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New NYSE Rule Requires Foreign Private Issuers to File Semi-Annual Unaudited Financial Information

The New York Stock Exchange (NYSE) announced the adoption of a rule change (the Rule Change) to its Listed Company Manual (the Manual) that would affect listed foreign private issuers (FPIs).¹ In adopting the Rule Change, the NYSE has narrowed the gap in reporting requirements that currently exists between NYSE-listed FPIs and NYSE-listed domestic issuers. The Rule Change is effective retroactively from Feb. 5, 2016.

Under the Rule Change, new Section 203.03 requires NYSE-listed FPIs to submit semi-annual unaudited financial information on Form 6-K to the Securities and Exchange Commission (the SEC). Unlike NYSE-listed domestic issuers, NYSE-listed FPIs were previously not subject to interim financial reporting requirements under the NYSE rules.² New Section 203.03 makes such reporting mandatory for an NYSE-listed FPI irrespective of whether there is a home country requirement to provide interim information. Given that Nasdaq-listed FPIs are subject to interim financial reporting requirements under Rule 5250(c)(2) of the Nasdaq Listed Company Manual, the Rule Change aligns NYSE-listed FPIs with Nasdaq-listed FPIs on this point.

¹ Under Rule 3b-4 of the Securities Exchange Act of 1934, as amended, a foreign private issuer is any issuer incorporated or organized under the laws of a foreign country, except an issuer of which (1) more than fifty percent of the outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2)(i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than fifty percent of the assets are located in the United States; or (iii) the business is administered principally in the United States.

² FPIs were also not required under SEC rules to file interim information with the SEC unless such information was publicly released in the home market or distributed to security holders, was required to be made public under home country law or distributed to security holders or was required to be filed with a stock exchange and made public.

The semi-annual information required to be filed under Form 6-K under new Section 203.03 consists of: (i) an interim balance sheet as of the end of the second fiscal quarter, and (ii) a semi-annual income statement for the first two fiscal quarters. An FPI must submit this information on a Form 6-K within a six-month period following the end of the FPI's second fiscal quarter. The financial information included in Form 6-K must be presented in English, but does not have to be audited or reconciled with U.S. GAAP or presented in U.S. dollars.

In addition, the Rule Change amends Sections 802.01E and 103.00 of the Manual. The amendment to Section 802.01E subjects an NYSE-listed FPI that does not timely file Form 6-K to the same compliance procedures applicable to NYSE-listed domestic issuers that fail to timely file an annual report on Form 10-K or a quarterly report on Form 10-Q. The noncompliant FPI has an initial six-month compliance period to file the Form 6-K and any subsequently due Form 20-F or Form 6-K. If the noncompliant FPI fails to submit all required filings during this initial six-month compliance period, then the NYSE has discretion to grant the FPI an additional six-month compliance period. An FPI that fails to make timely filings within the compliance periods is at risk of being delisted. The amendment to Section 103.00 clarifies that all NYSE-listed FPIs are required to comply with the new filing requirement despite existing language allowing FPIs to follow home country practice in lieu of complying with NYSE requirements.

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