SQUIRE PATTON BOGGS

FOREIGN PRIVATE ISSUER GUIDE

How US Securities Law Obligations Differ From Those of Domestic Issuers

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Contents

Explanatory Note

This Guide summarizes very complex legal requirements and should not be considered a definitive explanation of applicable laws. This Guide is not a legal opinion upon which you should place reliance in taking specific action. The purpose of this Guide is to provide simplified information and educate you generally about the requirements for a foreign private issuer and the key differences between the obligations of foreign private issuers and those of domestic issuers under the United States securities laws. As such, this Guide contains general outlines and summaries to help your determination to go public as either a foreign private issuer or a domestic issuer. For an understanding of the details and nuances of the rules discussed and their application to specific facts and circumstances, we encourage you (and your underwriters) to consult with Squire Patton Boggs.

This Guide is limited to a discussion of the principal United States securities laws and rules governing your disclosure requirements and reporting obligations once your company is listed on a US exchange. This Guide does not address foreign laws or other laws that may be applicable to you. It also does not address the securities laws and other legal requirements applicable to corporate transactions such as a public offering of securities, a merger or a tender offer. I would be happy to advise you on the legal implications of those transactions as they arise.

I would be happy to visit you to discuss the information contained in this Guide. My contact information is set out below.

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Executive Summary

This Guide explains the United States Securities and Exchange Commission's (SEC) requirements with respect to being considered a foreign private issuer. A foreign private issuer must be a company organized outside the United States that satisfies:

1. A US shareholder test, or
2. A three-part US business contacts test.[1]

Under the US shareholder test, a foreign company is not considered a foreign private issuer if more than 50 percent of its outstanding voting securities are held directly or indirectly (through voting trust certificates or depository receipts) by US residents. If a foreign company fails this shareholder test, it will still be considered to be a foreign private issuer unless it fails any one part of the US business contacts test.

The US business contacts test includes the following three parts:

1. A majority of the foreign company's executive officers or directors are US citizens or residents;
2. More than 50% of the foreign company's assets are located in the United States; or
3. The foreign company's business is administered principally in the United States.

The details and analysis of the foreign private issuer test are described in Section 1 of this Guide.

Foreign private issuers are considered to have fewer and less restrictive SEC obligations than domestic issuers. It is beneficial for foreign companies to be considered foreign private issuers, as the SEC makes numerous accommodations to such issuers. The following list highlights some additional SEC obligations imposed on domestic issuers:

- Significantly more required disclosures (on Forms 10-K, 10-Q and 8-K), including sensitive (and personal) individualized compensation information of certain executive officers and directors;
- Certain executive officers are subject to greater personal liability with respect to their certifications of disclosures on Forms 10-Q and 10-K;
- The SEC's rules governing the solicitation of proxies and related disclosure obligations;
- Required to report in US dollars under US GAAP, rather than in local currency under a variety of accounting standards (such as local GAAP and IFRS);
- Increased risk of being subject to negative consequences with respect to late filings;
- The SEC's disclosure rules regarding intentional disclosures of material nonpublic information; and
- Insiders are subject to beneficial ownership reporting obligations, liabilities and prohibitions.

Complying with these additional SEC obligations takes an extensive amount of time and is costly (both in terms of the burden on a domestic issuer's personnel and monetary cost).

Qualifying as a foreign private issuer is a significant benefit to a company listing on NASDAQ or the NYSE. As an issuer prepares for an IPO, the benefits of foreign private issuer status should be kept in mind when making decisions that could impact the US shareholder and US business contacts tests.

After the initial determination that a foreign company qualifies as a foreign private issuer in connection with its initial public offering, it is required to test its status as a foreign private issuer once per year, on the last business day of its second fiscal quarter.

[1] Exchange Act Rule 3b-4(c).

1. Foreign Private Issuers

The SEC makes certain accommodations to companies that qualify as foreign private issuers. A foreign private issuer must be a company organized outside the United States, but not every foreign company qualifies as a foreign private issuer. In order for a foreign company to qualify as a foreign private issuer, a company must satisfy the definitional tests contained in Exchange Act Rule 3b-4(c). There are two basic tests: (1) the US shareholder test and (2) the three-part US business contacts test.[2]

1.1 US Shareholder Test

Under the US shareholder test, a foreign company will not be considered a foreign private issuer if more than 50% of its outstanding voting securities are directly or indirectly (through voting trust certificates or depository receipts) held by US residents. If a foreign company fails this shareholder test, it will still be considered to be a foreign private issuer unless it fails any one part of the US business contacts test.

> ***Practical Consideration:*** *In connection with a foreign company's initial public offering in the United States, we typically assume all shares included in the public offering will be held by US shareholders. The estimated percentage to be held by the new shareholders is generally based upon the valuation of the foreign company and the determination of how many shares need to be sold at a specified price to raise the desired capital. However, it is helpful if the foreign company can (if possible) limit the number of US investors and keep track of sales to any such investors, in order to adequately monitor its foreign private issuer status.*

> ***Practical Consideration:*** *With respect to determining the residency of a foreign company's shareholders, there currently exists little available guidance on the definition of residency and there is some ambiguity in the rule. For this reason, we recommend applying the most conservative approach and counting all of the following types of individuals as US residents: those with US tax residency, those with US Green Card status, those with US mailing addresses (including providences and military bases) and those with US citizenship.*

> ***Practical Consideration****: In order to analyze properly the US shareholder test, we typically review information from the following sources: share transfer journals or transfer agent reports with respect to shareholders of record; information provided by DTC/Broadridge (or similar entities) pertaining to non-objecting beneficial holders (individuals beneficially holding shares through a broker who did not object to having his or her or its name and address released to a company); and objecting beneficial holders (individuals beneficially holding shares through a broker who did object to having his or her or its name and address released to a company).*

1.2 US Business Contacts Test

The three parts of the US business contacts test in the foreign private issuer definition are as follows:

[2] Exchange Act Rule 3b-4(c).

1. a majority of the company's executive officers or directors are United States citizens or residents;
2. more than 50% of the company's assets are located in the United States; or
3. the company's business is administered principally in the United States.

Citizenship and Residency of the Company's Management

The first part of the US business contacts test focuses on whether a majority of the company's executive officers or a majority of its directors are US citizens or residents. For this purpose, an "executive officer" is defined as a company's president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policymaking function or any other person who performs similar policy making functions for the company.[3]

> ***Practical Consideration:*** *The determination of who is an "executive officer" is based on the facts and circumstances of the particular situation, as well as the management responsibilities and policymaking functions performed by each officer.*

Location of the Company's Assets

The second part of the US business contacts test focuses on whether more than 50% of the company's assets are located in the United States, but the rules do not provide guidance regarding how this determination should be made. A company may begin this analysis by reviewing its balance sheet asset line items and determining the geographic location of such assets. This determination may be straightforward for tangible assets, but less obvious for other types of assets, including intangible assets and goodwill. This analysis should involve the company's outside accountants, who may be willing to provide guidance regarding how accounting principles address this issue and whether a valuation standard other than a balance sheet review might provide a more accurate determination.

> ***Practical Consideration:*** *In connection with preparations related to an initial public offering in the United States, it is important for a foreign company to maintain data on the location of its assets and update it to reflect any acquisitions or dispositions. The company should keep this test in mind when considering future acquisitions and dispositions to the extent that the percentage of its shares owned by US residents is close to the 50% threshold.*

Administration of the Company's Business

The third part of the US business contacts test focuses on whether a company's business is administered principally in the United States. There is little guidance from the SEC regarding where a company's business is "principally administered." This test is intended to address a different type of contact than the US citizenship or residency status of its directors and executive officers, although it also is probably not as simple as determining the location of a majority of the company's employees. Factors that might be considered in this analysis include the following:

- where the company's principal business functions (and business segments) are administered;
- where the company's headquarters is located;
- where the company's management spends their working days;
- where the company's board of directors meetings are held; and
- where the company's shareholders meetings are held.

> ***Practical Consideration:*** *In connection with preparations related to an initial public offering in the United States, it is important for foreign companies to maintain data on the above factors in order to support a determination that its business is principally administered outside of the United States.*

[3] Exchange Act Rule 3b-7.

1.3 Foreign Private Issuer Testing

After the initial determination that a foreign company qualifies as a foreign private issuer in connection with its initial public offering, it is required to test its status as a foreign private issuer once per year, on the last business day of its second fiscal quarter.[4] In the event the foreign company determines that it fails to qualify as a foreign private issuer, it is required to start using the forms and complying with the rules applicable to domestic issuers beginning on the first day of the fiscal year following the determination date. Any such foreign company will remain unqualified as a foreign private issuer unless it meets the foreign private issuer qualifications on a future test date.

> ***Practical Consideration:*** *For a foreign private issuer with a non-US shareholder owning over a majority of its issued and outstanding shares, the US Shareholder Test determination may be as simple as requesting a certified shareholder list from its transfer agent. For other foreign private issuers whose share ownership is not easily as determined, the US shareholder test determination can be cumbersome and onerous. It can require, among other things: setting record dates in the DTC system; ordering geographic surveys from DTC; communicating with shareholders filing publicly available beneficial ownership reports; and communicating with brokers, dealers, banks and other nominees with respect to identifying the amount of shares represented by accounts of customers resident in the US. In the event a foreign company fails to satisfy the US shareholder test and has to analyze whether it qualifies as a foreign private issuer pursuant to the US business contacts test, it may spend a considerable amount of time documenting its executive officers' and directors' citizenship and residency, the location of its assets and where its business is administered, if it has not previously tracked such information.*

[4] Exchange Act Rule 3b-4.

2. Exchange Act Reporting Obligations

2.1 Annual Reports

Foreign Private Issuer's Obligations

Pursuant to the Securities Exchange Act of 1934 (the Exchange Act), the SEC, a foreign private issuer is required to file annual reports with the SEC on Form 20-F and furnish other reports on a Form 6-K. The Form 20-F must be filed within four months after the end of each fiscal year.

The Form 20-F consists of a cover page, required disclosure (narrative, tabular and financial statements) on a variety of topics, signature pages and an exhibit list (incorporating by reference required exhibits previously filed with the SEC and including any new exhibits called for by the report).[5] Since this is the main disclosure document for foreign private issuers, it can range from approximately 60 pages to over 200 pages (excluding exhibits) in length.

- Part I requires disclosure regarding a foreign private issuer's selected historical financial data, risk factors, description of business, unresolved SEC comments, management's discussion and analysis of financial condition and results of operation (MD&A), disclosure of limited information (including aggregate compensation information with respect to directors, members of senior management and employees if permitted to be disclosed on an aggregate basis pursuant to local laws) with respect to the foreign private issuer's directors, senior management and employees, information concerning its major shareholders, related party transactions, taxation and market risk.
- Part II requires disclosure regarding its defaults, dividend arrearages and delinquencies, changes to the rights of shareholders, information concerning its internal control over financial reporting, a comparison of how its corporate governance is different in its home country than those followed by US companies under applicable NASDAQ/NYSE requirements, identification of its audit committee financial expert, exemptions from listing standards for audit committees, description of its code of ethics as well as information regarding its principal accounting fees and services.
- Part III requires disclosure regarding the foreign private issuer's financial statements and exhibits. Foreign private issuers are required to provide audited (under US generally accepted auditing standards by an auditor meeting US independent standards) financial statements that must be prepared in accordance with:
  - US GAAP;
  - International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB) (without a US GAAP reconciliation);
  - IFRS other than as issued by the IASB (with US GAAP reconciliation); or
  - Local GAAP (with US GAAP reconciliation).[6]

With respect to US GAAP reconciliation, new foreign private issuers are required to provide US GAAP reconciliation with respect to the last two fiscal years and any required interim periods).[7]

> ***Practical Consideration:*** *Unlike a domestic issuer's annual report on Form 10-K (described below), the annual report on Form 20-F provides all instructions in the Form 20-F itself. This is in contrast to the annual report on Form 10-K, which requires domestic issuers to consult many secondary sources (including Regulation S-K and Regulation S-X).*

The Form 20-F must be signed by the foreign private issuer and include certifications under Sections 302 and 906 of the Sarbanes-Oxley Act and Rule 13a-14(b) by its principal executive officer (PEO) and its principal financial officer (PFO) indicating that the Form 20-F fully complies with the requirements of the Exchange Act and that the information contained in the report fairly presents, in all material respects, the financial condition and results of operation of the foreign private issuer.[8] Certifying officers have federal criminal liability for false certifications, which are punishable by fines and imprisonment.

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[5] *See* Form 20-F.
[6] Regulation S-X Rule 4-01(a)(2).
[7] Form 20-F, General Instruction G.
[8] *See* Form 20-F.

Practical Consideration: *The Section 302 certification is a civil provision, while the Section 906 certification is a criminal one. The SEC has released guidance stating that a signatory to the Section 302 certification can be liable for any material misstatement or omission under antifraud standards. The officer potentially could be subject to SEC action for violating Section 13(a) or 15(d) of the Exchange Act and to both SEC and private actions for violating Section 10(b) and Rule 10b-5 of the Exchange Act.[9] Any officer who certifies the statements set forth in the Section 906 knowing that the Exchange Act report accompanying the statement does not comport with all the requirements set forth therein may be subject to a criminal fine of $1,000,000 and/or imprisonment up to 10 years. If the officer makes the certification willfully, then the penalties are increased to $5,000,000 and 20 years, respectively. The PEOs and PFOs of foreign private issuers are required to provide this certification annually in connection with the Form 20-F, while their domestic issuer counterparts must provide this certification quarterly in connection with the Forms 10-Q and 10-K.*

Domestic Issuer's Obligations

Domestic issuers must file an annual report on Form 10-K with the SEC following the end of each fiscal year. The required filing dates with respect to the report depend upon the domestic issuer's status as a large accelerated filer (due 60 calendar days after fiscal year end), accelerated filer (due 75 calendar days after fiscal year end) or any other type of filer (due 90 calendar days after fiscal year end).[10] Although related, an annual report on Form 10-K is different than the annual report sent to shareholders. The following paragraphs describe the requirements of an annual report on Form 10-K.

The Form 10-K consists of a cover page, required disclosure (narrative, tabular and financial statements) on a variety of topics, signature pages and an exhibit list (incorporating by reference required exhibits previously filed with the SEC and including any new exhibits called for by the report).[11]

- Part I requires disclosure regarding a domestic issuer's description of business, risk factors, unresolved SEC comments, and a description of properties and legal proceedings.
- Part II requires disclosure regarding a domestic issuer's selected historical financial data in US GAAP, audited financial statements for the year for which the report is filed in US GAAP, equity securities, an MD&A regarding the domestic issuer's financial results, quantitative and qualitative disclosure regarding market risk, controls and procedures as well as information relating to changes in and disagreements with accountants, and internal control over financial reporting.
- Part III requires disclosures relating to corporate governance, director and executive officer compensation, transactions with management, compliance with Section 16(a) filings and principal accounting fees and services.

Practical Consideration: *Part III's information requires extensive preparation typically by teams of in-house professionals, as well as outside counsel. Part III generally takes months of preparation and requires the compensation committee's and the board of director's review and approval. This extra time and expense is not typically borne by foreign private issuers. For example, the annual report on Form 10-K requires domestic issuers to disclose executive compensation information on an individual basis with specific disclosure regarding the domestic compensation philosophy, objectives, annual*

[9] Certification of Disclosure in Companies' Quarterly and Annual Reports, Release No. 33-8124, 34-46427 (2002).
[10] Form 10-K, General Instruction A(2).
[11] *See* Form 10-K.

total compensation (base salary, bonus, equity compensation) and potential payments in connection with change in control, retirement, death or disability. Conversely, the Form 20-F permits foreign private issuers to disclose compensation information on an aggregate basis.

Domestic issuers may incorporate by reference into the Form 10-K certain Part III information contained in their proxy statements relating to annual shareholder meetings[12] (see Section 3), but only if such proxy statement will be available within 120 days after the end of the fiscal year.[13] (See Section 3.01 for a detailed description of the Part III information that may be contained in the proxy statement and incorporated by reference into the Form 10-K.) Therefore, most domestic issuers simultaneously prepare their Forms 10-K and proxy statements in order to reduce duplicative disclosure and simplify the Form 10-K. In addition, domestic issuers are permitted to incorporate by reference into the annual report to shareholders certain Part I and Part II information contained in their annual report on Form 10-K and filed with the SEC.[14] (See Section 2.04 below for more information regarding annual reports submitted to shareholders.)

The Form 10-K must be signed by a domestic issuer's PEO, its PFO, its principal accounting officer (PAO) and a majority of its directors. (The requirement for director signatures is designed to encourage the directors to review it carefully to ensure the Form 10-K's accuracy and completeness.) As it may be difficult to obtain signatures from all directors, many directors of domestic issuers execute powers of attorney allowing an officer of the company to sign on their behalf. In addition, the Form 10-K must include the same two certifications of the PEO and the PFO that are required to be included with the Form 20-F. (As previously mentioned, both the PEO and PFO assume personal civil and criminal liability for inaccuracies in connection with the matters subject to their certifications.)

2.2 Quarterly Financial Reports

Foreign Private Issuer's Obligations

As discussed below under Section 2.03 (Current Reports), foreign private issuers are generally not required to furnish financial information to the SEC other than in their annual report on Form 20-F, unless such information meets a few limited requirements.[15] Therefore, foreign private issuers are not generally required to provide quarterly financial information to their shareholders. However, NASDAQ requires all foreign private issuers to furnish on a Form 6-K their interim balance sheet and income statement as of the end of their second quarter.[16] This information does not have to be reconciled to US GAAP, but must be provided not later than 6 months following the end of the foreign private issuer's second quarter.

Practical Consideration: *A foreign private issuer's underwriters may find it more challenging to market to potential US investors who are accustomed to the availability of quarterly reports. As such, the underwriters may obligate the foreign private issuer, pursuant to the underwriting agreement, to furnish to the SEC a Form 6-K containing substantially the same information as required by a domestic issuer's quarterly report on Form 10-Q following the end of each fiscal quarter. If a foreign private issuer agrees to this requirement, it generally has some flexibility in the timing of furnishing these reports and in complying with Form 10-Q's requirements (including the PEO's and PFO's certification requirements). Voluntarily furnishing quarterly reports also may help the foreign private issuer increase the analyst base that follows its stock.*

Domestic Issuer's Obligations

Domestic issuers must file quarterly financial reports on Form 10-Q with the SEC.[17] The required filing dates with respect to these reports depend upon the domestic issuer's status as a large accelerated filer (due 40 calendar days after each

[12] Form 10-K, General Instruction G(3).
[13] If a domestic issuer is unable to file its definitive proxy statement within the 120-day period, it must amend its Form 10-K within such period to include the missing Part III information.
[14] Form 10-K, General Instruction G(1-2).
[15] Exchange Act Rule 13a-13(b)(2).
[16] NASDAQ Listing Rule 5250(c)(2).
[17] Exchange Act Rule 13a-13.

fiscal quarter end), accelerated filer (due 40 calendar days after each fiscal quarter end) or any other type of filer (due 45 calendar days after each fiscal quarter ends) with respect to the first three quarters. (No quarterly report is required to be filed with respect to its fourth quarter, as the annual report on Form 10-K will be filed for the whole year shortly thereafter.) The domestic issuer must explicitly follow the requirements and address every item of the Form 10-Q.

The Form 10-Q requires disclosure of condensed, unaudited financial information for the applicable quarter and fiscal year-to-date period, with comparative information for the corresponding periods of the prior fiscal year, and an abbreviated MD&A covering such periods.[18] In addition, the Form 10-Q generally requires information regarding quantitative and qualitative disclosures about market risk, controls and procedures, legal proceedings, risk factor updates, sales of equity securities, defaults on financial obligations and any other information a domestic issuer may consider material. A domestic issuer's auditors are required to review (but not audit) these quarterly reports. The Form 10-Q is required to be signed by the domestic issuer and by its PFO or PAO. In addition, the Form 10-Q must include the same two certifications of the PEO and the PFO that are required for each Form 10-K. (As previously mentioned, each of the PEO and PFO assume personal civil and criminal liability for inaccuracies in connection with the matters subject to their certifications.)

2.3 Current Reports

Foreign Private Issuer's Obligations

Foreign private issuers are not required to comply with Form 8-K's disclosure obligations (discussed below)[19] and are required to furnish to the SEC only a limited amount of information on a current report on Form 6-K:[20]

- Material non-public information that was made public under local law;
- Information that was filed with and made public by any foreign stock exchange on which the company's securities are listed; and
- Information that was distributed or required to be distributed to shareholders under local law.[21]

The Form 6-K consists of a cover page, limited required disclosure (described above), a signature page and an exhibit list (if applicable). It must be signed by an authorized officer of the foreign private issuer.

> ***Practical Consideration:*** *A foreign private issuer's underwriters may find it more challenging to market to potential US investors who are accustomed to the availability of more information than a foreign private issuer is required to disclose. As such, they may obligate the foreign private issuer pursuant to the underwriting agreement to, among other things, furnish to the SEC a Form 6-K relating to some or all events required to be disclosed pursuant to a current report on a domestic issuer's Form 8-K, and regarding the time and place of its shareholders meeting (including a statement providing information as to all matters that the foreign private issuer is required to publish pursuant to local law for its shareholders).*

Domestic Issuer's Obligations

A current report on Form 8-K provides real-time disclosure of particular types of events. Certain significant events that occur between periodic filings must generally be reported to the SEC in a current report on Form 8-K within a 4 business day deadline (events identified under items 7 through 9 below are not subject to the 4 business day reporting requirement). The Form 8-K is required to be signed by the domestic issuer.[22]

Unlike the few events that trigger a foreign private issuer's obligation to furnish information on a current report on Form 6-K to the SEC, domestic issuers are subject to many additional events that trigger their obligation to file or furnish, as the case may be, information on a current report on Form 8-K to the SEC.[23] The following events (numbered consistently with Form 8-K's requirements) trigger a current report on Form 8-K filing:

[18] *See* Form 10-Q.
[19] Exchange Act Rule 13a-11(b).
[20] Exchange Act Rule 13a-16(c).
[21] *See* Form 6-K.
[22] *See* Form 8-K.
[23] Exchange Act Rule 13a-11.

FORM 8-K ITEM NO.	LATE FILING PROBLEMS?
1. Business & Operations *(compensation arrangements are excluded from 1.01 and covered in 5.02)*	
1.01. Entry into a material definitive agreement (or any material amendment) not made in the ordinary course of business or an amendment of such an agreement that is material to the issuer	No
1.02. Termination of a material definitive agreement excludes termination as a result of expiration of the agreement by its terms or upon the completion of obligations	No
1.03. Bankruptcy or receivership of the issuer or its parent (includes petitions and orders confirming reorganization, arrangement or liquidation)	Yes
2. Financial Information	
2.01. Completion of acquisition or disposition of a significant amount (as determined pursuant to Regulation S-X) of assets by the issuer or any of its majority-owned subsidiaries not in the ordinary course of business	Yes
2.02. Results of operations and financial condition • Any public announcement or release disclosing material nonpublic information for a completed period • A Form 8-K is not required with respect to a call/webcast if it occurred within 48 hours after a Form 8-K (attaching a press release as an exhibit) was filed announcing such call/webcast and if the financial information was posted on the issuer's website	No
2.03. Creation of a material direct financial obligation (e.g., long-term debt, capital lease, operating lease or short-term debt) or a material obligation under an off-balance sheet arrangement of an issuer • Applies even if the issuer is not a party to the transaction • Exemption for securities sold pursuant to an effective registration statement	No
2.04. Triggering events that accelerate or increase a direct financial obligation or an obligation under an off-balance sheet arrangement • Consequences must be material to the issuer (increasing/accelerating obligations and conversion from contingent to direct obligations are material)	No
2.05. Costs associated with exit or disposal activities • Includes commitment to an exit or disposal plan or otherwise disposal of a long-lived asset or termination of employees under a plan of termination described in SFAS No. 146	No
2.06. Material impairments • Conclusion that a material charge for impairment to one (or more) asset(s) is required and will be incurred under GAAP • A Form 8-K is not required if such conclusion was made in connection with the preparation, review or audit of financial statements required to be included in the next Exchange Act report due to be filed (e.g., Forms 10-Q and 10-K) if such report is filed on a timely basis and the conclusion is disclosed in such report	No

FORM 8-K ITEM NO.	LATE FILING PROBLEMS?
3. Securities & Trading Markets	
3.01. Notice of delisting or failure to satisfy a continued listing rule or standard; transfer listing • If an issuer received notice from the national securities exchange (including NASDAQ and NYSE) maintaining its principal listing for any class of its common equity regarding (a) failure to satisfy a rule/standard for continued listing on such exchange; or (b) the exchange's steps to delist such class of securities • If an issuer notifies the national securities exchange (including NASDAQ and NYSE) maintaining its principal listing for any class of its common equity that it is aware of any material noncompliance with a rule/standard for continued listing on such exchange • Must report a public reprimand letter (or similar communication) but not an early warning notice • Must report the adoption by the issuer of authorization to delist	Yes
3.02. Unregistered sales of equity securities[24] • If the sale of equity securities by the issuer in an unregistered transaction constitutes at least 1 percent of its outstanding equity securities (securities convertible into such class of equity securities are not included) • If rights to the holders of any class of registered securities have been materially limited by the issuance or modification of any other class of securities	Yes
3.03. Material modification to rights of security holders • If any instrument defining the rights to the holders of any class of registered securities has been materially modified • If rights to the holders of any class of registered securities have been materially limited by the issuance or modification of any other class of securities • Includes working capital restrictions and limitations on payments of dividends	Yes
4. Accountants & Financial Statements	
4.01. Change in issuer's (or its significant subsidiary) certifying accountant (including resignation, refusal to stand for re-appointment or dismissal by the current independent accountant or the appointment of a new independent accountant) • Must disclose in a Form 8-K even if previously reported in a Form 10-Q, 10-K or definitive proxy statement	Yes
4.02. Nonreliance on previously issued financial statements or a related audit report or completed interim review • Determination by board of directors or committee (or if the issuer is advised by or receives notice from its independent accountant) that previously issued financial statements should no longer be relied upon because of an error in such financial statements • Must disclose in a Form 8-K even if previously reported in a Form 10-Q, 10-K or definitive proxy statement	Yes

[24] If the issuer is a smaller reporting company, no report is needed if the securities sold in the aggregate since its last report filed under 3.02 or its last periodic report, whichever is more recent, constitute less than 5% of the number of shares outstanding of the class of equity securities sold. *See,* Form 8-k, Section 3, Item 3.02.

FORM 8-K ITEM NO.	LATE FILING PROBLEMS?
5. Corporate Governance & Management	
5.01. Changes in control of the registrant	Yes
5.02. Departure of directors or certain officers; election of directors; appointment of certain officers; compensatory arrangements of certain officers	
(a) If a director resigns or refuses to stand for re-election because of a disagreement with the issuer regarding its operations, policies or practices or if a director has been removed for cause	Yes
(b) If the issuer's PEO, president, PFO, PAO, principal operating officer (POO) or any person performing similar functions, or any named executive officer, retires, resigns or is terminated from that position, or if a director retires, resigns, is removed or refuses to stand for re-election (not involving 5.02(a)'s circumstances)	Yes
(c) Appointment of new PEO, president, PFO, PAO, POO or any person performing similar functions	Yes
(d) Election of new director (except by a vote of securities holders at annual or special shareholder meeting)	Yes
(e) Entry into, adoption of, or otherwise commencement of a material compensatory plan, contract or arrangement (whether or not written) as to which the issuer's PEO, PFO or named executive officer participates or is a party to, or ○ A material amendment regarding any such arrangement, or ○ A material grant or award under any such arrangement	No
5.03. Amendments to articles of incorporation or bylaws; change in fiscal year	Yes
5.04. Temporary suspension of trading under issuer's employee benefit plans	Yes
5.05. Amendments to the registrant's code of ethics, or waiver of a provision of the code of ethics	Yes
5.06. Change in shell company status	Yes
5.07. Submission of matters to a vote of security holders	Yes
5.08. Shareholder Director Nominations	Yes
6. Asset-Backed Securities	N/A to most issuers
7. *May* Elect to Disclose Pursuant to Regulation FD (to be filed simultaneously/promptly)	No
8. *May* Elect to Disclose Other Events the Issuer Deems Important to Security Holders (no filing deadline • Disclose non-public information as required by Regulation FD	No
9. Financial Statements & Exhibits	N/A

Practical Consideration: *Domestic issuers have more triggering SEC-reportable events than foreign private issuers. As such, domestic issuers must pay careful attention to Form 8-K's triggering events and meet applicable filing requirements as delinquent filings regarding certain disclosure items (identified in the chart above as "Yes" under the "Late Filing Problems?" heading) can negatively impact them (including ineligibility to use short-form registration statements on Forms S-3, S-8 and S-4, loss of WKSI status and unavailability of Rule 144's safe harbor for directors, officers and affiliates). It is important for domestic issuers to establish and maintain effective internal reporting procedures so that matters that trigger a filing will become immediately known to the people responsible for filing items with the SEC. For more information regarding the consequences of late filings, see* ***Section 3.02*** *below.*

2.4 Annual Reports to Shareholders

Foreign Private Issuer's Obligations

Foreign private issuers are not required to distribute an annual report to its shareholders pursuant to applicable SEC regulations.[25]

Practical Consideration: *A foreign private issuer's underwriters may find it more challenging to market to potential US investors who are accustomed to the availability of the information that a domestic issuer is required to disclose. Accordingly, they may obligate the foreign private issuer pursuant to the underwriting agreement to, among other things, distribute an annual report to its shareholders.*

Domestic Issuer's Obligations

Prior to (or contemporaneously with) the distribution to shareholders of the proxy statement relating to any shareholders meeting at which directors are to be elected (see Section 2), domestic issuers are required to furnish to their shareholders and the SEC an annual report to shareholders.[26] The report is not considered to be "filed" for purposes of the liability provisions relating to documents filed under the Exchange Act (although it is subject to the antifraud provisions of Rule 10b-5) and does not need to be submitted to the SEC in advance for review. It must include, among other things, information relating to the domestic issuer's business; including segment and geographic financial information, disclosure regarding its principal products and/or services; and a description regarding the business done during the most recent fiscal year. All directors and executive officers must be identified with their principal occupation. Annual reports frequently include charts, graphs and pictures and are printed in an attractive format. Many domestic issuers combine the annual report on Form 10-K and the annual report into a single document introduced by the PEO's letter.

[25] Exchange Act Rule 3a12-3.
[26] Exchange Act Rule 13a-1.

3. Section 14A and Related Proxy Disclosure Obligations

3.1 Proxy Rules

Foreign Private Issuer's Obligations

Foreign private issuers generally are exempt from the SEC and applicable NASDAQ/NYSE rules governing the solicitation of proxies, including the rules governing the components of proxy statements and other materials sent to shareholders prior to shareholder meetings.[27] However, NASDAQ rules require foreign private issuers listed on one of its exchanges to hold an annual shareholders meeting.[28] Both NASDAQ and the NYSE require foreign private issuers to solicit proxies for all shareholder meetings.[29] NASDAQ permits foreign private issuers to follow their local law proxy solicitation rules rather than NASDAQ's rules, so long as this is disclosed in the foreign private issuer's Form 20-F or its website.[30]

> ***Practical Consideration:*** *Many foreign private issuers find it beneficial to their shareholders to furnish on a Form 6-K certain information regarding their shareholder meetings and distribute to their shareholders a proxy card containing a brief summary of the matters to be voted on at the shareholders meeting and other related information as this detailed disclosure is the type of disclosure that is expected from proxy advisers. Proxy advisers, such as Institutional Shareholder Services Inc. (ISS), are third-party firms that advise investors how to vote on matters proposed in a company's proxy statement. A foreign private issuer that does not provide detailed information in its proxy statement risks proxy advisers recommending that shareholders vote against its proposals. (See Section 3.05 below for additional information regarding proxy advisers.)*

> ***Practical Consideration:*** *Based upon our experience, foreign private issuers who voluntarily distribute limited information to shareholders in connection with annual meetings incur nominal expenses whereas domestic issuers incur significant expenses in connection with the preparation, review and distribution of proxy materials subject to the SEC's obligations.*

ISS is one of the largest US proxy advisers. Each year it publishes a large manual containing its recommendations on how shareholders should vote on certain matters. Analyst and large institutional investors often follow proxy advisers' recommendations on how to vote at shareholder meetings. As such, a foreign private issuer may find it difficult to get certain proposals passed if ISS has made a recommendation against the issuer's proposals, which ISS may do if the proposal is not accompanied by information that a domestic issuer would include. ISS's influence is even more important if the foreign private issuer does not have a controlling shareholder vote in support of the proposal.

> ***Practical Consideration:*** *A foreign private issuer should familiarize itself with ISS's annual guidelines and be prepared to dialog with ISS with respect to its proxy proposals.*

Domestic Issuer's Obligations

NASDAQ's and the NYSE's domestic issuers are required to hold an annual meeting of their shareholders, provide proxy statements with respect to all shareholder meetings and solicit proxies.[31] (A proxy allows a shareholder who does not attend a shareholder meeting to designate individuals to vote the shares owned by the shareholder in a specified manner.)

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[27] Exchange Act Rule 3a12-3(b).
[28] NASDAQ Listing Rule 5620(a).
[29] NASDAQ Listing Rule 5620(b); NYSE Listed Company Manual Section 402.04.
[30] NASDAQ Listing Rule 5615(a)(3)(B), 5620(b).
[31] NASDAQ Listing Rule 5620(a)-(b); NYSE Listed Company Manual Section 302.00, 402.04.

Practical Consideration: *US securities laws generally do not require a domestic issuer to hold an annual meeting by a required date. However, since most domestic issuers incorporate by reference the executive compensation information contained in their proxy statement into their annual report on Form 10-K, the annual meeting shareholder materials generally are filed with the SEC and distributed to a domestic issuer's shareholders within 120 days after the filing of the Form 10-K.*

In the solicitation of proxies for a domestic issuer's shareholder meeting, a domestic issuer must follow Regulation 14A and Schedule 14A under the Exchange Act. These rules specify the disclosure information that must be provided to shareholders in relation to the shareholder meetings, including: the information that must be disclosed to investors prior to or at the time of a proxy solicitation; how such information must be presented in the proxy statement; the form of proxy; and the treatment of investor proposals. (This Guide addresses only the information included in proxy statements regarding routine matters.) Generally, a domestic issuer's proxy statement with respect to its annual meeting of shareholders includes disclosure regarding the following:

- letter from the domestic issuer's PEO or chairman of the board (this is not required);
- meeting information, voting mechanics (e.g., revocability and/or voting at the meeting or by proxy, through telephone, the Internet or by mail) and specific proposals;
- the board of directors leadership structure and role in risk oversight, director independence, board meeting information, shareholder communications with the board, specific information with respect to a domestic issuer's audit, nominating and compensation committees and consideration of diversity in director nominations;
- director and executive officer information (biographical, share ownership, litigation and attributes/director qualifications);
- related-party transactions;
- executive compensation disclosure (reported on an individualized basis with respect to a domestic issuer's named executive officers) consisting of a narrative compensation discussion and analysis and technical executive compensation tables (see below for more information);
- director compensation disclosure (reported on an individual basis with respect to a domestic issuer's non-employee directors) in a tabular format;
- compliance with Section 16(a) (see Section 6.0 for more information); and
- auditor information.

Compensation of Certain Executive Officers

In connection with proxy statements related to shareholders meetings involving routine matters (e.g., the election of directors or the adoption of a compensation plan in which any director or executive officer will participate), a domestic issuer is required to provide executive compensation disclosure on an individualized basis with respect to the following persons (each a named executive officer, or NEO):

- the persons holding the positions of PEO and PFO during its last completed fiscal year;
- excluding the PEO and PFO, the three most highly compensated executive officers based upon total compensation for the domestic issuer's last completed fiscal year; and
- up to two additional individuals if such individuals would have been considered one of the three most highly compensated executive officers but for the fact that such individuals were not serving as an executive officer at the end of the domestic issuer's last fiscal year.[32]

Practical Consideration: *Unlike the Form 20-F, which permits foreign private issuers to follow local laws and disclose compensation paid to their senior management on an aggregate basis, domestic issuers are obligated to provide this information for*

[32] Item 402(a)(3) of Regulation S-K.

executives on an individual basis. Since this information will be publicly disclosed, [33] *domestic issuers should inform their NEOs that this disclosure is mandatory.*

Practical Consideration: *Gathering the compensation information necessary to satisfy the SEC's executive compensation disclosure requirements takes substantial effort and time. Due to the extensive information that is required to be disclosed regarding executive compensation, we recommend that domestic issuers establish a team (including members from the human resources, legal and finance departments) to analyze and prepare this information. In addition, we recommend this team begin their annual meeting preparations at least four to five months before a shareholders meeting.*

Compensation Discussion & Analysis

Domestic issuers must provide detailed and individualized discussion regarding the compensation awarded to, earned by or paid to its NEOs. The Compensation Discussion & Analysis portion of the proxy statement (or the annual report on Form 10-K if incorporated by reference) is referred to as the CD&A and is similar to the type of detail provided in the MD&A.[34] The CD&A is a narrative discussion of a domestic issuer's compensation policies, programs and practices for its NEOs. It is intended to provide investors with information regarding compensation policies and practices that are not readily apparent from the executive compensation tables (discussed below). It is required to be sufficiently precise to identify material differences in compensation policies and decisions for individual NEOs where appropriate. The CD&A must explain all material elements of the compensation of the NEOs, including:

- the overall objectives of the compensation program(s);
- each compensation program it is designed to award;
- each element of compensation;
- why each element was chosen;
- how amounts and formulas for pay are determined (including performance factors and consideration of risk-taking);[35]
- how each compensation element and decisions regarding such element fit into the domestic issuer's overall compensation objectives;
- interplay between compensation incentives and NEOs taking unnecessary and excessive risks that are detrimental to the shareholders; and
- involvement or use of compensation consultants.

Practical Consideration: *Since the SEC rules require domestic issuers to provide detailed information with respect to each contract, plan or arrangement that provides a payment or benefit to the NEOs, a domestic issuer should review its contracts, plans and arrangements to determine whether they provide for payments and/or benefits for the NEOs.*

Whether it is included in the annual report on Form 10-K (or through incorporation by reference from the proxy statement), the CD&A will be deemed to be "filed" and, therefore, will be subject to the antifraud provisions of the securities laws. Accordingly, the PEO and PFO will have to certify as to the accuracy of the information, but not to the compensation committee's deliberations. Instead, the PEO and PFO may rely on the compensation committee report, which will be considered furnished to the SEC.

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[33] Form 20-F, Items 6.B and 6.E.
[34] Item 402(b) of Regulation S-K.
[35] While the SEC rules require domestic issuers to discuss the performance factors used to set each NEO's performance-based pay, domestic issuers may omit specific quantitative or qualitative performance-related factors or any factors or criteria involving confidential trade secrets or confidential commercial or other financial information if disclosure would result in competitive harm. However, any such domestic issuer that omits such information is still required to discuss the difficulty or the likelihood for its NEOs to meet such target. (Instruction 4 to Item 402(b) of Regulation S-K.)

Executive Compensation Tables

Domestic issuers are required to provide detailed, complex and technical individualized compensation disclosure in tabular format with respect to each of its NEOs on a variety of compensation elements.[36] Domestic issuers are required to include the following executive compensation tables:

- summary Compensation Table;
- grants of Plan-Based Awards;
- outstanding Equity Awards at Fiscal Year-End;
- option Exercises and Stock Vested;
- pension Benefits; and
- nonqualified Deferred Compensation.

> ***Practical Consideration:*** *Analyzing and compiling the information required to be disclosed in these tables is a time-intensive process and involves careful review of the terms of each NEO's compensation arrangements, plans and awards in connection with the SEC's executive compensation rules, regulations and guidance.*

Potential Payments in Connection With Termination or Change in Control

Additionally, domestic issuers must provide additional disclosure regarding the potential payments each of its NEOs is eligible to receive upon termination of employment (with or without cause), death, disability, retirement or in connection with a change in control of the domestic issuer.[37] Specifically, a narrative disclosure must be provided regarding each contract, plan or arrangement providing for payment to an NEO in connection with any termination, death, disability, retirement or change in control. Furthermore, domestic issuers must provide a tabular disclosure quantifying all payments that would be made to each NEO under the different termination, death, disability, retirement or change in control scenarios assuming the triggering event occurred on the last business day of the domestic issuer's last completed fiscal year.

> ***Practical Consideration:*** *The foregoing information is a simplified summary of the executive compensation tables. The rules are complex and include numerous nuances depending on specific situations. Therefore, domestic issuers should consult with legal counsel to analyze the specific facts and circumstances of its compensation plans and arrangements.*

3.2 Proxy Card

Domestic issuers must provide shareholders with a proxy card that includes certain required information. The SEC rules applicable to domestic issuers also impose timing restrictions on when domestic issuers may solicit proxies.

> ***Practical Consideration:*** *Careful consideration will need to be given regarding the impact of a domestic issuer's local law timing requirements for distributing proxy cards and the SEC timing rules for making available or distributing proxy cards.*

3.3 Annual Meetings

Planning and organizing an annual meeting takes a great deal of time and effort, including the onerous disclosure and timing requirements of the SEC's proxy rules and potential interplay with Form 10-K's disclosure requirements. Multiple groups, such as corporate executives, internal legal counsel, human resources, finance and investor relations departments, the board of directors, the audit committee and the nominating and compensation committee, outside legal counsel and auditors, and other third parties, are involved in preparing for the annual meeting. Domestic companies often use a timing and responsibility checklist in order to ensure that all matters and SEC and exchange requirements are completed before the annual meeting.

[36] *See* Items 402(c-i) of Regulation S-K.
[37] Item 402(j) of Regulation S-K.

Practical Consideration: *Understanding the legal framework governing a domestic issuer's annual meeting involves the interplay between various regulations including the laws of the State in which a domestic issuer is domiciled, SEC obligations, applicable NASDAQ/NYSE requirements and listing standards and the domestic issuer's corporate organizational documents.*

3.4 Record Dates

The record date is the date that determines which shareholders are entitled to receive notice of and to vote at the shareholder meeting. Generally, domestic companies incorporated or formed under the laws of most US states must set record dates at a minimum of 10 days and a maximum of 60 days prior to the meeting.[38]

Practical Consideration: *Fixing the record date as far in advance of the meeting as possible will help ensure that domestic issuers are able to solicit enough proxies for passing proposals at the shareholder meetings.*

Practical Consideration: *Some foreign companies find themselves in the unique position of having to set two record dates (one for distributing proxy materials and one for voting) where local law requires a record date for voting to be set very close to the meeting date.*

3.5 ISS/Shareholder Activism

As described above, ISS is one of the largest US proxy advisers. Each year it publishes a large manual containing its recommendations on how shareholders should vote on certain matters. Analysts and large institutional investors often follow proxy advisers' recommendations on how to vote at shareholder meetings. As such, a domestic issuer with a large institutional base can find it difficult to get certain proposal passed if ISS has publicly made a recommendation against a domestic issuer's proposal. The influence that ISS has over shareholder votes is even more important if a domestic issuer does not have a controlling shareholder that would support the domestic issuer's recommendations. In this instance, a domestic issuer's diverse shareholder base may require a company to engage a proxy solution to help it obtain the required votes.

Practical Consideration: *A domestic issuer should familiarize itself with ISS's annual guidelines for applicable regions and interest groups to ensure that it can adequately address and support the proposals in its proxy statement and avoid having ISS or other proxy advisers recommend that shareholders vote against proposal.*[39]

[38] The New York Stock Exchange recommends 30 calendar days between the record date and the meeting. *Listed Company Compliance Guide*, NYSE REGULATION, (Mar. 7, 2014).
[39] Annual guidelines are available at Issgovernance.com. Guidelines are typically issued in December before the start of the fiscal year.

4. Other Exchange Act Issues

4.1 Reporting Currency

Section 3-20 of Regulation S-X permits foreign private issuers to present financial statements in any single currency that its management deems appropriate, while domestic issuers are required to present financial statements in US dollars. However, some foreign private issuers find converting to reporting in US dollars beneficial, as many of their analysts may make inaccurate foreign currency conversion calculations that do not appropriately reflect the foreign private issuer's financial position.

4.2 Consequences of Late Exchange Act Filings

Domestic issuers must pay careful attention to their disclosure process to ensure timely Exchange Act report filings. The failure to make timely Exchange Act reports (including Form 10-K (including portions of proxy statements incorporated by reference into the Form 10-K), Form 10-Q and certain Form 8-Ks) raises the following issues:

- Notifying the SEC of Inability to File on Time. Domestic issuers must file with the SEC, within one business day after the due date for a Form 10-K or Form 10-Q, a Form 12b-25 disclosing its inability to file the applicable Exchange Act report timely and the reason for the delay.[40]
- NASDAQ Issues. If a domestic issuer is late in filing a required Exchange Act report with the SEC, NASDAQ will issue a staff notice that will provide the domestic issuer 60 calendar days to submit a plan to regain compliance, provided the domestic issuer is not currently under review for a prior staff delisting determination. NASDAQ can provide additional 15-day extensions for good cause shown. Upon review of the plan, NASDAQ may allow the domestic issuer to remain listed for up to 180 calendar days from the date of the late filing. If the domestic issuer is not current in its filings at the end of the 180-day period, NASDAQ will send a staff delisting determination. In addition to issuing a staff notice, NASDAQ will require the domestic issuer to issue a press release disclosing that it failed to timely file an Exchange Act report with the SEC.[41]
- NYSE Issues. If a domestic issuer is late in filing its Form 10-K with the SEC, NYSE will send the domestic issuer a notice. Within five days after receipt of such notice, the domestic issuer must contact the NYSE and issue a press release disclosing the status of the filing, reason for delay and anticipated filing date. The NYSE will issue a press release in the event the domestic issuer fails to do so within this time period. If the Form 10-K is not filed within six months from the filing due date, the NYSE may permit the domestic issuer to continue trading its securities for an additional six-month period or suspend and/or delist the domestic issuer.[42]
- Violation of the Exchange Act. The failure to file an Exchange Act report on time constitutes a violation of Section 13(a) of the Exchange Act and, although uncommon, the SEC could institute administrative proceedings against the domestic issuer seeking a variety of outcomes, including revocation of its Exchange Act registration.
- Insider Trading Halt. If material nonpublic information concerning the reasons for a late SEC report is in the possession of the domestic issuer, then its share repurchases and any insider trading transactions should be stopped until the information is publicly available. Additionally, domestic issuers should refrain from granting stock options during this period.
- Ongoing Use of Existing Registration Statements. In connection with late (or missed) Exchange Act reports, domestic issuers should consult legal counsel regarding whether it should continue to use an already effective registration statement.
- WKSI Status and Form S-3ASR Eligibility. A well-known seasoned issuer (WKSI) may file an automatic shelf registration statement with the SEC on Form S 3ASR to register an unspecified amount of equity or debt securities.[43] A Form S 3ASR becomes effective automatically upon filing (without review by the SEC). Therefore, after filing a Form S 3ASR with a universal prospectus, a WKSI can file a prospectus supplement indicating the amount and features of the securities to be sold and immediately start selling the securities. Also, a WKSI is not required to register a specified dollar amount of securities at the time of filing the Form S 3ASR and may postpone payment of filing fees until each shelf take-down. In order to be considered a WKSI, a domestic issuer would need to (a) meet the Form S-3 eligibility requirements described below and (b) as of a specified determination date generally have a worldwide market value of its outstanding voting and nonvoting common equity held by non-affiliates of US$700 million or more.[44]

[40] Exchange Act Rule 12b-25.
[41] NASDAQ Listing Rule 5250(c)(1), 5810(c)(2)(F).
[42] NYSE Listed Company Manual Section 802.01E.
[43] Form S-3, General Instruction D.
[44] Securities Act of 1933 Rule 405.

- Form S-3 Eligibility. Form S-3 is a short-form registration statement that permits issuers to incorporate by reference Exchange Act reports containing many types of information that generally is required to be included in the Form S-1 long-form registration. (Form S-3 is similar to the foreign private issuer-equivalent Form F-3 registration statement.) If a domestic issuer does not meet the Form S-3 eligibility requirements, then it is required to comply with the more cumbersome and detailed disclosures required in the Form S-1, including providing current executive compensation disclosure as discussed in Section 3.02 above. Among many eligibility requirements, in order to use a Form S-3 domestic issuers must:[45]
  - Be current in all Exchange Act reports (e.g., a domestic issuer must file the disclosures required by Exchange Act reports on or before the date it files a Form S-3); have been subject to the requirements of Section 12 or 15(d) and filed all material under Sections 13, 14 or 15(d) for at least 12 calendar months preceding the filing of a registration statement on S-3
  - Have timely filed all required Exchange Act reports during the 12 calendar months before the filing (and any portion of a month immediately preceding filing) of the Form S-3 (e.g., absent a waiver from the SEC, a missed filing would result in the domestic issuer being ineligible to use a Form S-3 until its Exchange Act reports have been timely made for a full year).
- Form S-8 Eligibility. A Form S-8 is a short-form registration statement used by domestic issuers to register securities offered to employees under employee benefit plans. In order to use the Form S-8, a domestic issuer must be current in all of its Exchange Act reports. Therefore, a domestic issuer may not use a Form S-8 until any missed report is filed.[46]
- Form S-4 Eligibility. A Form S-4 is a registration statement used by domestic issuers to register securities issued in an exchange offering or issued as consideration in connection with an acquisition. The Form S-4 permits certain information to be incorporated by reference from a domestic issuer's Exchange Act reports if the issuer is eligible to use the Form S-3.[47] Therefore, if a domestic issuer is ineligible to use a Form S-3, it will be required to include all information in the Form S-4 registration statement that is typically incorporated. This will significantly increase the time necessary to craft the Form S-4.
- Resale of Restricted/Control Securities Under Rule 144 Safe Harbor. Rule 144's safe harbor is available if certain conditions are satisfied, including the availability of current public information about a domestic issuer for the 12 months preceding the sale.[48] The failure to file a required Exchange Act report results in the inability of directors, officers and affiliates, among others, to rely upon the safe harbor until the late filing is made.
- XBRL Filings. If a domestic issuer does not file and post on its website the XBRL exhibit by the required time, it will be deemed to be "untimely" in its Exchange Act reports and will be unable to use a short-form registration statement (Forms S-3 and S-8) for 12 months.[49] Also, its security holders cannot use the resale provisions of Rule 144 because a domestic issuer would be deemed not to have adequate current public information for the purposes of the rule.[50]
- Disclosure Controls and Procedures. A late filing may be indicative of a problem in a domestic issuer's controls and procedures and, as such, would merit an internal review by a domestic issuer. In addition, a domestic issuer may need to disclose in its Exchange Act reports the steps taken to rectify any internal problems. Furthermore, it is possible that the SEC would consider a late filing a failure of a domestic issuer's disclosure controls and procedures, which would prevent its PEO and PFO from making the certifications required under Sarbanes-Oxley.
- Impact on Indentures, Credit and Other Agreements. If a domestic issuer becomes delinquent in its Exchange Act reporting obligations, it should review its indentures, credit agreements and other material agreements in order to identify any events of default, right to accelerate or other provisions that might be triggered upon such an event.
- Increased Analyst and Shareholder Scrutiny. Securities analysts and shareholders may draw negative conclusions about a domestic issuer as a result of a delinquent Exchange Act report and may ask its management questions concerning the cause of the delinquent filing as well as the status of any related corrective actions.
- Potential 10b-5 Antifraud Liability. The failure to file required Exchange Act reports may be considered to constitute a domestic issuer's failure to disclose material information, which may give rise to liability under Section 10(b) and Rule 10b-5 of the Exchange Act, which prohibit material misstatements in connection with the purchase or sale of securities.

[45] Form S-3, General Instruction A(3).
[46] Form S-8, General Instruction A(1).
[47] Form S-4, General Instruction B(1)(a).
[48] Securities Act of 1933 Rule 144(c).
[49] SEC Interactive Date to Improve Financial Reporting, Release Nos. 33-9002A; 34-59324A; and 39-2461A (2009).
[50] Conversely, foreign private issuers that prepare their financial statements in accordance with IFRS are not required to comply with XBRL until the SEC develops a taxonomy of use for foreign private issuers to prepare interactive data files. *The Center for Audit Quality*, SEC No-Action Letter (April 8, 2011).

Practical Consideration: *We generally have discussed the consequences a domestic issuer may have with respect to late Exchange Act reporting, because domestic issuers have more required filings with shorter filing deadlines (as short as 4 business days). However, foreign private issuers can face similar negative consequences for failing to timely file their annual report or Form 20-F or any required current reports on Form 6-Ks.*

4.3 Website Postings

Set forth below is a summary of the website posting obligations applicable to domestic issuers.

- Exchange Act Reports. A domestic issuer must disclose in its Form 10-K its Internet address and whether it makes its Forms 10-K, Forms 10-Q and Forms 8-K available on its website promptly following its filing with the SEC. This disclosure rule essentially requires the company to post such Exchange Act reports on its website in order to avoid the awkward disclosure that would otherwise be required.
- Section 16 Filings. Pursuant to Rule 16a-3(k) under the Exchange Act, a domestic issuer must also post on its website, within one business day after the applicable filing, each Form 3, 4 and 5 filed by its insiders. These filings must remain on the website for at least 12 months. (See Section 6.01 for a definition of insiders and Section 6.02 for more information regarding these filings.)

  Practical Consideration: *A domestic issuer needs to determine an appropriate place on its website for the posting of such information.*

- Code of Conduct. Pursuant to Item 406 of Regulation S-K, a domestic issuer publically must disclose its code of conduct (including any waivers or amendments).
- Board Committee Charters. SEC rules require a domestic issuer to publicly disclose whether it has audit, nominating and compensation committee charters in either its Form 10-K or proxy statement, as applicable. The disclosure a domestic issuer must provide includes a statement as to whether the charters are available on its website and, if they are, then it must provide its Internet address.
- Regulation FD. A domestic issuer can satisfy certain Regulation FD disclosures (see Section 5 for more information) by posting related information on its website. Regardless of the method of disclosure it chooses, domestic issuers are required, prior to the release of the information (whether by press release, SEC filing, website posting or other method), to provide notice of such disclosure to NASDAQ's MarketWatch Department and/or the NYSE.

  Practical Consideration: *Domestic issuers are required to post more items to their websites than their foreign private issuer counterparts, who, generally, are only required to comply with posting requirements for the Exchange Act reports, the code of conduct and the board committee charters described above. However, if a foreign private issuer decides to comply with its local laws in lieu of following NASDAQ and/or NYSE requirements, generally any such issuer must disclose this fact and describe the differences between the conflicting rules on its website.*

5. Regulation FD

5.1 Regulation FD

Regulation FD Generally

Domestic issuers are subject to Regulation FD. Regulation FD, which is short for "fair disclosure," generally requires that when a company intentionally discloses material nonpublic information, it do so through a public disclosure that is broadly available to all members of the public at the same time. In addition, if a company unintentionally discloses material nonpublic information to persons covered by the regulation, it must publicly disclose the information promptly.

Foreign private issuers are exempt from the requirements.[51] Many voluntarily comply with Regulation FD's requirements due to reputational concerns or potential liability that could arise under Rule 10b-5 from selective disclosure (e.g., from tipping off securities analysts or select shareholders). The SEC expressly requires domestic issuers to comply with Regulation FD.

> ***Practical Consideration:*** *While Regulation FD does not apply to foreign private issuers, they should seek to avoid selective disclosure in order to avoid Rule10b-5 antifraud liability.*

Company Representatives Subject to Regulation FD

Regulation FD only applies to disclosures made by the following company representatives:

- directors and executive officers;
- persons performing investor relations or public relations functions;
- employees and agents who regularly communicate with securities market professionals and shareholders; and
- any other person with any function similar to the above.

Statements made by other company employees do not trigger disclosure obligations under Regulation FD, unless the employee is acting at the direction of senior management.

Recipients Triggering Public Disclosure Obligations

Under Regulation FD, disclosures of material nonpublic information to the following classes of recipients trigger a company's public disclosure obligation:

- brokers, dealers and persons associated with them, such as securities analysts;
- investment advisers, institutional investment managers and persons associated or affiliated with them;
- investment companies, hedge funds and their affiliates; and
- shareholders, if it is reasonably foreseeable that the shareholder will buy or sell the company's securities on the basis of that information.

Disclosures Not Subject to Regulation FD

The public disclosure obligations of Regulation FD are not triggered by disclosure to:

- persons owing a duty of trust or confidence to the company, such as attorneys, accountants and investment bankers;
- persons who expressly agree to maintain the disclosed information in confidence, (for example, pursuant to a nondisclosure agreement that prohibits trading on the information); or
- in connection with registered securities offerings, other than certain continuous shelf offerings.

> ***Practical Consideration:*** *While the US Dodd-Frank Act removed communications with credit rating agencies from the types of disclosures that do not trigger Regulation FD obligations, we typically find most issuers now require credit rating agencies to agree*

[51] Regulation FD, Rule 101(b).

(either orally, written or through click-through Internet windows) to confidentiality obligations.

The release adopting Regulation FD makes clear that the regulation is not intended to apply to a domestic issuer's ordinary-course business communications with parties such as customers, suppliers, strategic partners and government regulators or to disclosures to members of the media.

Because Regulation FD only applies to disclosures made to any person outside the issuer, the SEC has stated that Regulation FD does not apply to communications of material nonpublic information by a domestic issuer to its employees.

However, there are good business reasons for a domestic issuer to limit the disclosure of confidential information to those employees who need that information in the performance of their jobs.

In addition, employees generally are bound by confidentiality obligations, and improper disclosure or use of confidential information by an employee could subject the employee to legal liability, including liability under the SEC's insider trading rules.

Material Nonpublic Information

Regulation FD does not define either "material" or "nonpublic." The SEC release adopting Regulation FD, quoting from leading cases on the issue, notes that information is material if there is "a substantial likelihood that a reasonable shareholder would consider the information important" in making a decision to buy or sell a company's securities. Stated another way, there must be a substantial likelihood that a reasonable shareholder would view the information "as having significantly altered the 'total mix' of information" available about the company. Additional factors the SEC has identified that a company can look to in determining materiality include:

- Is the information capable of precise measurement or is it based on an estimate?
- Does the information affect the trend in earnings or other key items?
- Is the information consequential to meeting analysts' consensus expectations?
- Does the information change any positive results to negative results?
- Is the information significant to any particular segment of the business?
- Is the information required for compliance with regulatory requirements or loan or other contractual requirements?
- Does the information affect compensation of key employees?
- Is the information intentionally wrong or misleading, or does it conceal unlawful transactions?
- Does the item prompt significant market reaction?

Practical Consideration: *The SEC has identified market reaction as the critical test for determining whether information is material. While a domestic issuer should consider the other factors listed, market reaction should be the most important factor in determining whether a Regulation FD disclosure is necessary.*

The SEC release also sets forth certain disclosure items that are likely to be material. These items include:

- Revenues or earnings;
- A merger, acquisition, tender offer or joint venture involving the domestic issuer;
- A change in control or a significant change in management of the domestic issuer;
- The public or private sale of a significant amount of additional securities of the domestic issuer;
- The establishment of a program to repurchase securities of the domestic issuer;
- A stock split;
- A default on outstanding debt or a bankruptcy filing; or
- A change in or dispute with its auditors.

Intentional and Non-Intentional Disclosures

Intentional disclosure of material nonpublic information occurs when the person making the disclosure knew, or was reckless in not knowing, that the information disclosed was both material and nonpublic. In determining whether a person acted in a

reckless manner, the SEC will consider whether any reasonable person under the circumstances would have made the same determination. An example of intentional disclosure is knowingly including nonpublic projections on a slide shown during a private conference with analysts. Another example is a wink or other gesture in response to an analysts question about whether the domestic issuer is on track to meet its forecasts, which intentionally signals an answer to the question. Intentional disclosure of material nonpublic information in a private setting is a violation of Regulation FD.

Unintentional disclosure is any disclosure of material nonpublic information that occurs when the person making the disclosure does not know, and is not reckless in not knowing, that such information is material and nonpublic. An example of unintentional disclosure is an executive's response to an unanticipated question posed during a private meeting with analysts that provides material information that the executive mistakenly believed had already been publicly disclosed. Unintentional disclosure of material nonpublic information triggers an obligation on the part of the company to disclose publicly that information promptly. "Promptly" means as soon as reasonably practicable after a director, executive officer or investor relations or public relations employee learns of the unintentional disclosure. Once the disclosure is discovered, it must be made within 24 hours or, if the next trading day does not begin for more than 24 hours, prior to the beginning of the next trading day.

Manner of Required Public Disclosure

There are several ways in which a company can make the public disclosure required by Regulation FD. One method that is always sufficient is the timely filing with the SEC of a current report on Form 8-K. Including information in another SEC filings, such as a Form 10-Q, a Form 10-K and a proxy statement also generally constitutes adequate public disclosure of that information, provided the information is not buried within the SEC filing.

Regulation FD's public disclosure requirement can also be satisfied by disseminating the information by a method or combination of methods "reasonably designed to provide broad, non-exclusionary distribution of the information to the public." A press release distributed through widely circulated news or wire services, a conference call open to the general public, through a webcast or dial-in number, or a posting material on a company's website may be sufficient. A domestic issuer can comply with Regulation FD by posting solely on its website if:

- the website is a recognized channel of distribution;
- posting the information on its website distributes the information in a manner calculated to reach the securities marketplace in general; and
- there has been a reasonable waiting period for investors and the market to react to the posted information.

> ***Practical Consideration:*** *Should a domestic issuer choose to use its website as the sole method for complying with Regulation FD, it should consult legal counsel to ensure that these three factors are met for each disclosure it intends to make. However, we find most issuers posting this information on their websites also make voluntary SEC filings and/or press releases disclosing the fact that information is available on their websites. As such, they are not solely relying on their websites to comply with Regulation FD.*

Penalties for Regulation FD Violations

If a domestic issuer violates Regulation FD, it will likely face some type of penalty. The penalty will vary depending on the parties and type of information involved in the breach. Examples of the types of penalties include a cease and desist order in an administrative action and an injunction and/or monetary penalties in a civil action. Note that Regulation FD does not create a private right of action for violations. Also, it is likely that the SEC would consider a failure to comply with Regulation FD as a violation of its disclosure controls and procedures, which would prevent its PEO and PFO from making the certifications required under Sarbanes-Oxley.

6. Insider Reporting Obligations, Short-Swing Profit Rules and Short Sale Prohibitions Under Section 16

Securities of foreign private issuers are exempt from Section 16 of the Exchange Act (Section 16).[52] A domestic issuer's securities are subject to Section 16's requirements, including the insider reporting obligations, short-swing profit rules and short sale prohibitions described below.

6.1 General

Section 16 imposes several obligations and restrictions with respect to the ownership and trading of securities of a domestic issuer on each of its directors and officers and each person or entity who is the beneficial owner of more than 10 percent of its equity securities (directors, officers and 10 percent shareholders are referred to in this section of the Guide collectively as "insiders"). Section 16 is intended to deter insiders from misusing confidential information for personal trading gain.

Section 16 Officers

For purposes of Section 16, the determination of whether someone is considered an officer generally is based on the facts and circumstances of the particular situation and the management responsibilities and policymaking functions performed by such person. It includes, at a minimum, the domestic issuer's president, any vice president in charge of a principal business unit, division or function (such as sales, administration or finance), the controller or chief accounting officer and any other officer who performs a policy-making function (this can include individuals at the subsidiary level as well). A person's title alone is not determinative of whether Section 16 applies. Because of the onerous reporting obligations, domestic issuers typically limit their Section 16 officers to as few individuals as possible. A domestic issuer's board of directors is ultimately responsible for designating the appropriate persons as Section 16 officers, each of whom will be subject to the reporting requirements, short-swing profit and short sale provisions of Section 16 discussed below. The board of directors is also responsible for updating as necessary, by formal resolution, its designation of officers subject to Section 16.

6.2 Insider Reporting Obligations

Section 16(a) requires a domestic issuer's insiders to file statements with the SEC reporting their beneficial ownership of the issuer's equity securities. Persons violating Section 16(a) may be subject to criminal penalties and civil penalties for each violation in addition to liability for the related deemed profits. Additionally, in the event that an insider fails to timely file any required Section 16 report, the domestic issuer must report such failure in its proxy statement and Form 10-K under a heading "Section 16(a) Beneficial Ownership Reporting Compliance."

The filing of Forms 3, 4 and 5 are personal obligations of each insider. In order to help avoid penalties associated with delinquent Section 16 reports, it is advisable for domestic issuers to task outside counsel with assisting insiders in the preparation and filing of such reports. Each Form 3, 4 and 5 must be filed electronically with the SEC on or before 10:00 p.m. Eastern Time on the business day on which the filing is due. A copy of each filed form must also be sent to the domestic issuer. In addition, the domestic issuer must post on its website, by the end of the next business day, each Section 16 report filed by its insiders. This posting requirement may be met by hyper linking to the website of the SEC or another third party, if certain conditions are met.[53]

> ***Practical Consideration:*** *Although a domestic issuer is not obligated to prepare (or file) Section 16 reports for its insiders, it should consider preparing and submitting its insiders' Section 16 reports on their behalf to facilitate accurate and timely filings (and also avoid the penalties associated with delinquent Section 16 reports).*

Beneficial Ownership

The reports under Section 16(a) are intended to cover all securities beneficially owned either directly or indirectly by the insider. For reporting purposes, beneficial ownership is based on whether the insider has (or shares) a pecuniary interest in the domestic issuer's equity securities. A "pecuniary interest" is defined as the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities. In addition to equity securities owned directly by the insider (or held in "street name" for its account), an insider is generally deemed to have a pecuniary interest in the following types of securities:

[52] 15 U.S.C. § 78p; Regulation S-K, Item 405.
[53] Final Rule: Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5, Release Nos. NOS. 33-8230, 34-47809, 35-27674 (2003).

- securities held jointly with others;
- securities from which the insider obtains benefits substantially equivalent to those of ownership (even if the insider does not own the securities);
- securities owned by any member of the insider's immediate family sharing the same household; and
- securities owned by a corporation, partnership, trust or other entity controlled by the insider or a family member described above (generally to the extent of such insider's proportionate economic interest in such entity).

The circumstances under which an insider may be a beneficial owner of equity securities are complex, and the descriptions provided above merely highlight the areas where an insider should be alert to the possible application of Section 16(a). An insider facing such a situation should consult legal counsel for guidance with respect to their particular reporting obligations.

> ***Practical Consideration:*** *Domestic issuers should consult legal counsel (or encourage each insider to consult their own legal counsel) to analyze the technical beneficial ownership rules in order to make sure that each insider accurately reports ownership attributable to them.*

Where there is uncertainty as to the insider's beneficial ownership, the insider generally should report such equity securities as being beneficially owned. Such reporting does not amount to an admission of beneficial ownership if accompanied by a disclaimer of beneficial ownership. An insider is free to disclaim beneficial ownership if the insider believes there is a reasonable basis for doing so.

Need for Care – Sanctions for Failure to File

As a means of increasing compliance by insiders with their Section 16 reporting obligations, Item 405 of Regulation S-K requires all domestic issuers to disclose in their proxy statements and annual reports on Form 10-K the names of all insiders who failed to timely file reports during the previous fiscal year, and the number of late or unfiled reports by each such insider. In complying with this requirement, the domestic issuer need only review Forms 3, 4 and 5 submitted by insiders and may rely on a written representation from each insider that no Form 5 was required (provided the domestic issuer retains the written representation for 2 years).

The SEC also can use its enforcement powers to promote compliance with the Section 16(a) reporting obligations. Sanctions available to the SEC include the power to issue cease-and-desist orders and the power to seek monetary penalties ranging from US$5,000 to US$100,000 for noncompliance with such orders. A court may increase the penalty to the amount of any gain realized through the violation of the securities laws or SEC rules. In addition, courts may bar an individual who violates the Section 16(a) reporting rules from serving as an officer or director of a public company. The domestic issuer, too, can incur liability by aiding and abetting violations by one of its insiders. Finally, any person who willfully fails to file a report which he or she knew was required to be filed under the Exchange Act or who willfully misrepresents information reported in any such filing may be subject to criminal sanctions (up to 20 years imprisonment and/or a fine of up to US$5,000,000) under Section 32(a) of the Exchange Act, in addition to SEC enforcement orders and possible civil liability.

6.3 Short-Swing Profit Rules

Section 16(b) of the Exchange Act seeks to discourage trading by insiders based on material nonpublic information.

Recovery of Short-Swing Profits

Under Section 16(b), any profit realized by an insider on a short-swing transaction (e.g., a purchase and sale, or a sale and purchase, of the domestic issuer's equity securities within a period of less than six months) must be disgorged to the domestic issuer upon demand by the domestic issuer (or a shareholder acting on its behalf). By law, the domestic issuer cannot waive or release any claim it may have under Section 16(b), or generally settle for less than the entire profit realized, or enter into any enforceable agreement to provide indemnification for amounts recovered. If the domestic issuer fails to recover the profit or bring a suit to do so, any shareholder may sue the insider on behalf of the domestic issuer to recover such profit, and collect attorney fees as well.

> ***Practical Consideration:*** *Domestic issuers should educate their directors and officers regarding the consequences of "short-swing" transactions.*

Strict Liability Provision

Section 16(b) liability is imposed without regard to whether the insider intended to violate the section. It is no defense that the insider was not aware of material nonpublic information, did not realize the transaction would be considered a purchase or sale, or did not realize that a transaction by another person could be attributed to the insider. All that is necessary for a successful claim is to show that the insider realized profits on a short-swing transaction. When computing recoverable profits on multiple purchases and sales within a six-month period, courts generally apply the provisions of Section 16(b) mechanically to reach the maximum amount of profit. It does not matter if the purchase or sale occurred first. It is not necessary for the same shares to be involved in each of the matched transactions. Transactions are paired so as to match the lowest purchase price with the highest sale price, the next lowest purchase price with the next highest sale price, and so on. The use of this method makes it possible for an insider to sustain a net loss on a series of transactions while having recoverable profits.

Broad Application

Many transactions other than typical open market transactions may constitute a "purchase" or a "sale" for purposes of Section 16(b), including acquisitions and dispositions in tender offers and certain corporate reorganizations, although there are certain transactions exempted under the applicable rules. In some circumstances, a domestic issuer's securities held by close relatives or by trusts or other entities may be considered to be owned beneficially by an insider, and a purchase (or sale) by such individual or entity may be matchable with a sale (or purchase) by a related party to produce a recoverable profit.

Exception for Certain Compensatory Arrangements

Certain transactions do not constitute matchable transactions for purposes of Section 16(b). Rule 16b-3 of the Exchange Act provides that the grant or issuance by the domestic issuer to a director or officer of awards pursuant to certain employee bonus, stock appreciation, profit sharing, retirement, thrift, savings and similar plans is not considered a purchase by the insider for purposes of Section 16(b) if certain conditions are met.

> ***Practical Consideration:*** *The short-swing profit recapture provisions of Section 16(b), which are personal obligations of the insiders, require advance planning and consideration in order to be avoided. Before any commitment is made to purchase or sell a domestic issuer's securities, we encourage insiders to consult with legal counsel regarding each transaction.*

6.4 Short Sale Prohibitions

Under Section 16(c), insiders are prohibited from effecting short sales of the domestic issuer's equity securities. A short sale is one involving securities that the seller did not own at the time of the sale, or, if owned, were not delivered within 20 days after the sale or deposited in the mail (or other usual channel of transportation) within five days after the sale.[54]

[54] 15 U.S.C. § 78p(c).

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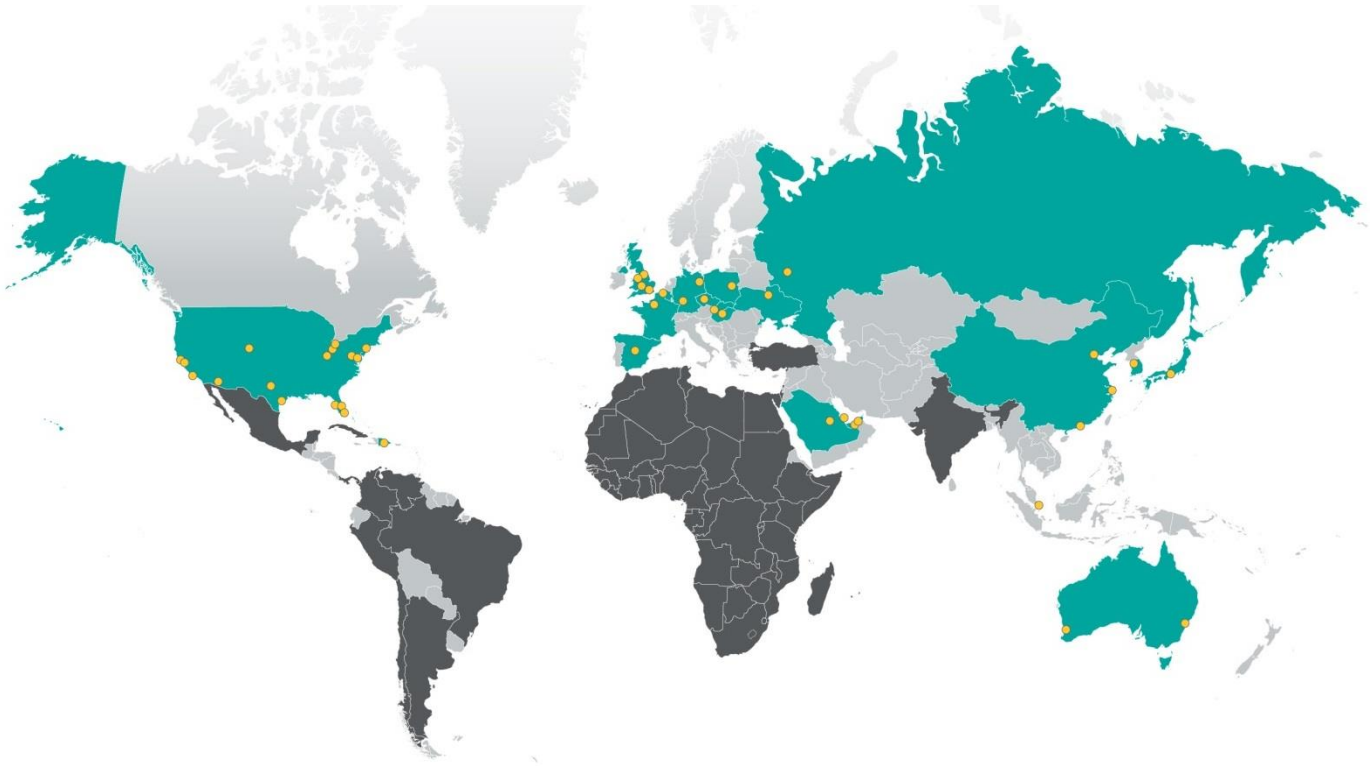

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