A Snapshot Of FPI Registration And Reporting Obligations

Law360, New York (October 24, 2013, 1:58 PM ET) -- Certain foreign companies that issue securities, or desire a secondary public trading market for their securities, in the United States face different registration and reporting requirements than U.S.-based issuers. The U.S. Securities and Exchange Commission has developed a series of forms for registration statements and reports to be used by "foreign private issuers," or FPIs (discussed below), which are typically designated by "F."

Among the most important is Form 20-F because it contains items of disclosure and related instructions that apply to registration statements used by FPIs to register the offer and sale of securities under the Securities Act of 1933, as amended (the "Securities Act") (Forms F-1, F-3 and F-4) and register a class of securities under Section 12(b) or 12(g) (15 USCS § 78l) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and annual reports filed pursuant to Section 13 (15 USCS § 78m) or 15(d) (15 USCS § 78o) under the Exchange Act.

This article explores the Exchange Act registration process for FPIs and subsequent reporting obligations using Forms 20-F and 6-K.

Foreign Private Issuer Status

What is a "foreign private issuer?" This term is defined in Rule 3b-4 (17 CFR 240.3b-4) under the Exchange Act and Rule 405 (17 CFR 230.405) under the Securities Act; the rules are identical. A foreign private issuer, for purposes of this discussion, is a corporation or other organization organized under the laws of a foreign country except for a corporation or organization that meets the following conditions as of the last business day of the most recently completed second fiscal quarter:

- More than 50 percent of its outstanding voting securities are directly or indirectly held of record by residents of the United States, and
- Any of the following apply:

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

Note that the use of the word "private" does not mean, for purposes of applying the rule, that the corporation is privately held; rather it is used to distinguish entities — including those that are publicly-traded — from foreign governments. The rule also requires a careful read.

First, it is a negative test — any company that meets both disqualifying conditions is not a FPI. Thus, it is
technically possible (although rare) for a foreign company that fails to meet the conditions to be treated for federal securities law purposes as if it were a U.S. domestic reporting company, in which case it would have to comply with all rules and forms that apply to U.S. companies that report to the SEC.

Second, the disqualifying conditions are conjunctive, i.e., both the voting security percentage test and the U.S. presence nexus test must be met in order for a foreign company not to be treated as an FPI. By way of example, it is theoretically possible for a company organized under, e.g., English law, to have all of its directors and officers be U.S. citizens, have all of its assets in the U.S. and be administered in the U.S. and remain an FPI so long as less than 50 percent of its voting securities are held of record by U.S. residents.

Guidance from the SEC notes that the citizen and residency test of executive officers and directors must be tested separately. Also, in determining who is an executive officer or director, a FPI cannot simply rely on home country rules. In the case of executive officer, it must look to the definition at Rule 405 under the Securities Act or Rule 3b-7 under the Exchange Act, which note that persons with policymaking authority should be included in the analysis.

As for directors, an FPI must consider individuals that perform the functions generally performed by a board of directors or a U.S. company. In determining the location of assets, a FPI must include both tangible and intangible assets.

Finally in determining whether an FPI’s business is administered principally in the U.S., it should consider several factors, including locations of its principal business segments or operations, its board and shareholder meetings, headquarters, and its most influential key executives.

In measuring the number of shareholders, a company must "look through" the record ownership of brokers, dealers or nominees holding shares for the account of their customers and consider ownership reports or other information provided to the company in order to determine the residence of shareholders. The Jumpstart Our Business Startups Act of 2012 also changed the definition of "held of record."

Although most FPIs — whether in a Securities Act registered offering or Exchange Act registration for secondary trading — voluntarily submit to the U.S. reporting regime, it is important to understand that an FPI can be required to file reports with the SEC if it exceeds the shareholder and asset thresholds of Exchange Act Section 12(g).

That section requires any company (domestic or foreign) that, as of the end of a fiscal year, has more than $10 million of assets and a class of equity securities held of record by 2,000 persons, or 500 persons who are not accredited investors, to register the class of securities by filing an Exchange Act registration statement.

Relief is available under Exchange Act Rule 12g3-2(a) (17 CFR 240.12g3-2) for an FPI not desiring to become an SEC reporting company if the class has fewer than 300 resident holders in the U.S. (but note the counting rules in that subsection and Exchange Act Rule 12g5-1 (17 CFR 240.12g5-1)) or, if the FPI meets the requirements of Rule 12g3-2(b) — primarily that it is not required to file reports with the SEC and its shares are listed on a foreign exchange that constitutes its primary trading market.

An instruction to Rule 3b-4 provides guidance in calculating the percentage of outstanding voting securities held by U.S. residents.

Status as a FPI has important reporting consequences: A foreign company that qualifies as a FPI does not need to comply with many SEC rules and forms that apply to U.S. companies (and foreign companies that are not FPIs). As stated in Exchange Act Rule 3a12-3 (17 CFR 240.3a12-3), an FPI is exempt from the
proxy rules (Rules 14(a), 14(b), 14(c) and 14(f)) under the Exchange Act, and from Section 16 (15 USCS § 78o) of the Exchange Act as to reports in securities transactions by insiders and short-swing profit recovery liability.

An FPI is also not required to file Form 10-Q quarterly reports or Form 8-K current reports. Rather, interim information is furnished to the SEC on Form 6-K (discussed below). FPIs are also exempt from Regulation FD, the purpose of which is to deter selective disclosure of material nonpublic information about an issuer or its securities to the classes of persons identified in the rule (generally, securities professionals and security holders).

Note, however, that 5-percent owners of equity securities of SEC-registered FPIs must file, as applicable, Schedule 13D (17 CFR 240.13d-101) and 13G (17 CFR 240.13d-102) beneficial ownership reports if the reporting criteria are met.

Filing an initial registration statement under the Exchange Act on Form 20-F is the event that triggers a FPI becoming an SEC-reporting company whether or not it elects to undertake a registered offering under the Securities Act.

Technically, a Form 20-F registration statement filed under Exchange Act Section 12(b) commences its reporting as of the exchange's certification of the listing to the SEC under Section 12(d), whereas a registration statement filed under Section 12(g) for a company whose shares will be unlisted or traded over-the-counter becomes effective 60 days after filing whether or not the SEC has completed its comment process.

The counterpart to an Exchange Act Form 20-F registration statement is Form 10 for domestic companies; in either case, once the registration statement is effective, the company has entered the SEC reporting system. Although beyond the scope of this discussion, it is important to review Rules 12g-1 (17 CFR 240.12g-1) and 12g3-2 in order to determine whether and when an FPI becomes obligated to file reports under the Exchange Act on Form 20-F.

**Form 20-F**

The items of disclosure in Form 20-F, as well as the instructions to particular items, are often lengthy and technical, and require careful study. Because Form 20-F is intended to be largely "stand-alone," it does not generally refer to Regulation S-K for items of disclosure (as do forms such as Forms 10-K and 10-Q for domestic companies).

As a result, one must develop familiarity with the form itself. In addition, it is important to notice which items (or subitems) apply to the particular use for the form. For example, certain items do not apply when Form 20-F is used as an Exchange Act annual report. Regulation S-X, however, applies to the presentation of financial information and must be consulted.

**Preparing Form 20-F**

Many FPIs that contemplate filing an Exchange Act registration statement on Form 20-F or look to its instructions when drafting a Securities Act registration are already publicly traded in their home country and have public disclosure documents.
In some cases an FPI that has publicly traded shares in its home country may desire to develop investor awareness in the U.S. by becoming an SEC reporting company even if it does not attempt to raise capital in this country. Whether the initial filing is pursuant to the Securities Act or Exchange Act, the public disclosure documents used in the FPI's home country should be gathered early in the process of drafting, because in many cases, they serve as the basis for the disclosure required by Form 20-F.

The initial registration statement on Form 20-F is the most demanding of time and resources. But, thereafter annual reports on form 20-F can usually be readily updated based on the initial filing (or subsequent Form 20-F annual report), often using much of the disclosure required by the FPI's home country.

The SEC's Division of Corporation Finance posts the current version of Form 20-F on its website. As the form is amended from time to time, it is important to review the latest version and not assume the format utilized for a company's last annual report will suffice for preparation of the next report.

Initial steps in preparing the form include determining whether the financial statements meet the requirements of Item 17 or 18 of the form (which likely includes consultation with the FPI's financial management or, perhaps, the outside accountant).

One should also examine the exhibit list in Item 19 (and note that the enumeration is different from Item 601 (17 CFR 229.601) of Regulation S-K) to determine whether the documents or information required to be filed with the form are available or need translation into English.

Bear in mind that FPIs are subject to many requirements of the Sarbanes-Oxley Act of 2002, and Form 20-F has been amended in recent years to accommodate certain SOX requirements.

For example, Item 15 requires a report on:

(1) management's conclusion as to the effectiveness of disclosure controls and procedures,

(2) management's report on internal control over financial reporting,

(3) the attestation report of the registered public accounting firm (a so-called SOX 404 report), and

(4) changes in internal control over financial reporting.

The principal executive officer and the principal financial officer must provide the Exchange Act Rule 13a-14(a) (17 CFR 240.13a-14) or 15d-14(a) (17 CFR 240.15d-14) certifications (so-called "Section 302 and 906 certifications," which are like those in Exchange Act periodic reports of domestic companies), the texts of which can be found at no. 12 of Item 19 and cannot be altered.

For an FPI filing an annual report on Form 20-F for the first time, counsel may be required to explain to senior management the meaning of the rather technical language of this item, including the exposure to personal liability resulting from the certifications. Note also the instruction to Item 15, which permits a one-year phase-in period for the reports in (2) and (3) above provided the FPI alerts investors by inserting the language required by the instructions.

As a result of SOX, Form 20-F contains other requirements in Item 16 — notably whether a company has determined that it has a so-called audit committee financial expert (Item 16A), and adopted and made publicly available a code of ethics covering certain "C-level" executives (Item 16B) — that may be unfamiliar to an FPI.
Because the company must either disclose its compliance or explain why it does not comply (which may be the means to "encourage" compliance), these items should be discussed with FPI management early on.

In case it does not already do so, a company needs to have the ability to categorize its principal accountant fees and service, as well as the audit committee pre-approval policies, in accordance with Item 16C. Nonroutine changes of accountants also require extensive disclosure and adherence to the disclosure and related procedures outlined in Item 16F.

Note that the General Rules and Regulations under the Securities Act apply to Form 20-F. For example, Rule 436 (17 CFR 230.436) requires that if a report or opinion of an expert or counsel is quoted or summarized in the document, the written consent of the expert or counsel must be filed as an exhibit. It is not uncommon for natural resource companies to summarize or quote the report of an engineer or geologist, in which case the consent is required.

Industry Guides

Industry Guides published by the SEC under the Securities Act and Exchange Act should be consulted as to guidance about disclosure in certain industry sectors. These include bank-holding companies, oil and gas programs, real estate limited partnerships, property-casualty insurance underwriters, and mining companies.

Plain English

In order to comply with the "plain English" requirements of the SEC (e.g., Securities Act Rule 421 (17 CFR 230.421)), a filer using home country documents as the basis for disclosure may need to edit the materials to meet the requirements, which can take time and add expense.

In certain cases, the FPI may elect to conform to U.S.-style plain English throughout its home country documents as this has become more familiar to U.S. investors. Counsel advising a FPI should discuss strategies for meeting the plain English requirements with the FPI's management or home country counsel well in advance of preparing to draft the Form 20-F.

Counsel may also wish to consult or direct management of the FPI to the SEC's handbook on plain English contained in Securities Act Release No. 33-7497 (Jan. 28, 1998) and the Division of Corporation Finance: Updated Staff Bulletin No. 7 "Plain English Disclosure" for more information on plain English principles.

XBRL

Item 101 to Item 19 requires that financial statements as interactive data files be submitted and posted for all filers for fiscal periods ending after June 15, 2011. But the SEC as of August 2012 has yet to issue certain rules to make compliance possible for FPIs.

Counsel representing FPIs should check with the SEC's Office of International Corporation Finance or the Office of the Chief Accountant in the Division of Corporation Finance about the application of the new XBRL rules to filings by FPIs.

SEC Review

The SEC reviews and comments on Exchange Act registration statements on Form 20-F in the same manner as it does for Form 10 registration statements for domestic companies. Comment letters may be lengthy, including comments addressing both disclosure in general as well as accounting matters, and
sometimes require several rounds (and related amendments of the Form 20-F) before the document is "cleared" by the SEC's Corporation Finance staff.

U.S. counsel to an FPI should educate the FPI's management and foreign counsel if this process is unfamiliar. Annual reports on Form 20-F are subject to the same three-year rotation of review as Forms 10-K for domestic companies.

The SEC Division of Corporation Finance has a useful discussion entitled "Filing Review Process" on its website that may be consulted by FPIs or persons representing them.

**Noteworthy Form 20-F Instructions**

The form's instructions contain several important definitions, including "home country" (the jurisdiction in which the company is legally registered) and "host country" (where the company seeks to offer, register or list its securities), which, for purposes of the form (and the discussion below), is deemed to refer to the United States. Some items of initial consideration when drafting the Form 20-F are listed below:

- Unlike a domestic company, an FPI that meets the definition of "smaller reporting company," as defined in Exchange Act Rule 12b-2, may not elect the scaled disclosure requirements in Regulation S-X and Regulation S-K for purposes of preparing Form 20-F. As a result, the Form 20-F cover page requires the filing company to state whether it is a large accelerated filer, accelerated filer or nonaccelerated filer, each defined in Rule 12b-2 (17 CFR 240.12b-2).

- An annual report on Form 20-F for all fiscal years ending on or after Dec. 15, 2011, must be filed with the SEC within four months after the fiscal year end (formerly six months). Note that, despite the cover page indicating whether a company is a large accelerated filer, accelerated filer or nonaccelerated filer, the filing deadline is the same (which is not the case for Form 10-K annual reports filed by U.S. companies).

- The registration statement or report must contain the numbers and captions of all items, which may result in some cases to a response of "not applicable."

- The registration statement or report must be filed electronically via the SEC's Electronic Data Gathering and Retrieval System (known as EDGAR). That will require that the company procure EDGAR filer codes. The only exception is for a company filing under a hardship exemption under Rule 201 (17 CFR 232.201) or 202 (17 CFR 232.202) of Regulation S-T.

- The registration statement or report must be in English.

- Form 20-F consists of three parts, all of which must be completed for an annual report filed on the form, and Parts I and II of which must be completed for a registration statement on the form.

- Unless an item in the Form 20-F instructions directs a company to provide information through a specified date or particular period, information should be given as of date reasonably close to the date of filing the registration statement or the latest practicable date for an annual report.

- FPIs filing Exchange Act registration statements or annual reports are permitted to file financial statements for fiscal years ending before Dec. 15, 2011, in accordance with Item 17 using the home country's accounting principles, and with a reconciliation to U.S. generally accepted accounting principles (U.S. GAAP), which is usually done in a separate note to the financial statements. But for all fiscal years ending on or after Dec. 15, 2011, except in limited cases,
companies that elect to report under home country GAAP (rather than U.S. GAAP) must provide the extensive reconciliation required by U.S. GAAP under Item 18 and Regulation S-X. Alternatively, the company may file with financial statements prepared in accordance with the International Financial Reporting Standards as issued by the International Accounting Standards Board.

**Confidential Submission of Form 20-F**

Formerly an FPI was permitted to submit a Form 20-F registration statement confidentially to the SEC for review. In December 2012, the SEC limited its policy for nonpublic submission of initial registration statements by FPIs to those where the registrant is

1. an FPI that is listed or is concurrently listing its securities on non-U.S. securities exchange,
2. an FPI that is being privatized by a foreign government, or
3. an FPI that can demonstrate the public filing of a initial registration statement would conflict with the law of an applicable foreign jurisdiction.

These limitations do not apply to an FPI that qualifies as a "emerging growth company," a new category of issuer created under the JOBS Act, enacted in April 2012. An FPI qualifies as an EGC if its total gross revenues for its last completed fiscal year are under $1 billion and it has not sold its common stock in an initial public offering before Dec. 8, 2012.

There are various "wrinkles" in the application of these tests, which the SEC addresses in a series of JOBS Act FAQs posted on its website. An FPI EGC may file its Form 20-F registration statement (and any amendment before registration) on a confidential basis with the SEC and should take note of the SEC guidance as to the manner of nonpublic filing and eventual publication.

**Form 6-K**

Form 6-K is a "cover" under which an FPI updates its Form 20-F annual report filed under the Exchange Act. Typically, a company attaches as exhibits documents required by the Form 6-K instructions that it files or makes public in its home country.

Interim reports under cover of Form 6-K are in lieu of the quarterly periodic and current reports (Forms 10-Q and 8-K filed by domestic companies). Although the instructions to Form 6-K potentially include a wide range of items, the instructions note matters that are likely to be material to investors and should be of primary concern.

Note that documents attached as 6-K exhibits are deemed "furnished" not "filed." This is an important distinction and merits attention because information reported on a Form 6-K that is "furnished" to the SEC is not incorporated into a registration statement (and therefore not subject to Securities Act Section 11 (15 USCS § 77k) and 12 (15 USCS § 77l) liability); nor does it subject a company to liability under Exchange Act Section 18 (15 USCS § 78r) for a false or misleading statement or omission.

Form 6-K reports must be submitted electronically via EDGAR unless a paper submission is permitted pursuant to a hardship exemption. The 6-K instructions contain requirements about foreign language documents and should be consulted.

Although the cover sheet states that the submission is "for the month of ___," many FPIs elect to submit Form 6-K reports reasonably contemporaneously with the home country report or filing in order
to assure that its U.S. investors have current information.

--By Jonathan Guest, McCarter & English LLP

Jonathan Guest is a partner in the Boston office of McCarter & English.

This article is excerpted from Lexis® Practice Advisor, a comprehensive practical guidance resource providing insight from leading practitioners on the topics critical to attorneys who handle transactional matters. For more information on Lexis Practice Advisor or to sign up for a free trial please click here. Lexis is a registered trademark of Reed Elsevier Properties Inc., used under license.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2013, Portfolio Media, Inc.