

The background of the slide features a dark green world map overlaid with a grid of financial data. At the top right, a list of currency codes and their corresponding values and percentage changes is visible: ITL, DEM, BEF, FRF, MGF, RUS, +12%, ▼22%, -0.4, ▼26.23, -0.16, ▼16.22. Below this, another row of currency codes is shown: JPY, EUR, CHF, GBR, SEK, CAD. At the bottom, more currency data is displayed: RMY 18.68 - 0.7%, DTR 31.48 - 0.0%, and MLO, RUS, 13.28 - 1.2%. A large, stylized green arrow originates from the bottom left and points towards the top right, passing behind the main title.

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GLOBAL PUBLIC COMPANY ACADEMY

FOREIGN PRIVATE ISSUERS: LISTING IN THE U.S.

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Foreign Private Issuers: Listing in the U.S.

- What is a foreign private issuer ("FPI")
- How and when must you check if you are an FPI
- Public offerings and FPIs
- Life as a public company
- Mergers and acquisitions
- Deregistration and delisting

What Does Being a Foreign Private Issuer Get You?

- More flexible Securities Act registration process
- More flexible ongoing Exchange Act reporting requirements
- Accommodations to “home country” corporate governance

Definition of "Foreign"

- Any company incorporated/organized outside the U.S.
- Unless
 - 50% of outstanding voting securities are directly or indirectly owned of record by U.S. residents, **and one of the following**
 - majority of directors or executive officers are U.S. citizens or residents;
 - 50% of assets are located in U.S.; **or**
 - business is principally administered in the U.S.
- If under 50% U.S. ownership, location of assets or management irrelevant.
- When determining ownership must "look through" nominee accounts held in U.S., home jurisdiction, and jurisdiction of principal trading market

FPI Definition

- Issuers with multiple classes of stock with different voting rights can determine whether more than 50% of outstanding voting securities are directly or indirectly owned by U.S. residents by:
 - Calculating the 50% of the voting power of both classes on a combined basis, or
 - Calculating based on the number of voting securities
 - Must apply on a consistent basis
- Factors to determine the status of an individual as a U.S. resident include:
 - Permanent resident status (Green Card holder presumed to be U.S. resident)
 - Others without permanent resident status also may be, based on criteria the issuer consistently applies to determine residence, including tax residency, nationality, mailing address, physical presence, location of financial and legal relationships, immigration status

FPI Definition (cont.)

- To determine whether a majority of executive officers or directors are U.S. citizens or residents there are 4 determinations:
 - Citizenship status of executive officers
 - Residency of executive officers
 - Citizenship of directors
 - Residency of directors
 - must treat executive officers and directors as separate groups (not as a single group) and determine for each group
- Issuers with 2 boards of directors:
 - must determine which board performs the functions most closely undertaken by U.S.-style boards
 - if those functions are divided between both boards, issuer may aggregate members of both for calculation of majority
- To determine whether more than 50% of assets are located outside the U.S.:
 - May use geographic segment information used in financial statements, or any other reasonably consistently applied methodology

FPI Definition (cont.)

- There is no single factor to determine whether the issuer's business is principally administered in the U.S.
 - Assess location from which officers, partners, managers primarily direct, control and coordinate the business
 - Holding annual or special meetings of stockholders in the U.S., absent other factors is not sufficient
 - Nor is holding occasional board meetings in the U.S. sufficient

How and when must you check if you are an FPI

- New registrants must test their status as of a date within 30 days of initial filing of a registration statement with the SEC.
- Must test annually on the last business day of the second fiscal quarter
- Registration under the Exchange Act required if \$10m or more in assets and 2000 or more shareholders worldwide (but no more than 500 non-accredited)
 - Exemption for foreign issuers with fewer than 300 shareholders in U.S. (Rule 12g3-2(a))
 - "Information-supplying" exemption (Rule 12g3-2(b))

How and when must you check if you are an FPI (cont.)

- If a company fails FPI test or fail to meet the provisions of an exemption, must comply with Exchange Act reporting requirements beginning on the first day of the next fiscal year
- Note that a company can be subject to regulation in (a) home country, (b) country where primary trading market is located and (c) U.S.

Public Offerings and FPIs

- FPIs are treated somewhat differently from “domestic” issuers
- Rationale:
 - Encourage listing on a U.S. market
 - Facilitate investment by U.S. investors into foreign companies
 - Reduce regulatory arbitrage
 - Reduce cost of raising capital across borders
 - Encourage free flows of capital across borders
 - Provide for comity with "home" country
 - U.S. investors could invest directly abroad (e.g., on the LSE), so it's better to provide some added U.S. investor protection rather than none

Public Offerings and FPIs (cont.)

- FPI alternatives for trading in the U.S.:
 - Securities are listed on a U.S. exchange (often as ADSs) and have to be registered under the Exchange Act pursuant to Section 12(b) and are subject to Sarbanes-Oxley
 - Securities traded on OTCBB and registered under Exchange Act.
 - FPI is an Exchange Act issuer and subject to certain sections of Sarbanes-Oxley, excluding sections pertaining to listed companies
 - Securities exempt from registration under Exchange Act (Rule 12g3-2(b)). ADSs, if applicable, are registered under the Securities Act on Form F-6. Not subject to Sarbanes-Oxley and likely trading on the Pink Sheets

American Depositary Shares (ADSs)

- Shares of foreign companies traded in the U.S. typically traded in the form of ADSs
 - ADSs represent the underlying shares of the foreign company
 - American Depositary Receipts (ADRs) are negotiable certificates that represent ADSs
 - ADSs registered on Form F-6; underlying shares registered on Form F-1
 - ADSs are usually issued by a U.S. commercial bank (the "Depository")
 - "Sponsored" vs. "unsponsored" ADS facilities
 - SEC allows Depository to set up an ADS facility if issuer is eligible to use Rule 12g3-2(b)
 - Recent increase in number of unsponsored facilities following changes to Rule 12g3-2(b)

American Depositary Shares (ADSs) (cont.)

- Benefits of ADSs
 - Make it easier for U.S. investors to hold, trade and receive U.S. dollar dividends
 - Enable FPIs to enter U.S. market to meet commercial and strategic objectives
 - Enhanced visibility
 - Better valuation in U.S. markets vs. home country
 - Compensation plans
 - Strategic transactions

Global Offerings With a U.S. Tranche/Dual Listings

- Coordinating review by multiple authorities
 - e.g.: UKLA (U.K. Listing Authority)
 - "Forward looking statements" vs. "profit forecasts"
 - Presentation of "pro forma" information
 - Analyst research pre-closing
 - Publicity outside of the U.S.: Non-U.S. market practice and Rule 135(e)
 - Underwriting mechanics / marketing practices
 - Reg M anti-manipulation rules

Corporate Governance Issues

- NYSE and NASDAQ waive some rules that conflict with home-country law or practice
 - Majority independent Board of Directors
 - Fully independent Board committees (e.g., Compensation Committee, but not Audit Committee)
 - Shareholder approval for share issuances, change of control transactions
- Most Sarbanes-Oxley requirements apply equally to FPIs; SEC rules mandatory
- Disclosure in Form 20-F of any significant ways in which corporate governance practices differ from those required of non-FPIs by NYSE/Nasdaq

Problematic Requirements

- Audit committee provisions
 - All members independent (under SEC and exchange rules) and financially literate
- Board composition / independence issues
- CEO/CFO certifications
- Non-GAAP financial measures
- Internal controls
 - Audited by second annual report on Form 20-F unless qualify as EGC
- Personal loans to officers and directors

Life As a Public Company

- General disclosure regime
 - Separate "integrated disclosure system" for FPIs: Forms F-1, 2 & 3, Form 20-F, Form 6-K, etc.
 - FPIs are exempt from Section 16 insider trading rules and the proxy rules
 - Confidential review is permitted for initial SEC registration (as with "Emerging Growth Companies" generally)
- Regulation FD: Fair Disclosure –
 - FPI exemption but general selective disclosure considerations
- Regulation G: Non "GAAP" Financial Measures
- Insider Trading
- Internal Controls; Disclosure Controls

Disclosure

- Form 20-F – serves as:
 - Annual report (counterpart to 10-K)
 - General Exchange Act registration statement (counterpart to Form 10)
 - Source of integrated disclosure (counterpart to Regulation S-K)

Generally Less Demanding Disclosure With Respect To:

- Management compensation, changes in share ownership
- Age of financial statements
- Longer timeframes; less frequent disclosure
 - Form 20-F annual report due 4 months after year-end
 - No specific quarterly reporting requirements (exchanges usually require filing of six month statements; comfort letter considerations for capital raises)
 - Exchanges also generally require prompt announcement of material information that may reasonably be expected to affect the market in its securities
- Foreign language documents: summaries allowed in some cases

Some Additional Disclosure

- Exchange rate information
- Convenience translations
- Foreign exchange or export controls
- Limitations on rights of foreign securityholders
- Foreign taxation
- Difficulties enforcing liabilities under federal securities laws outside the U.S.

Form 6-K

- FPIs not required to report on Forms 10-Q or 8-K
- Form 6-K: FPIs are required to provide to the SEC and U.S. exchange on which securities are listed significant information:
 - Made public in home country pursuant to the law of that country
 - Filed on foreign exchanges and made public
 - Distributed to shareholders

Financials

- Historically, in U.S. GAAP or another "another comprehensive body of accounting principles" (e.g., IAS), with reconciliation
- FPIs now permitted to prepare financials in IFRS without reconciliation to U.S. GAAP
- Item 17 vs. Item 18
 - Item 18 is more comprehensive: segment reporting, plus "all other" information required by U.S. GAAP
 - Item 18 required for certain purposes (including at a later point in time use through incorporation by reference)
 - Effective for fiscal years beginning on or after December 15, 2009, FPIs are now required to include only Item 18 financial statements in SEC reports. Item 17 is still available for pro form as and significant investee financial statements

Mergers and Acquisitions

- Potential acquirers of FPIs can rely on exemptions from SEC rules for certain tender and exchange offers and business combinations
 - 2 tiers of exemptions
 - Tier I (10% or less U.S. holders): exemption from most U.S. tender offer rules
 - Tier II (40% or less U.S. holders): exemption from certain mainly procedural provisions that may be inconsistent with non-U.S. rules or practices. Remain subject to most filing, dissemination and procedural requirements of the U.S. rules.
- Business Combinations
 - **Rule 802** — exemption from registration of securities issued in cross-border exchange offers or business combinations (e.g., mergers) to holders of securities in FPIs with limited U.S. ownership
 - 10% or less of target securities are owned by U.S. resident holders
 - Inquiry of banks, brokers dealers, etc. in relevant jurisdictions
 - U.S. holders must receive same documentation (in English) as non-U.S. holders

Deregistration and Delisting

- Delisting from an Exchange
 - Form 25
 - Delisting is effective 10 days after filing
 - Withdrawal from registration under Section 12(b) effective 90 days after filing
 - Public notice and comply with requirements of exchange
- Termination and Suspension of Periodic Reporting Requirements
 - Termination under Rule 12h-6
 - Suspension under Section 15(d)
- Requirements
 - Trading volume in U.S. = <5%, or
 - Holders threshold: less than 300 record holders worldwide or in U.S.
 - “Home country” listing
 - 12 month waiting period if delisted in advance of Form 15 filing or terminated an ADR facility to minimize U.S. trading volume.

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QUESTIONS?

THANK YOU

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