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THE UNIQUE IMPACT OF RECENT SEC RULES ON FOREIGN PRIVATE ISSUERS

Foreign private issuers should be aware that new SEC rules can have a special impact on them, and that the SEC may be rethinking its traditional approach for such issuers.

By Paul M. Dudek *

For the past two years, the US Securities and Exchange Commission (“SEC”) has been pursuing an ambitious rule-writing agenda, proposing and adopting numerous new regulations in areas ranging from the settlement cycle for securities transactions (T+1), to the outsourcing of services by registered investment advisers, to updating the SEC’s regulations under the Privacy Act. Public companies in particular have increasingly been the focus of new SEC mandates, with a large number of these rule-writing matters being directed at companies that are reporting to the SEC under the Securities Exchange Act of 1934 (“Exchange Act”) and are listed on the New York Stock Exchange or Nasdaq Stock Market.

These companies include a large number of foreign private issuers¹ (“FPIs”) which are listed on US stock

exchanges and report to the SEC. FPIs have been uniquely affected by the new rules, and they also appear likely to be impacted by various rule-making initiatives that the SEC has proposed but not yet adopted. In many cases under these new rules, the SEC’s approach varies starkly from the SEC’s historical practice of providing accommodations to FPIs that take account of home country disclosure and governance practices.²

This article highlights how the SEC’s adopted and proposed rules impact those FPIs that are listed on US stock exchanges. While the SEC has adopted or proposed accommodations for FPIs in some of its recent rule writings, in many cases it has elected to treat FPIs in the same manner as US companies in its black letter regulations. This effort towards “equal treatment” in practice frequently results in unequal or higher burdens on FPIs, or otherwise impacts them differently than the

¹ An FPI is an entity (other than a foreign government) incorporated or organized under the laws of a foreign jurisdiction unless: (1) more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents and (2) any of the following applies: (i) the majority of its executive officers or directors are US citizens or residents; (ii) more than 50% of its assets are located in the United States; or (iii) its business is administered principally in the United States. Rule 405 under the Securities Act of 1933 (“Securities Act”) and Exchange Act Rule 3b-4(c). A recent SEC release

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estimates over 850 FPIs are registered with the SEC. Rel. No. 33-11126 (2022).

² These are discussed in “Current SEC Initiatives Impacting Foreign Private Issuers,” by the author, 51 Rev. of Securities & Commodities Reg’n 179 (Sept 5, 2018).

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