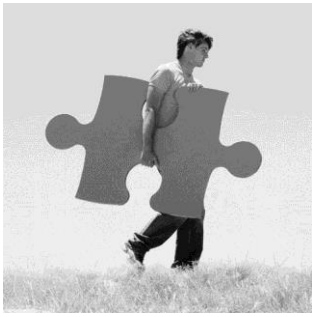
Client Alert

December 12, 2016



SEC Staff Issues New C&DIs Related to Foreign Issuers

On December 8, 2016, the Securities and Exchange Commission's ("**SEC**") Division of Corporation Finance (the "**Staff**") released several new compliance and disclosure interpretations ("**C&DIs**") clarifying the definition of "foreign private issuer" (an "**FPI**") under Rule 405 ("**Rule 405**") under the Securities Act of 1933, as amended (the "**Securities Act**"), and Rule 3b-4(c) ("**Rule 3b-4(c)**") under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). On the same day, the Staff issued additional C&DIs, which provide explanations on the permitted use of an F-Series registration statement and Form 20-F by an FPI (and its subsidiaries) in certain contexts. This alert provides a brief summary of these C&DIs. A complete list of the C&DIs issued on December 8, 2016 by the Staff is available here: https://media2.mofo.com/documents/fpi.pdf.

I. Definition of FPI

The Staff issued C&DIs to clarify whether an issuer qualifies as an FPI under Rule 405 under the Securities Act and Rule 3b-4(c) under the Exchange Act. Rule 405 and Rule 3b-4(c) each define a "foreign private issuer" as any issuer incorporated or organized under the laws of a foreign country (other than a foreign government), except an issuer that satisfies the following conditions: (1) as of the last business day of the issuer's most recently completed second fiscal quarter, more than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) *any* one of the following conditions are satisfied: (i) the majority of the issuer's executive officers or directors are U.S. citizens or residents, (ii) more than 50 percent of the issuer's assets are located in the United States, or (iii) the issuer's business is administered principally in the United States.

Treatment of Multiple Voting Classes. Pursuant to the C&DIs, an issuer with multiple voting classes may now utilize one of two methods to determine whether its voting stock is owned by more than 50 percent of U.S. residents by assessing: (1) whether 50 percent of the voting power of those classes on a combined basis is directly or indirectly owned of record by residents of the United States; or (2) the number of its voting securities. While the Staff did not convey a preference for either methodology, it did expressly note that an issuer "must apply a determination methodology on a consistent basis."

Evaluating U.S. Residency. The Staff shed light on the factors that should be employed to determine whether an individual qualifies as a "U.S. resident" for purposes of evaluating whether an issuer's outstanding voting securities are held of record by U.S. residents under both Rule 405 and Rule 3b-4(c). While a person who has permanent resident status (i.e., a Green Card holder) is presumed to be a U.S. resident, the Staff explained that individuals without permanent-resident status may also, albeit without the benefit of a presumption, be deemed U.S. residents for purposes of Rule 405 and Rule 3b-4(c) based on several criteria, including: (i) tax residency; (ii) nationality; (iii) mailing address; (iv) physical presence; (v) the location of a significant portion of the individual's financial and legal relationships; or (vi) immigration status. While the Staff did not mandate the use

of any one of these criteria, it asserted that the issuer must nevertheless "decide what criteria it will use to determine residency and apply them consistently without changing them to achieve a desired result."

Determining Whether a Majority of Executive Officers or Directors Are U.S. Citizens or Residents. For purposes of determining whether a majority of an issuer's executive officers or directors are U.S. residents or citizens under Rule 405 and Rule 3b-4(c), the Staff addressed whether the calculation must be made separately for each group of directors or officers or, alternatively, if executive officers and directors are to be treated as a single group. The Staff explained that such an assessment must be made separately for both directors and executive officers. Accordingly, an issuer must make the following four determinations under Rule 405 and Rule 3b-4(c): (i) the citizenship status of its executive officers; (ii) the residency status of its executive officers; (iii) the citizenship status of its directors; and (iv) the residency status of its directors. In the case of an issuer that maintains two boards of directors, the Staff established that the issuer must make the "majority" analysis with respect to the board of directors that performs functions that closely resemble those undertaken by a U.S.-style board of directors. If such functions are allocated to both boards, then the issuer may "aggregate the members of both boards for purposes of calculating the majority."

Assessing Whether the Majority of an Issuer's Assets Are Located in the United States. To determine whether more than 50 percent of an issuer's assets are located in the United States, the Staff has clarified that an issuer may either: (i) use the geographic segment information determined in the preparation of its financial statements; or (ii) apply on a consistent basis any other reasonable methodology in assessing the location and amount of its assets.

Evaluating Whether an Issuer's Business Is Administered Principally in the United States. There is no particular factor that is determinative for evaluating whether an issuer's business is administered principally in the United States under Rule 405 and Rule 3b-4(c). Instead, an issuer must assess on a consolidated basis the location from which its officers, partners or managers primarily direct, control and coordinate its activities.

II. Permitted Use of an F-Series Registration Statement and Form 20-F Annual Report

The Staff provided several interpretations in its C&DIs regarding the circumstances in which an FPI (and its subsidiaries) may utilize an F-Series registration statement and Form 20-F annual report, as well as the type of information that may be omitted from a Form 20-F and the filing deadline for the Form 20-F.

Offerings Involving a Non-FPI Subsidiary as Either Issuer or Guarantor. Where an FPI guarantees securities of its non-FPI subsidiary, the parent FPI (as guarantor) and non-FPI subsidiary (as issuer) may use an F-Series registration statement to register the offering of the securities under the Securities Act, as well as a Form 20-F with respect to any reporting obligations, as long as certain requirements are satisfied. Where the parent-guarantor and subsidiary-issuer are eligible to present condensed consolidated financial information in the parent-guarantor's filings, and the parent qualifies as an FPI, the parent-guarantor and its subsidiaries may use (i) an F-Series registration statement to register an offering of guarantees and guaranteed securities that are issued by a subsidiary (either domestic or foreign) that does not itself qualify as an FPI and (ii) a Form 20-F with respect to any reporting obligations associated with the F-Series registration statement. The subsidiary-issuer would not be required to submit separate financial statements if any of Rules 3-10(b) through 3-10(d) under Regulation S-X apply and all other applicable conditions of the rule(s) are satisfied by the parent-FPI's (as guarantor) filings. The Staff further explained that the same would apply in the case of a parent-guarantor and subsidiary-issuer that were eligible to present narrative disclosures (as opposed to condensed consolidating financial information) under Rule 3-10 under Regulation S-X.

Likewise, where a parent FPI issues securities that are guaranteed (or co-issued) by one or more of its non-FPI subsidiaries, the parent FPI and subsidiary guarantor(s) (or co-issuers) may still use an F-Series registration statement to register the offering under the Securities Act and Form 20-F with respect to reporting obligations. Separate financial statements will not be required to be filed for the parent's subsidiaries if: (i) Rule 3-10(e) or

3-10(f) under Regulation S-X applies; and (ii) all applicable conditions of Rule 3-10 under Regulation S-X relied upon are satisfied in the parent's filings.

Wholly Owned Subsidiary's Omission of Certain Information in Its Form 20-F. An FPI's wholly owned subsidiary may omit certain information under General Instruction I(2) (to Form 10-K) from its Form 20-F filing, as long as the registrant includes a prominent statement on the Form 20-F's cover page: (i) that it satisfies the conditions set forth under General Instruction I(1)(a) and (b) to Form 10-K; and (ii) is therefore filing the Form 20-F with a reduced disclosure format.

Deadline for Filing a Form 20-F. In accordance with General Instruction A(b)(2) to Form 20-F, the Staff stated that the Form 20-F must be filed within four months after the end of an issuer's fiscal year. In the case of an issuer whose last day of its fiscal year is the last day of the month (e.g., February 28), the Form 20-F will be due four "complete" months after that day. If the last day of an issuer's fiscal year falls on any day other than the end of a month, the Form 20-F must be filed on the same day four months ahead.

Incorporation of Information by Reference into Form 20-F. An FPI may, pursuant to Rule 12b-23 under the Exchange Act ("**Rule 12b-23**"), incorporate by reference information previously filed with the SEC into any item of Form 20-F, subject to certain limitations set forth under Rule 12b-23. An FPI that incorporates such information by reference must, however, "identify with specificity the information that is being incorporated by reference."

III. Summary Chart

C&DIS ISSUED ON DECEMBER 8, 2016		
C&DI Question	***Applicable SEC Rule or Form***	***Key Takeaways***
• Question 203.17 (*Securities Act Rules*) • Question 110.02 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• An issuer with multiple voting classes may utilize one of two methods to evaluate whether its voting stock is owned by >50 percent of U.S. residents.
• Question 203.18 (*Securities Act Rules*) • Question 110.03 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• A permanent U.S. resident is presumed to be a U.S. resident. • Non-permanent U.S. resident status may be deemed a U.S. resident based on any one of the criteria set forth by the Staff (but issuer must apply criteria that has been utilized consistently).
• Question 203.19 (*Securities Act Rules*) • Question 110.04 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• Separate determination must be made for evaluating whether the majority of directors and executive officers are U.S. residents or citizens.
• Question 203.20 (*Securities Act Rules*) • Question 110.05 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• An issuer with two boards of directors must make a "majority" analysis with respect to the board that performs U.S.-style functions. • If relevant functions are allocated to both boards, the issuer may aggregate the members of both boards for purposes of calculating the majority.
• Question 203.21 (*Securities Act Rules*) • Question 110.06 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• To determine if >50 percent of an issuer's assets are located in the United States, an issuer may either: (i) use the geographic segment information determined in the preparation of its financial statements; or (ii) apply on a consistent basis any other reasonable methodology in assessing the location and amount of its assets.
• Question 203.22 (*Securities Act Rules*) • Question 110.07 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• There is no particular factor that is determinative for evaluating whether an issuer's business is administrated principally in the United States. • An issuer must assess on a consolidated basis the location from which the issuer's officers, partners or managers primarily direct, control and coordinate its activities.
• Question 203.23 (*Securities Act Rules*) • Question 110.08 (*Exchange Act Rules*)	• Rule 405 under the Securities Act • Rule 3b-4(c) under the Exchange Act	• Absent any other factors, an issuer that holds an annual (or special) meeting of its shareholders or occasional meetings of its board of directors in the United States would not be deemed to be administering its business principally in the United States.
• Question 102.03 (*Securities Act Forms*) • Question 110.03 (*Exchange Act Forms*)	• F-Series Registration Statement • Form 20-F	• An FPI parent (acting as guarantor) and its non-FPI subsidiaries may use (i) an F-Series registration statement to register an offering of guarantees and guaranteed securities that are issued by a subsidiary (either domestic or foreign) that does not itself qualify as an FPI and (ii) a Form 20-F with respect to any reporting obligations associated with the F-Series registration statement.
• Question 102.04 (*Securities Act Forms*) • Question 110.04 (*Exchange Act Forms*)	• F-Series Registration Statement • Form 20-F	• Where an FPI parent issues securities that are guaranteed (or co-issued) by one or more of its non-FPI subsidiaries, the parent-FPI and subsidiary-guarantor(s) (or co-issuers) may still use an F-Series registration statement to register the offering under the Securities Act and use Form 20-F with respect to associated reporting obligations.
• Question 110.05 (*Exchange Act Forms*)	• Form 20-F	• The Form 20-F must be filed within four months after the end of an issuer's fiscal year. In the case of an issuer whose last day of its fiscal year is the last day of the month (e.g., February 28), the Form 20-F will be due four "complete" months after that day.
• Question 110.06 (*Exchange Act Forms*)		• An FPI's wholly owned subsidiary may omit certain information from its Form 20-F filing, as long as the registrant includes a prominent statement on the Form 20-F's cover page that: (1) it satisfies the conditions set forth under General Instruction I(1)(a) and (b) to Form 10-K; and (2) it is therefore filing the Form 20-F with a reduced disclosure format.
• Question 110.07 (*Exchange Act Forms*)		• An FPI may incorporate by reference information previously filed with the SEC into any item of Form 20-F, subject to certain limitations provided under Rule 12b-23 under the Exchange Act.

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