

SEC Issues Guidance on Audit Committees of Dual-Listed Brazilian Issuers

November 13, 2018

For the first time, the SEC's staff issued guidance last week under its rule governing audit committees for listed issuers. The guidance addresses the composition of audit committees for issuers that are listed in both Brazil and the United States, and it takes the form of an interpretive letter from the Division of Corporation Finance to law firms Cleary Gottlieb and Simpson Thacher.

The SEC's interpretive letter and the incoming letter from the two law firms can be found [here](#).

If you have any questions concerning this memorandum, please reach out to your regular firm contact, any of our partners and counsel listed under [Capital Markets](#), [Corporate Governance](#) and [Latin America](#) in the "Our Practice" section of our website or the following authors

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Rule 10A-3, implemented through the listing standards of the U.S. exchanges, establishes audit committee requirements for listed issuers. While many corporate governance standards of the U.S. exchanges are inapplicable to foreign private issuers, Rule 10A-3 does apply to them, making it by far the most significant U.S. corporate governance requirement for listed non-U.S. companies.

Rule 10A-3 includes several provisions intended to accommodate foreign private issuers that have to reconcile the U.S. regime with home-country requirements. One of these is an exemption, relied on by numerous issuers from several countries including Brazil, for an issuer that has a board of auditors (or similar body), or statutory auditors, meeting specified criteria. One criterion concerns composition: the mechanism (a board of auditors, for example) must be “required under home country legal or listing requirements” to be separate from the board of directors or to combine directors and non-directors. In particular, a body composed entirely of directors would not qualify for the exemption.

In Brazil, as a result of evolving corporate governance standards under local law, it is increasingly common for a listed issuer to have an audit committee that combines members of the board of directors and other persons who are not board members. Until now, it has not been clear

whether an audit committee with this kind of “mixed composition,” which is permitted but not required under local rules, complies with the general regime under Rule 10A-3 or, if not, whether it can be viewed as qualifying for the exemption. In last week’s letter, the Division concurred with the view of the two law firms that a dual-listed Brazilian issuer whose bylaws require an audit committee with mixed composition may rely on the board of auditors exemption.

Rule 10A-3 was adopted in 2003 pursuant to the Sarbanes-Oxley Act, and it is detailed and highly prescriptive. When the SEC adopted the rule, it said it “has the authority to respond to, and will remain sensitive to, the evolving standards of corporate governance throughout the world to address any new conflicts that may arise with foreign corporate governance rules and practices that cannot be anticipated at this time.” In this spirit, the interpretive letter for Brazilian issuers is a welcome instance of SEC staff pragmatism toward foreign issuers and evolving corporate governance standards outside the United States.

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