CAPITAL MARKETS
EQUITY

SEC dilutes accommodations available to foreign private issuers

Anna Pinedo and Gonzalo Go of Mayer Brown explain recent changes that may affect foreign issuers' appetite to list in the US

Foreign (non-U.S. domiciled) issuers that list a class of their equity securities in the US (FPIs) enjoy increased visibility, enhanced access to the US capital markets, and other important benefits. However, choosing to become a public company is expensive and time-consuming and may require changing an FPI's operations in ways that it would not necessarily choose if it were not required to do so.

An FPI is an issuer that is domiciled in any foreign country that is not a foreign government, unless more than 50% of its outstanding voting securities are held directly or indirectly of record by US residents and any of the following applies: (i) majority of its executive officers or directors are US citizens or residents, (ii) more than 50% of its assets are located in the US or (iii) its business is administered principally in the US. Traditionally, US policymakers encouraged foreign issuers to access the US capital markets and then made available certain disclosure, reporting and corporate governance accommodations. Unfortunately, there has been a shift in approach. To quote certain Securities and Exchange Commission (SEC) Commissioners in their public remarks, the "**overly aggressive and very expensive rule-making agenda**" and the "**shift in regulatory philosophy**" from the SEC's "**long-standing and bipartisan approach of largely deferring to the disclosures made by FPIs pursuant to their home-country reporting requirements**" may "**sacrifice principles of mutual**

recognition and international comity to impose [SEC's] own views on the rest of the world [and] may ultimately harm US investors and companies". As the SEC has considered and adopted amendments to many of its rules, rather than incorporate "**sensible accommodations**" for FPIs, the amendments have expressly been made applicable to foreign issuers. For example, consider the following recent rulemakings:

1. **Abbreviated buyback disclosure timing**. In connection with the share repurchase disclosure amendments, FPIs are now required to disclose repurchases of securities (buyback) registered under Section 12 of the Securities Exchange Act of 1934 (Exchange Act) within 45 days after the end of a fiscal quarter. An FPI should report buybacks using a new Form F-SR without a materiality threshold. If home-country disclosures on Form 6-K satisfy the Form F-SR requirements, an FPI can incorporate such disclosures into its Form F-SR.
2. **New "cooling-off" period for directors and officers relying on Rule 10b5-1's affirmative defence**. Rule 10b5-1 under the Exchange Act provides an affirmative defense to insider trading liability for trades undertaken pursuant to a binding contract, an instruction to another person to execute the trade for the instructing person's account or a written plan (collectively, a "10b5-1 Plan") adopted when the trader was not aware of material nonpublic information. Amended Rule 10b5-1 requires that in order to qualify for the affirmative defence
   a. trading under a 10b5-1 Plan adopted by a director or "officer" (as defined in Rule 16a-1(f)) must not begin until (i) 90 days following plan adoption or modification or (ii) two business days following financial results disclosure via Form 20-F or Form 6-K for the fiscal quarter in which the plan was adopted or modified (but not to exceed 120 days following plan adoption or modification), whichever is later; and
   b. trading under a 10b5-1 Plan for persons other than issuers or directors and officers must not begin until 30 days following plan adoption or modification.
3. **Subject to amended "clawback" listing standards starting October 2 2023**. The amended clawback listing standards of the NYSE and Nasdaq , as required by SEC Rule 10D-1, apply to FPIs to the extent they have a class of securities listed on such exchanges. A FPI that has not designated officers as executive officers for SEC purposes will need to assess which of its officers fall within SEC Rule 10D-1 definition of "executive officer," and may have additional considerations such as analysing whether the required recoupment violates its home-country law.
4 **Heightened disclosures for China-based issuers**. An FPI based in or with the majority of its operations in the PRC (China-based issuer) is required to disclose risks relating to its inability to provide investors with high-quality, reliable disclosures and financial reporting due to restrictions on the Public Company Accounting Oversight Board's (PCAOB) ability to inspect or investigate PCAOB-registered public accounting firms. If the SEC determines that a China-based issuer had three consecutive non-inspection years, the Holding Foreign Companies Accountable Act requires that the SEC prohibit its securities from being traded on a national securities exchange or through any other method regulated by the SEC, including over-the-counter trading, unless such China-based issuer subsequently "certifies to the [SEC] that [it] has retained a registered public accounting firm that the [PCAOB] has inspected … to [SEC's] satisfaction...."
5. **Must have two diverse directors if listed on Nasdaq**. Nasdaq-listed companies must have, or explain why they do not have, at least two diverse directors, including at least one director who self-identifies as female (regardless of designation at birth) and at least one director who self-identifies as an underrepresented minority or a member of the LGBTQ+ community. An FPI may satisfy this board-composition requirement by having two directors who self-identify as female. Nasdaq-listed FPIs are also required to annually disclose diversity information in a standardised board diversity matrix.
6. **EDGAR submission of "glossy" annual reports**. Amended Rule 14a-3(c) requires an FPI that furnishes its glossy annual report on Form 6-K to also electronically submit it via the SEC's EDGAR platform no later than the date when such report is first sent or given to securityholders, or the date on which its proxy statement's preliminary copy (or definitive copy, if preliminary filing was not required) is filed with the SEC pursuant to Rule 14a-6, whichever date is later.

Several proposed rules to be considered later this year according to the **SEC's spring rulemaking agenda**, if approved as proposed, may impose additional burdens for FPIs. These include, for example, proposed rules on **climate change disclosures, cybersecurity risk governance** and **special purpose acquisition companies**. While the US capital markets remain the most liquid and deep and should remain attractive to foreign issuers, the calculus regarding whether to list a class of securities on a US securities exchange may be impacted by the erosion of once-welcome accommodations for FPIs.