

APPOINTMENT OF A U.S. DULY AUTHORIZED REPRESENTATIVE REQUIRED FOR REGISTRATION STATEMENTS FILED WITH THE SEC

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Both the Securities Act of 1933, as amended (the “Securities Act”), and the Securities Exchange Act of 1934 as amended (the “Exchange Act”) require foreign private issuers of securities in the United States’ market to appoint a Process Agent in the United States, which is a contact upon whom court papers may be served.

Another requirement under the Securities Act regulations is to appoint a U.S. Duly Authorized Representative in the United States (“USDAR”). The USDAR is also required to sign the registration statement.

APPOINTMENT AND SIGNATURE OF USDAR REQUIRED FOR FOREIGN PRIVATE ISSUERS ON INITIAL REGISTRATION AND SUBSEQUENT AMENDMENTS

According to Section 6(a) of the Securities Act, any securities required to be registered with the SEC by filing a registration statement must bear the signature of the issuer, its principal executive officer(s), its principal financial officer(s), its principal accounting officer(s) and the majority of its board of directors.

In addition to the signature requirements noted above, foreign private issuers or territorial persons¹ must affix on their registration statement the signature of their “duly authorized representative in the United States.” If the issuer is a foreign government or related political subdivision, however, the statement need be signed only by the underwriter².

This obligation is also extended to any subsequent amendments made to the registration statement. According to the Rules and Regulations under the Securities Act: “... every amendment to a registration statement shall be signed by the persons specified in section 6(a) of the Act.”³

The SEC-required forms to register securities of foreign private issuers such as Form F-1, Form F-3, Form F-4, Form F-6 or Form S-8⁴, all require the designation and signature of a USDAR.

¹ According to the Section 2 (a) (6) of the Securities Act: “the term “Territory” means Puerto Rico, the Virgin Islands, and the insular possessions of the United States.”

² Notably, one court has recognized in dicta that a foreign government might satisfy this provision by having its duly authorized representative execute the registration. See SEC v. Chinese Consol. Benevolent Ass’n, 39 F. Supp. 85, 89 (S.D.N.Y. 1940), rev’d on other grounds, 120 F.2d 738 (2d Cir. 1941), cert. denied, 314 U.S. 618 (1941).

³ 17 CFR Part 230.471 (a)

⁴ For more information about these forms and to obtain copies of them, please refer to the SEC website at <http://www.sec.gov/forms>



THE ROLE OF USDAR: NOT AN AGENT FOR SERVICE OF PROCESS?

The role of the USDAR is not clear. The statute does not define it, nor has there been a court decision setting forth the USDAR's responsibility or liability.

In one of the few cases on the topic, in 2008, the Central District Court of California addressed this matter in *Vivian Oh vs. Max Chan*⁵ but declined to define the exact role of a USDAR.

The role of the agent for service (or process agent), on the other hand, is more clearly defined. As noted above, the process agent is the point of contact upon which legal process may be served in any action arising against the party naming the agent. In this sense, the lack of definition as to the role of the USDAR could lead one to assume that the roles are distinct.

TIMING OF USDAR APPOINTMENT IS CRITICAL

Despite the lack of statutory or judicial clarity on the role and responsibilities of the USDAR, appointing one is of extreme importance for foreign private issuers registering to issue securities in the United States. In fact, not having the signature of a USDAR in advance of the registration statement filing via EDGAR (Electronic Data Gathering, Analysis, and Retrieval system) may cause delays with the SEC filing resulting in serious consequences.

Choosing a single service company to provide both the USDAR and process agent services may result in a more efficient experience in completing these appointments and meeting the Securities Act regulations. If you are engaging a service company to serve as agent for service and/or USDAR, it is recommended that the foreign private issuer consider obtaining an acceptance letter for both the USDAR and process agent appointments, along with a signature from the USDAR on the registration statement to be held in escrow pending the filing with the SEC.

This article is provided for informational purposes only and should not be considered, or relied upon, as legal advice.

⁵ *Vivian Oh v. Max Chan*, Case No. 2:07-cv-04891 DDP-AJW (C.D. Cal. 2008)

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