

New SEC Rules for “Foreign Private Issuers” Effective

The SEC's new disclosure rules for “foreign private issuers” became effective on September 30, 2000. Companies that are already publicly traded in the U.S., as well as those in the process of registering securities for trading in the U.S. or planning a U.S. securities offering, will be required to comply with the revised version of the annual Form 20-F filing. The SEC has also revised all its securities offering forms for foreign issuers to coordinate with the changes to Form 20-F.

One of the most significant changes accompanying the new Form 20-F disclosure rules is the SEC's revised definition of the term “foreign private issuer.” This change may reduce the number of companies able to qualify.

Failure to qualify as a “foreign private issuer” can be critical and costly for Canadian public companies. Qualifying companies are not required to file quarterly reports and are exempted from the SEC's proxy rules. In addition, insiders are exempted from the beneficial ownership reporting and short swing-trading provisions of Section 16 of the Securities Exchange Act of 1934. If the definition is not met, a foreign issuer must make regulatory filings with the SEC as if it were a fully-reporting U.S. public company.

“Foreign Private Issuers” Must Determine Residency of Beneficial Shareholders

The new SEC definition of a “foreign private issuer” requires companies to determine whether over fifty percent (50%) of their outstanding voting securities are beneficially held by U.S. residents. The old SEC definition was based on the residency of the owner of record. This did not address the fact that the majority of individual and institutional investors are not registered shareholders, rather their shares are held in custody by intermediaries clearing through depositories.

The new definition requires a company seeking to qualify as a “foreign private issuer” to demonstrate its eligibility by probing well beyond the record list of shareholders. The issuer must “look through” the record ownership of each depository, brokerage firm, and bank to determine whether the company's beneficial shareholders are U.S. residents.

The SEC expects foreign issuers to demonstrate a “good faith” effort to identify the residency of their shareholders.

How We Can Help

Allen Nelson & Co. frequently conducts geographic shareholder surveys for Canadian companies seeking a cost-effective way to ensure compliance with SEC rules. We are authorized to download CEDE & CO. Security Position Listings from The Depository Trust Company's mainframe computer in New York City when the issuer provides CEDE & CO. with written authorization appointing us as their agent. After we have reviewed the Security Position Listings, we personally contact the U.S. service agencies, brokerage firms, custodians and banks to determine the residency of their customers holding the foreign issuer's shares in “Street Name” accounts. We provide our clients with reports detailing the number of beneficial shareholders who are U.S. residents, the aggregate number of shares held in the U.S., and totals for each state.