Effects of the JOBS Act, Recent Developments Under Dodd-Frank and Other Recent Regulation and Judicial Decisions Affecting Foreign Private Issuers

In response to a sluggish economy, the Jumpstart Our Business Startups Act (JOBS Act) of April 12, 2012, has brought about many, arguably more favorable, legal changes for "foreign private issuers" (FPIs). Although not intentionally targeting FPIs, the JOBS Act contains several provisions of which FPIs may take advantage. The most significant involve the registration and disclosure requirements around raising capital and conducting public and private offerings as well as ongoing reporting and compliance.

Earlier, as a reaction to the financial crisis of 2008 and perceptions of widespread financial corruption, manipulation and global systemic risk, the sweeping Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) was signed into law on July 21, 2010 and for the most part added new liabilities and requirements to capital raising and public company compliance. Three years after enactment, many regulations have been implemented and even prosecuted while others still have yet to be proposed. Although domestic financial institutions are the obvious target, Dodd-Frank's far reaching effects touch FPIs in significant ways.

Furthermore, the changing regulatory landscape and global economic turmoil have given rise to several legal and operational issues that FPIs must now face. This article highlights certain of these effects and issues, including rules recently adopted or proposed pursuant to Dodd-Frank or the JOBS Act, other relevant enacted or proposed rules or regulations and recent Securities and Exchange Commission (SEC) and judicial decisions, in order to assist FPIs navigate these latest regulatory obstacles.

An issuer incorporated or organized under the laws of any foreign country that is not a foreign government qualifies as an FPI *unless* (a) more than 50% of its outstanding voting securities are held of record directly or indirectly by US residents *and* (b)(i) the majority of its executive officers or directors are US residents, (ii) more than 50% of its assets are located in the US *or* (iii) its business is principally administered in the US.

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THE JOBS ACT'S NEW FRAMEWORK

One bright spot of new legislation is the Jumpstart Our Business Startups Act (the JOBS Act), which was signed into law on April 5, 2012 and may provide some relief with respect to FPIs who anticipate making offerings in the US. To the extent a potential FPI meets the qualifications of an "emerging growth company" or "EGC" pursuant to the JOBS Act, certain regulatory burdens imposed by the SEC will be significantly reduced. The reprieves provided by the JOBS Act may encourage a potential FPI at least to consider a US offering and even listing.

An EGC is defined as a company that conducts an IPO after December 8, 2011, and has less than $1 billion in "total annual gross revenue" (under GAAP or IFRS, as applicable) during its most recently completed fiscal year. A company continues to be an EGC until the earliest of (1) the last day of the fiscal year during which it had total annual gross revenues of $1 billion or more; (2) the last day of the fiscal year following the fifth anniversary of its IPO, (3) the date on which the company has, during the previous three-year period, issued more than $1 billion in nonconvertible debt or (4) the date on which the company becomes a "large accelerated filer" (basically, a company with $700 million of public equity float that has been reporting for at least one year). An issuer must be an EGC to avail itself of certain changes implemented by the JOBS Act.

Unregistered Public Offerings

On September 23, 2013, amendments to Rules 144A and 506 mandated by the JOBS Act became effective. These amendments permit general advertisements and solicitations in connection with unregistered offerings that result in sales to only qualified institutional investors (QIBS) under Rule 144A or to only accredited investors under Rule 506. Under these new rules, and for the first time since the adoption of the United States Securities Act of 1933 (the Securities Act), a company may conduct a public offering of its securities without having to prepare a required registration statement filed with and declared effective by the SEC prior to completing sales of the offered securities.

Issuers, including FPIs, may commence public advertisement and solicitations of Rule 506 offerings on September 23, 2013 subject only to the application of the general anti-fraud rules and reasonable steps that the issuer must take and document to verify the qualification of each investor as an accredited investor. The amendments to Rule 506 also identify certain "bad actors" who have been adjudicated under certain criminal, regulatory or civil actions relating to securities who are prohibited from participating in the distribution of securities in a Rule 506 offering. The involvement of any such bad actor in a Rule 506 offering would disqualify the issuer from relying on the Rule 506 exemption and require registration of the offering under the Securities Act.

Concurrent with the adoption of the final amendments to Rule 506, the SEC also proposed additional rules to further ameliorate the risk of fraud in Rule 506 offerings that, if adopted, would require specific disclaimers and disclosures in offering materials, advance filing of a Form D prior to any public advertisement or solicitation of a Rule 506 offering, and one-year bans from reliance on Rule 506(c) for issuers that fail to comply with the new rules, including the requirement to take reasonable steps to verify an investor's accredited investor status.

Testing the Waters

Section 105(c) of the JOBS Act amended Section 5 of the Securities Act to permit an EGC (or any person authorized to act on behalf of an EGC, such as an investment banker), to engage in oral or written communications with potential investors in order to gage interest in an offering, either before or after the filing of a registration statement with the SEC. Such communications must target only QIBs or institutions that are accredited investors (as defined in Rules 144A and 501(a), respectively), and must comply with the prospectus delivery requirements of Securities Act Section 5(b)(2) related to sales of the securities.

In the past, the SEC restricted "gun jumping" - communications to potential investors when a securities offering was contemplated or in process - to prevent issuers and underwriters from attempting to offer or sell securities in the absence of available information about the issuer or the securities. Specifically, the SEC was concerned that certain communications may condition the market or arouse public interest in a particular security without providing investors adequate disclosure. Prohibited communications included press releases, interviews, Facebook postings, Twitter "tweets", and other communications on social media platforms, and no intent is required to be found guilty of violating the gun jumping restrictions.

EGCs should still carefully consider the timing and content of any meetings or communications to QIBs or institutions that are accredited investors. In addition, FPIs must consider whether testing-the-waters communications are permissible pursuant to the laws of their domestic jurisdictions. Anti-fraud provisions of the federal securities laws continue to apply to the testing-the-waters communications, and the testing- the-waters materials should be consistent with the information contained in the most recent draft of the registration statement. The SEC retains authority to request copies of written testing-the-waters communications through the comment letter process, and to request supplemental information to confirm consistency with the registration statement. It is therefore important that EGCs contemplating an IPO maintain discipline in communications in all media and be prepared to respond to SEC comments, so that the informality of social media, email and the like, does not lead to statements that require subsequent potentially embarrassing corrections. This may result in issuers limiting testing-the-waters activities to oral communications. In part because of such concerns, to date, the few EGCs that have utilized the liberalized "testing the waters" rules have primarily used only oral communications in the context of their registered public offerings.

Confidential Submission

In addition, the JOBS Act substantially mitigates the negative effect of the SEC's limitation in past years of an FPI's ability to file a non-public initial registration statement. In December 2011, the SEC restricted non-public filings by FPI's to: (1) foreign governments registering debt securities; (2) FPIs that are listed or concurrently list their securities on a non-US exchange; (3) FPIs that are being privatized by a foreign government; or (4) FPIs that demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction. These are significant hurdles to making a non-public submission, however, to the extent an FPI is an EGC, it may confidentially submit its registration statement to the SEC for review and comment and is only required to file the registration statement publicly 21 days prior to the effective date of the registration statement. This allows an FPI to keep its non-public and sensitive information private until a road show and pricing of an offering are imminent.

Reduced Audited Financial Statement and Financial Data Requirements

The JOBS Act also reduces a number of requirements related to an EGC's IPO registration statement. Such changes provide that an EGC may (1) provide two years of audited financial statements instead of the currently required three years; (2) omit selected financial data for any period prior to the earliest audit period (in effect, requiring only two years of selected financials); and (3) limit its MD&A to periods covered by its audited financial statements plus interim periods. Although these requirements have not yet been included in the Form 20-F, which governs the disclosure requirements for FPIs, the SEC staff has issued guidance confirming that these reduced requirements also apply to FPIs. Further, the Act directs the SEC to study Reg S-K and provide a report to Congress on how the IPO process could be further streamlined for EGCs. Such further changes would also likely apply to FPIs.

The reduction in required financial information, coupled with the confidential registration statement submission options, may encourage FPI EGCs to list in the US. Moreover, the JOBS Act could encourage certain companies to consider just a single US listing because in a typical dual listing (in the United States and the FPI's home jurisdiction), the issuer will usually be required to present three years of financial information under the non-US jurisdiction's rules.

No Auditor Certifications as to Internal Controls

EGCs do not have to provide auditor certifications regarding internal controls required by Section 404(b) of the Sarbanes-Oxley Act for the first five years after an initial public offering or until other measures related to size and revenue are met. This significantly reduces the time and expense of becoming a reporting company under US securities laws.

Analyst Research Reports

Previously, broker-dealers were prohibited from publishing research for US investors relating to an issuer prior to its IPO and during certain post-IPO blackout periods. The JOBS Act now permits research analysts to participate in additional communications with management of an EGC in connection with an IPO and to publish research reports relating to the EGC to be distributed by broker-dealers (including those participating in the offering) both prior to the proposed offering and following its completion, even during former blackout periods. The general anti-fraud rules still apply, however, and sales and trading personnel are still prohibited from publishing such reports. No overwhelming changes in market practice with respect pre-IPO research reports has occurred; however a best-practice seems to be developing which contractually preserves the so-called quiet period overlapping the time a prospectus is required to be delivered pursuant to Rule 174(d) of the Securities Act.

Offerings of $50 Million or Less

The JOBS Act also requires the SEC to create a new exemption (or modify an existing exemption, such as that provided by Regulation A) for public offerings of equity securities, debt securities and debt securities convertible or exchangeable into equity securities that, in the aggregate, do not exceed $50 million in any 12-month period. This exemption is expected to apply to both domestic issuers and FPIs.

Additional conditions the SEC may require include, the preparation, electronic filing with the SEC and distribution to potential investors of an offering statement, including audited financial statements, and the imposition of disqualification provisions similar to those in Dodd-Frank limiting the ability of “bad actors” to take advantage of the exemption. Issuers that take advantage of this exemption will be required to file audited financial statements with the SEC annually and make periodic disclosure as the SEC directs, including, among other items, a description of the issuer’s business and financial condition and its corporate governance principles.

Registration Requirements Under Rule 12(g)

The JOBS Act made two significant changes to the thresholds which require an issuer to register its securities and file periodic and current reports with the SEC regardless of whether or not it conducted a public offering. Previously, Rule 12(g) of the Securities Act required any issuer with more than $10 million of assets and a class of equity securities held of record by 500 or more holders to register such class of securities. The JOBS Act changes the threshold number of holders of record to either 2,000 or 500 holders who are not accredited investors. Additionally, the JOBS Act amended the definition of holders of record to exclude persons who received securities pursuant to an employee compensation plan (e.g., a stock option plan) in transactions exempt from registration under Section 5 of the Securities Act. This exclusion from the calculation of holders of record applies to both current and former employees of the company, but not their transferees. These changes are likely to be very helpful for small companies that provide equity compensation to incentivize key employees.

DODD-FRANK - RECENT REGULATORY AND JUDICIAL DEVELOPMENTS

Broadened Jurisdiction of the SEC and Department of Justice and Limitations on Private Rights of Action as Regards FPIs

One of the most significant impacts of Dodd-Frank on FPIs is the broadened reach and scope of the federal securities laws. Section 929P(e) of Dodd-Frank grants subject matter jurisdiction to US federal courts for alleged violations of securities law whereby (i) conduct within the U.S. constitutes a significant step in furtherance of the alleged violation (even if targeting only foreign investors in a transaction taking place outside of the U.S.) or (ii) conduct occurring outside the U.S. has a foreseeable impact on the U.S. Even though only for actions brought by the SEC or the US Department of Justice (DOJ), this expanded jurisdictional grant may substantially reverse the US Supreme Court’s 2010 decision in *Morrison v. National Australia Bank Ltd.*, No. 08-1191 (U.S. June 24, 2010), which held that the antifraud provisions of the securities laws apply only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United and rejected the so-called “conduct and effects” tests which had previously been used to argue for extraterritorial application.

Another element of the *Morrison* decision that is in jeopardy of being overturned is the limitation it imposed on the rights of private parties to bring such anti-fraud claims such as under SEC Rule 10b-5. Whereas Morrison had ruled that the subject securities had to have either been purchased on a US exchange or within the US and de facto eliminated the ability of private investors who purchased the securities extraterritorially to bring a claim, Dodd-Frank required the SEC to solicit public comments and publish a study to determine the extent of private rights of action extraterritorially. The study was issued in April 2012 and did not give a clear mandate regarding the direction the SEC or Congress might pursue regarding overturning *Morrison* as to private claims.

In addition, Section 929M broadens the liability of secondary actors, such as accountants, lawyers and other advisors, for potential securities law violations. Prior to the passage of Dodd-Frank, the legal standard for an aiding and abetting claim required the plaintiff/defendant to have "knowingly" provided "substantial" assistance to the alleged violator. Now, a valid aiding and abetting claim can prevail if the plaintiff/defendant merely "knowingly or recklessly" provided assistance. Again, this provision only applies to cases brought by the SEC or the DOJ, however it may create significant hurdles when engaging other professionals in securities transactions, such as requiring broader indemnities in engagement letters or limiting the scope of certain opinions provided.

Foreign Auditor Work Papers

Combining both the above elements of extraterritorial jurisdiction and secondary actor liability, Section 929J requires that foreign auditors, who provide services upon which a registered public accounting firm relies in conducting an audit or interim review of an issuer, supply their "work papers" upon request from the SEC and the Public Company Accounting Oversight Board (PCAOB). This subjects such foreign firms to the scrutiny of the SEC and the potential reach of the heightened secondary actor liability mentioned above and consequently, will likely increase costs for FPIs when preparing financial information.

An instructive example of this broadened reach has recently been playing out in the media. On December 3, 2012, the SEC brought an administrative proceeding against the foreign affiliates of five major accounting firms based on their refusal to produce audit work papers relating to Chinese client companies. The accounting firms claim that providing the documents would violate Chinese law and subject them to domestic liability. If the SEC prevails the outcome may be to disqualify the auditors as authorized to practice before the SEC which could in turn cause some of their clients to be delisted from US exchanges and make it difficult for Chinese and other FPI's to trade on US exchanges. Such a standard applied to smaller accounting firms could further exacerbate the risk and expense faced by FPIs when preparing requisite financial information. Following a stalemate, on May 24, 2013, the PCAOB announced that it had signed a Memorandum of Understanding with Chinese securities regulators that would enable the PCAOB under certain circumstances to obtain audit work papers of China-based audit firms. In addition, on July 9, 3013 the Chinese Securities Regulatory Commission issued a statement that it would hand over accounting documents of a Chinese company to the SEC and the PCAOB. While the specific documents and companies were not specified, this recent policy change could signal future compliance and joint oversight. However much uncertainty around this issue remains and the extent of the SEC's reach is not clear, the only likely inevitability is that the costs of preparing financial information for non-US operations will be more expensive.

In response to such events, the SEC has issued comment letters to issuer filings requesting that risk factor disclosures highlight situations in which the PCAOB may be unable to conduct inspections in relevant jurisdictions, and to make clear that investors in U.S. markets who rely on such auditors' reports are deprived of the benefits of PCAOB inspections of auditors. FPI's should expect and preempt such comments to their filings by providing any applicable disclosure.

Compensation Committee Rules

On June 20, 2012 the SEC adopted final rules under Section 10C-1 of the Exchange Act, requiring the national securities exchanges to propose standards by September 25, 2012 requiring listed companies to have a compensation committee composed solely of independent directors, to grant the compensation committee the authority to hire, oversee and pay compensation consultants and to set forth the independence criteria for advisers to the compensation committee which a compensation committee must consider. Section 10C-1 also provides that the authority granted to and the criteria used by directors responsible for making compensation determinations in the absence of a compensation committee, must be consistent with those above. On January 13, 2013 the SEC approved the NYSE's and NASDAQ's proposed listing standards which basically mirror the SEC's directive.

Foreign private issuers will continue to be allowed to follow their home country practices in lieu of NASDAQ's revised listing rules relating to compensation committees so long as they disclose annually the reasons that they do not have independent compensation committees, and describe the listing requirements they do not follow, as well as the home country practices that they do follow.

New Compensation Clawbacks

Although the SEC has postponed the proposal and adoption of rules implementing Section 954, the possibility that FPIs will be required to claw back certain performance based executive compensation remains. Section 954 specifically requires the SEC to direct the US exchanges to implement listing standards requiring issuers to adopt a compensation clawback policy whereby, in the event of a financial restatement with respect to the past three years, any executive officer who received compensation based on the misstated financial performance will be required to repay such compensation in an amount equal to the difference between what he received and what he would have received pursuant to the restatement. Unlike a similar provision in the Sarbanes-Oxley Act of 2002 (SOX), Section 954 is not limited to the CEO and CFO and does not require any wrongdoing on the part of the executive to initiate a clawback. This produces obvious complications such as the compensation of former executives, loss of income taxes previously paid on such compensation and the ultimate ability to recoup such compensation. The effect to FPIs is tempered to the extent that the policy is only required of issuers on US exchanges and the fact that International Financial Reporting Standards generally requires fewer restatements than Generally Accepted Accounting Principles, but attention should be paid to the proposed and final rules expected later this year.

Whistleblower Bounties

On August 12, 2011, Rule 21F (Whistleblower Incentives and Protection) took effect under the Securities Exchange Act of 1934. Unlike the previous whistleblower provisions, awards are now mandatory for any whistleblower who provides information of possible fraudulent conduct to the SEC which leads to a successful enforcement action and monetary sanctions of $1,000,000 or more. Whistleblowers are eligible to receive rewards of up to 30% of the sanction amount even if they participate in the illegal conduct, as culpability and interference with internal compliance are not bars, but merely two of a multitude of factors to be considered by the SEC when determining the amount of the award. Many are concerned that this type of bounty will prevent employees from voicing suspicions through internal procedures and prevent early detection in favor of larger (more lucrative) scandal. Rather than produce a diligent and thoughtful workforce, this legislation could misalign employee incentives and increase the number of frivolous lawsuits faced by all issuers including FPIs. Privately-owned FPI's also face an unfavorable effect of the rule with respect to their state-owned competitors, since foreign officials are excluded from whistleblower status. Pursuant to SEC guidance, employees of state-owned foreign companies would be considered foreign officials, thereby exempting such institutions from the reach of 21F.

In a recent case, *Asadi v. G.E. Energy (USA), L.L.C.* (July 2013), the Fifth Circuit held that, to be protected under Dodd-Frank's anti-retaliation provision, an individual must be a "whistleblower," which is defined by the statute as an individual who has made a report to the SEC. Notably, this holding directly conflicts with the SEC's regulations interpreting the Act, as well as five district court decisions that had all held that employees who make internal reports to company management are protected under Dodd-Frank even if they did not make reports to the SEC. Despite the current legal uncertainty many corporate whistleblower policies now provide protections for whistleblowers who report internally.

Foreign Financial Institutions

The heart of Dodd-Frank targets domestic financial institutions, however, given the broad scope of the legislation, FPIs are not necessarily immune from these provisions. Many provisions of Dodd-Frank apply to FPI's that are "covered financial institutions," the broad definition of which includes deposit banks, broker dealers, investment advisors and "any other financial institution that the appropriate Federal regulators, jointly, by rule, determine should be treated as a covered financial institution." Dodd-Frank also regulates "foreign nonbank financial companies" which are defined as foreign companies "predominantly engaged in, including through a branch in the United States, financial activities." A company is predominately engaged in financial activities if 85% or more of its consolidated gross annual revenue is derived from activities that are financial in nature, or 85% or more of the consolidated assets of the company and its subsidiaries are related to activities that are financial in nature. Thus, the reach of Dodd-Frank's financial stability provisions is quite broad and FPIs should carefully assess their operations to determine if they fall into the above categories which could make them subject to enhanced prudential standards, registration requirements, examination by the Board of Governors of the Federal Reserve System (FRB), the FRB's enforcement authority and prohibitions on management interlocks. Enforcement of these provisions is still in its premature stages and application to non-US entities will likely be a sensitive issue. Although Section 115 provides that the FRB must give due regard to the principle of national treatment and equality of competitive opportunity, taking into account the extent to which the non-US entity is subject on a consolidated basis to home country standards that are comparable to those applied in the U.S., merely complying with local regulations may not be sufficient to prevent an FPI from running afoul of these regulations.

Mine Safety Disclosure

Effective January 27, 2012, Form 20-F was amended to implement Section 1503 regarding mine safety disclosure. New Item 16H of the form requires that FPIs filing annual reports provide information pertaining to coal or other mines which the registrant or its subsidiaries operate. Such information includes the number of citations received for failure to comply with health or safety standards, total dollar value of proposed assessments from the Mine Safety and Health Administration (the Mine Administration) and the total number of mining-related fatalities during the period covered by the report. An FPI must also report the number of coal or other mines that receive written notice of a pattern or potential for a pattern of violations from or are in a pending legal action with the Mine Administration.

Conflict Mineral Reporting Rules

On August 22, 2012 the SEC passed rules implementing Section 1502 of Dodd-Frank which require companies to publicly disclose their use of "conflict minerals," which were upheld on July 23, 2013, the District Court for the District of Columbia. The conflict mineral rules apply to any issuer, that files reports with the SEC under Section 13(a) or 15(d) of the Exchange Act, including FPIs, EGCs and smaller reporting companies. Under the rules, issuers are required to disclose annually on a new Form SD whether they use "conflict minerals" that are "necessary to the functionality or production" of a product that they either "manufacture" or "contract to manufacture" and that originate from the covered countries. Issuers must comply with the disclosure requirements for the year beginning on January 1, 2013, with the first reports due on May 31, 2014, and subsequent reports due on May 31 of each year. Form SD should include a description of the due diligence taken by the issuer with respect to the conflict minerals' source and chain of custody, a description of the products manufactured or contracted to be manufactured that are not "DRC conflict free," the facilities used to process such conflict minerals, the country of origin of the conflict minerals, and the efforts made to determine the mine or location of origin. Further, the due diligence measures must include an independent private sector audit of the issuer's and the issuer must identify the auditor in the report and certify that the issuer obtained the required audit.

Other Disclosure Provisions

Rules have not yet been proposed to implement Sections 955 and 972, which address the disclosure of employee and director hedging transactions and proxy disclosure regarding the separation of the chairman and chief executive officer positions. In the past either the SEC or the exchanges have exempted FPIs from this type of disclosure. However without any proposals or guidance, it is unclear if this will remain the case.

FCPA REGULATORY ENFORCEMENT AND OTHER REGULATIONS AND JUDICIAL DETERMINATIONS

Increased Foreign Corrupt Practices Act Enforcement

Since 2005, Foreign Corrupt Practices Act (FCPA) enforcement actions brought by the SEC and the DOJ have increased by more than 600%. Furthermore, the sanctions and settlements reached have been significantly more severe, such as the unprecedented 15 year sentence of Joel Esquenazi, the former president of Terra Telecommunications Corp., for paying bribes to officials of Telecommunications D'Haiti. Some have speculated that this change is based on the analysis of information provided by disclosure requirements implemented by Sarbanes-Oxley, the government's realization and exploitation of a fine raising opportunity or the post 9/11 shift in focus to global commerce and corruption. Regardless of the motivation, it is clear that the US federal government is devoting significant resources to the enforcement of the FCPA, which raises certain concerns for all issuers engaging in international commerce and without question for FPIs.

The whistleblower bounties described above also apply to reported alleged violations of the FCPA. This of course increases the incentive to alert the SEC and/or DOJ to potential bribery or corruption relating to foreign officials and transactions. One point to note, however, is that unlike the de facto definition of "foreign officials" to include state-owned entity employees under the whistleblower provisions, the determination of whether or not a state-owned employee is a "foreign official" under the FCPA requires a fact-intensive inquiry and depends on the nature and characteristics of the entity at issue. Thus FPIs should closely review and monitor their FCPA policies and procedures to counter prosecutorial fervor with institutional diligence.

Furthermore, the DOJ is increasingly seeking international cooperation and in 2012, announced its close alliance with law enforcement counterparts in Mexico and Panama and an effective investigation of BizJet International Sales and Support, Inc. Ultimately BizJet entered into a deferred prosecution agreement (DPA), pursuant to which the department agreed to defer prosecution for three years in exchange for BizJet's payment of an $11.8 million fine and the implementation enhanced compliance procedures that included periodic reports to the DOJ and cooperation in all ongoing department investigations.

On November 14, 2012, the SEC and the DOJ provided guidance as to the application of and compliance with the FCPA in the form of their extensive and detailed Resource Guide to the US Foreign Corrupt Practices Act. The guide's main points of clarification relate to:

- The scope of the FCPA's anti-bribery and accounting provisions.
- What constitutes a foreign official.
- Proper and improper gifts and entertainment expenses.

- Parent and successor liability.
- The elements of an effective compliance program.
- Civil and criminal resolutions available.
- Procedures for obtaining DOJ opinions.

Importantly, the guide establishes that in order for conduct to trigger the FCPA it must 1) serve a business purpose, 2) be conducted with corrupt intent, 3) be a willful or voluntary act and 4) offer something of value to the public official. The guide contains several hypotheticals and examples to further elucidate the rules. The guide also discusses proper and improper gift and entertainment expenses when conducting business abroad and recommends the use of and provides tips for an effective corporate compliance policy. While not a change in SEC and DOJ interpretation of the FCPA, the guide provides a useful comprehensive repository of the agencies' current positions on and analysis of the FCPA as well as their viewpoint on enforcement and settlement guidelines.

SEC Cybersecurity Disclosure Guidance

On October 13, 2011 the SEC issued guidance concerning the disclosure of cybersecurity, including the risks of cyber events, measures that issues take to prevent such cyber events, any cyber events that have occurred and the remedial measures being taken and the costs associated therewith. The SEC highlighted certain items under Rule S-K which may require additional disclosure such as Risk Factors, MD&A, Description of Business, Legal Proceeding and the Financial Statements. In addition, the SEC stated that to the extent cyber incidents pose a risk to a registrant's ability to record, process, summarize, and report information that is required to be disclosed in SEC filings, management should also consider whether there are any deficiencies in its disclosure controls and procedures that would render them ineffective. FPIs subject to reporting requirements should provide such relevant cybersecurity information.

Furthermore, there have been recent indications that the SEC may augment the above guidance or even provide substantive regulations related to cyber security and cyber attacks. SEC chairman Mary Jo White asked her staff to review whether reporting companies should be required to provide more information regarding cybersecurity and cyber attacks as stated in a letter to Senate Commerce Committee Chairman Rockefeller dated May 1, 2013. Senator Rockefeller was instrumental in the SEC's 2011 guidance and stated that White's comments make "it clear the SEC will continue to prioritize increased disclosure of cybersecurity practices and to monitor the steps companies are taking to manage cybersecurity risks."

Iran Threat Reduction & Syria Human Rights Act of 2012

On August 10, 2012, the President signed into law the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA). ITRA amends Section 13 of the Exchange Act requiring an issuer that files Exchange Act periodic reports to provide disclosure in its periodic report if during the reporting period it or any of its affiliates has knowingly engaged in certain specified activities involving contacts with or support for Iran or other identified persons involved in terrorism or the creation of weapons of mass destruction. New Section 13(r) also requires an issuer that includes a description of an identified activity in a periodic report to concurrently file with the SEC a notice that identifies the issuer and indicates that disclosure of the activity has been included in its periodic report.

Transitional Filing Deadlines

December 15, 2011 marked the end of the transition period for compliance with the new Form 20-F filing deadline, which requires that FPIs file their annual report with the SEC within four months of the end of their fiscal year rather than six months, as previously required.

Resource Extraction Rules Vacated

On July 2, 2013, in *American Petroleum Institute v. SEC*, the District Court for the District of Columbia vacated and remanded the SEC's approval of Rule 13q-1, which was adopted on August 22, 2012 to implement Section 1504 of Dodd-Frank. Rule 13q-1, applied to FPI's and mandated that resource extraction issuers disclose in an annual report certain payments made to the United States or foreign governments in connection with the commercial development of oil, natural gas, or minerals. The rule would have required disclosure for fiscal years ending after September 30, 2013. The American Petroleum Institute and other trade groups contended that the SEC should have allowed issuers to submit payment information confidentially to the SEC. The Court agreed with the trade groups, finding that the statute did not intend these reports to be publicly disclosed. Further, the Court held that the SEC erred by denying any exemption for foreign law prohibitions, finding that the decision was based on arbitrary and capricious reasoning and drastically increased the rule's burden on competition and cost to investors. The SEC must decide whether to appeal or revise or rewrite the rule. In the meantime, issuers should continue to compile information related to resource extraction payments, as it may need to be reported to the SEC in some form sometime in the near future.

Transition to IFRS

Since 2007, foreign private issuers that are reporting companies in the US have been permitted to prepare their financial statements in accordance with the International Financial Reporting Standards (IFRS) as adopted by the International Accounting Standards Board without any reconciliation to US GAAP. There are currently over 450 foreign private issuers who use IFRS without reconciliation to US GAAP whose market capitalization is in the multiple trillions of U.S. dollars. In addition, approximately 40% of registrants monitored by an Assistant Director group within the Division of Corporation Finance responsible for oversight of large financial institutions also file financial statements prepared in accordance with IFRS.

The SEC has yet to recommend adoption of rules allowing or requiring domestic registrants to comply with IFRS and has not committed to any timetable for adoption or convergence. However, the July 2012 report by the SEC staff provides a thorough analysis of the work that needs to be undertaken to transition the United States from GAAP to IFRS. While FASB, the SEC and the SEC staff all appear to remain committed to transitioning to IFRS as a global accounting standard and are working toward that goal with their international counterparts, the only thing that is clear today is that there is a great deal of work to be done, and any convergence timeline will be measured in years, not months.

Reconciliation of Financial Statements in Form 20-F

For FPI's that prepare financial statements pursuant to neither GAAP nor IFRS, the SEC eliminated the more relaxed reconciliation option of Item 17 and, for fiscal years ending on or after December 15, 2011, all such FPIs are required to comply with the more fulsome financial statement requirements contained in Item 18 of Form 20-F. Item 18 requires FPIs, other than FPIs that prepare financial statements in accordance with IFRS , to provide all of the information required by U.S. GAAP and Regulation S-X. Therefore, based on the lack of required GAAP reconciliation and other issues discussed herein, the use of IFRS for FPIs is becoming even more attractive.

XBRL Data Not Required for IFRS Filers

On April 8, 2011, the SEC issued a no-action letter confirming that FPIs that prepare financial statements in accordance with IFRS will not be required to provide financial information in an interactive data format using XBRL until the SEC specifies the XBRL taxonomy for IFRS financial statements. Under the SEC's XBRL phase-in schedule, FPIs that prepare IFRS financial statements would have been required to provide financial information in XBRL format for fiscal periods ending on or after June 15, 2011; however, the SEC has not yet specified an XBRL taxonomy for use by FPIs that prepare IFRS financials. Guidance was not provided in the SEC's no-action response as to when the IFRS taxonomy will be specified or what the deadline will be to process and implement the IFRS taxonomy once it has been specified.

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