the FPI becomes aware of any non-compliance with any applicable NYSE corporate governance standards.
- Each FPI must submit an executed written affirmation annually to the NYSE and must submit an interim written affirmation as and when required by the interim written affirmation form specified by the NYSE.
“Short form” registration statement that permits disclosure of minimal information in the prospectus included in the F-3 by incorporating by reference more extensive disclosure already filed with the SEC

- Generally available to an FPI once:
  - It has filed at least one annual report on Form 20-F;
  - It has been subject to Exchange Act reporting requirements for a period of at least 12 calendar months immediately preceding the filing of the Form F-3 registration statement; and
  - It has filed in a timely manner all reports required to be filed during the 12 calendar months and any portion of a month immediately preceding the filing of the Form F-3 registration statement.

**Note:** If an FPI is a WKSI (i.e., a public company that has a worldwide market value of its outstanding ordinary shares held by non-affiliates of $700 million or more) at the time it files a Form F-3 registration statement (or within 60 days thereof), it will be able to elect, among other things, to have such registration statement go effective automatically upon such filing with the SEC (i.e., the Form F-3 will not be subject to SEC review and comment and the timing delay associated therewith).
Other Select Considerations for FPIs

- Foreign audit firms that include audit reports on the financial statements of issuers in SEC filings must be registered with the Public Company Accounting Oversight Board (the “PCAOB”).

- It is unlawful for any audit firm that is not registered with the PCAOB to prepare, issue, or participate in the preparation or issuance of any audit report with respect to any issuer filing with the SEC.

- Foreign auditors practicing before the SEC must comply with the requirements of Article 2 of Regulation S-X.
  - Expected to demonstrate sufficient knowledge and experience in applying U.S. GAAP, IFRS as issued by IASB, PCAOB Auditing Standards, SEC financial reporting rules, and SEC independence requirements

- All SEC filings must be in English.
  - Pursuant to Rule 403 under the Securities Act and Rule 12b-12 under the Exchange Act, the FPI must submit a fair and accurate English translation of any foreign language document required to be filed with or submitted to the SEC.
Sutherland’s securities practice serves a wide range of clients, from public companies large and small raising capital in the public capital markets to private corporations leveraging private placements to build their businesses. We work with management teams, boards of directors, and underwriters of small, medium, and Fortune 500 companies to complete initial public offerings, follow-on equity and debt offerings, rights offerings, and private placement transactions to fund corporate growth, strategic transactions, and refinance activity. Our team includes a number of attorneys who previously served on the staff of the U.S. Securities and Exchange Commission, and we routinely interact with SEC staff members in connection with the filing of registration statements and other securities filings. We have the breadth, depth and experience to complete complex capital formation transactions efficiently. Our securities team is highly experienced in successfully completing offerings of all types including:

- Private placements of debt and equity
- Initial public offerings and follow-on equity offerings
- Secured and unsecured public debt
- Convertible debt
- Stock exchanges, tender offers, and stock repurchase programs
- Sales of stock by insiders and other selling stockholders
- Transferable and non-transferable rights offerings
- Ongoing financial reporting and disclosure
- Ownership reporting under Section 13 and Section 16