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Advisory

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SECURITIES LAW

SEC Disclosure Policy on Foreign Issuer Interests in U.S. – Embargoed Countries

The events of September 11, 2001 will most certainly create shifts in the policies of some U.S. regulatory agencies. Some changes were happening, however, before the tragic occurrences of that day.

In May 2001, the U.S. Securities and Exchange Commission (SEC) adopted what amounts to a new reporting requirement for foreign companies, with little or no publicity, seeking financing in U.S. capital markets. Pursuant to an initiative announced by then-acting SEC Chair Laura Unger, and a memorandum from the Director of the SEC's Division of Corporation Finance, the SEC staff now requires foreign filers (generally, companies that are listed on a U.S. stock exchange or Nasdaq, or that are "going public" in the U.S.) to disclose information about their business dealings with foreign governments, entities or persons in countries subject to comprehensive U.S. sanctions regimes. The new policy has substantial legal and public relations implications for U.S. investors and foreign companies with an interest in raising funds in international, as well as U.S., capital markets.

SEC Requirements

As of May 8, 2001, the SEC regards information from foreign issuers with respect to business interests in countries subject to any sanctions programs administered by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and countries designated as "countries of concern" by the U.S. State Department under the International Religious Freedom Act, adopted by the U.S. Congress in 1998 as "material" and therefore necessary for disclosure to U.S. investors in the context of required SEC filings. The current list of countries either under sanctions or designated as "countries of concern" is as follows: *Afghanistan (Taliban-controlled), Angola, Burma (Myanmar), China (PRC), Cuba, Iran, Iraq, Laos, Liberia, Libya, Nigeria, North Korea, India, Indonesia, Pakistan, Sierra Leone, Sudan, Syria, and Vietnam.* This list is subject to change at any time as political and economic events throughout the world affect U.S. public policy. In addition to the country list, material business dealings or relationships with individuals or companies (such as, "specially designated nationals" and "designated terrorist organizations") on any of several lists maintained by the U.S. government will also need to be disclosed. Foreign filers need to consult the most current versions of the OFAC and State Department lists to ensure compliance.

In the past, the SEC staff has performed only a selective review of filings for such information. The new policy calls for a review of all registration

statements filed by foreign companies with the SEC to ensure disclosure of such material business dealings and relationships in sanctioned countries. In addition, the SEC has announced that it will refer to the attention of OFAC disclosures of such information on a routine basis. Finally, to facilitate the process of staff review and investor access to information, on September 27, 2001, the SEC proposed rules requiring electronic filing by foreign filers that will further highlight such disclosures. The rules currently permit, but do not require, foreign filers to make securities filings with the SEC via the SEC's electronic filing system, EDGAR. The mandatory EDGAR filing requirements are expected to take effect during the second quarter of 2002.

Implications

The SEC's new position on this disclosure requirement raises public relations and potential enforcement concerns for foreign companies seeking access to the U.S. capital markets and U.S. persons investing in or doing business with foreign companies that have activities in or with a U.S.-sanctioned country. The SEC cited its "investor protection mandate" as the rationale for requiring such heightened disclosure from foreign companies. A principal aim of U.S. groups committed to the promotion of religious freedom and human rights in Sudan and other countries is the exposure to negative publicity of companies with operations in such locales as part of efforts to encourage divestments. Post-September 11th, one can only draw the conclusion that these efforts will be enhanced and greater scrutiny given to such business interests around the world. Although the SEC policy at present is to require such disclosures in registration statements (*i.e.*, the F-1), we anticipate that these requirements will be expanded to other informational filings by the 4th quarter.

The SEC's action also increases potential exposure for U.S. companies and persons who invest in foreign companies with commercial dealings in U.S.-sanctioned countries. OFAC rules on investing in third-country companies with interests in embargoed countries are less than clear. However, the agency has a well-earned reputation for taking an aggressive approach to its legal mandate. The SEC's announcement that it will transmit to OFAC the more detailed information it requires on foreign company activities in sanctioned countries, combined with continued political pressure on the Treasury Department, also increases the probability of OFAC investigations and aggressive enforcement action against U.S. investors in foreign companies that disclose in SEC filings information on activities in U.S.-embargoed countries. Such investigations would be both disruptive of such companies' efforts to raise capital and damaging to their public image in the United States.

Summary

In the aftermath of September 11th, it should be noted that proponents of tougher disclosure requirements for foreign companies seeking access to U.S. capital markets can be expected to emerge in the U.S. Congress, along with new legislation. It is important for foreign filers to consult with U.S. advisors on future compliance issues.

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