2006 EDITION

FOREIGN PRIVATE ISSUERS OF EQUITY SECURITIES IN THE UNITED STATES

DISCLOSURE AND REPORTING OBLIGATIONS

Jones Day
Kevin D. Cramer • Richard M. Kosnik •
J. Eric Maki

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Foreign Private Issuers Of Equity Securities In The United States—Disclosure And Reporting Obligations

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Printed in the United States of America

About this Publication

This publication is written for foreign companies that are considering entering the U.S. capital markets or already have equity securities that trade in the U.S. It describes a foreign company's disclosure and reporting obligations under the principal federal securities laws. In a number of ways, U.S. securities laws treat foreign companies differently from U.S. companies. This publication highlights the reporting obligations of foreign non-governmental issuers of securities. This edition includes developments related to the passage on July 30, 2002 of the Sarbanes-Oxley Act (the "Sarbanes-Oxley Act"), which focuses on increasing the reliability and accuracy of corporate reporting and accounting practices, as well as related developments involving the U.S. Securities and Exchange Commission and the New York Stock Exchange and Nasdaq. The authors would like to thank Flavia Dezotti-Hallake and Jose Artinano for their invaluable assistance with the preparation of this publication.

About Jones Day

Jones Day encompasses more than 2,200 lawyers resident in 30 locations around the world, and ranks among the world's largest and most geographically diverse law firms. Beginning with the enactment of the U.S. securities laws in 1933, Jones Day has been active in advising clients on the full range of U.S. securities laws and regulations. Today, Jones Day's international capital markets practice is focused on a broad range of activities, including advising on all aspects of the U.S. federal securities laws, as well as securities regulations in Belgium, France, Germany, Hong Kong, India, Italy, Spain, Taiwan and the U.K. The practice includes representations in connection with American Depositary Receipt and Global Depositary Receipt programs, the preparation and filing of registration statements with the U.S. Securities and Exchange Commission, the listing of securities on U.S., European and Asian securities exchanges and quotation systems, multiple exchange listings, Rule 144A and Regulation S offerings, and international tender and exchange offers.

About the Authors

Kevin Cramer is a Partner in Jones Day's New York Office, where he practices general corporate and U.S. securities law. His international capital markets experience includes work for issuers, underwriters, and placement agents on more than 100 public and private securities offerings, including initial public offerings, Rule 144A and Regulation S offerings of American Depositary Receipts/Global Depositary Receipts, convertible bond offerings and other types of debt securities; mergers and acquisitions; cross-border tender offers; and joint ventures. He also has represented foreign companies from Asia, Australia, Europe and Latin America in connection with all aspects of the establishment of Level I, II and III ADR programs. From October 1997 to June 2000, Kevin was Partner-in-Charge of Jones Day's Sydney, Australia office. He relocated in June 2000 to Hong Kong, PRC, where he served as Partner-in-Charge of the office until January 2003. Kevin also served as co-head of Jones Day's international securities practice from January 2000 to January 2003. He has appeared as a commentator on U.S. securities law developments on CNBC Asia, addressed numerous seminars on accessing the U.S. capital markets, and has authored articles regarding U.S. securities laws and their application to non-U.S. companies raising funds in the United States, including Sarbanes-Oxley Act policies and procedures. Kevin has been recognized for his cross-border capital market's expertise in Euromoney's *Guide to the World's Lending Capital Markets Lawyers,* 1998, 2000, 2003 and 2005 editions.

Rich Kosnik is head of the New York Office securities practice and coordinates the integration of Jones Day's U.S. and international capital markets efforts. Rich has managed a broad range of transactions and projects representing financial institutions, U.S. issuers, and non-U.S. issuers from numerous jurisdictions around the world, including equity and debt securities offerings into the U.S. public and private markets, tender offers for equity and debt securities, and the establishment of a variety of ADR programs. Rich also advised U.S. and non-U.S. clients on securities regulatory projects, such as evaluating the impact of various SEC regulations and interpretive positions on clients' business practices and policies and reviewing activities of financial institutions, institutional investors, and global custodians in light of U.S. securities laws and regulations. Rich has extensive U.S. securities regulatory experience, having served for four years as an Associate Director at the U.S. Securities and Exchange Commission. During his tenure at the commission, he was in charge of the international corporate finance program and was responsible for overseeing the review of all public offerings by non-U.S. issuers in the United States and establishing and implementing the commission's rulemaking initiatives and interpretive policies in the international corporate finance area, including all matters relating to the interpretation of Rule 144A and Regulation S and their application to multinational offerings by non-U.S. issuers.

Eric Maki has extensive experience in the area of corporate finance, with particular emphasis in the area of public offerings and private placements of securities. He has represented issuers, underwriters, and investors in a wide variety of offerings of debt, equity, and preferred stock, including debt restructurings, tender offers, exchange offers, unit offerings, and other complex transactions. Eric's practice includes substantial representation of foreign issuers in connection with capital raising transactions in the United States and on a worldwide basis.

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FOREIGN PRIVATE ISSUERS OF EQUITY SECURITIES IN THE UNITED STATES — DISCLOSURE AND REPORTING OBLIGATIONS*

A foreign private issuer making a public offering of its equity securities in the United States will be subject to U.S. federal and state securities and other laws. The two basic federal securities laws are:

(1) the Securities Act of 1933 (the "Securities Act"), which governs the offering and sale of securities by an issuer to the public, and

(2) the Securities Exchange Act of 1934 (the "Exchange Act"), which, among other things, governs the subsequent trading of those securities in the secondary market, imposes periodic reporting obligations on public corporations, and imposes certain filing obligations on their directors, officers and major shareholders relating to their trading activities in their company's equity securities.

In 2002, the Sarbanes-Oxley Act enacted numerous accounting oversight and corporate accountability provisions into law in the United States. The Sarbanes-Oxley Act has important implications for foreign private issuers required to file reports under the Exchange Act or in the process of registering a public offering of securities under the Securities Act.[1] This article includes, where relevant, discussions of those portions of the Sarbanes-Oxley Act that have become effective or have been scheduled to become effective (i.e. those portions of the Sarbanes-Oxley Act for which there have been final rules adopted by the SEC.

In addition, individual states also have securities laws regulating public offerings of securities, and the national securities exchanges, such as The New York Stock Exchange, and certain

* The views set forth in this article are the personal views of the authors and do not necessarily reflect those of the firm with which they are affiliated.

1 The Sarbanes-Oxley Act does not distinguish between U.S. and foreign issuers. The U.S. Securities and Exchange Commission (the "SEC"), however, recognizes that cross-border listings frequently entail issuers having to navigate duplicative or even contradictory regulations in different jurisdictions and is sensitive to the need to accommodate unique foreign structures and requirements. Accordingly, the SEC has made several accommodations for the laws and regulatory regimes of other countries in implementing the provisions of the Act. The SEC is expected to consider a further accommodation for foreign private issuers relating to the deregistration process, although the timing of any such accommodation remains uncertain.

other markets, including the Nasdaq National Market, impose certain obligations on companies whose securities are listed on such exchanges or markets.[2] The term "foreign private issuer" is defined under the Securities Act and the Exchange Act as any foreign issuer other than a foreign government except an issuer that meets the following conditions:

(1) more than 50% of the outstanding voting securities of such issuer are directly or indirectly held of record[3] by residents of the United States; and

(2) any of the following:

(i) the majority of the executive officers or directors are United States citizens or residents;

(ii) more than 50% of the assets of the issuer are located in the United States; or

(iii) the business of such issuer is administered principally in the United States.

A company's characterization as a foreign private issuer is significant for a number of reasons including the following, each of which is discussed in greater detail in this article:

(1) the applicable disclosures that must be contained in public offering documents are somewhat less stringent than those applicable to U.S. issuers;

(2) the requirements relating to the company's financial statement disclosures vary from that of a U.S. issuer;

(3) a foreign company's periodic reporting requirements are less onerous than those applicable to U.S. issuers; and

(4) various provisions of the federal securities laws are not applicable to foreign private issuers.

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2 Issuers may also be subject to the Investment Company Act of 1940 (the "Investment Act"). While the Investment Act, as its title indicates, governs investment companies (e.g., mutual funds) and generally is inapplicable to companies engaged in an operating business, an issuer's line of business as well as the composition of its assets needs to be examined to determine whether as a result of a public offering of its securities, it inadvertently falls within the definition of an "investment company" subject to regulation under the Investment Act. A discussion of the circumstances in which a company could inadvertently become an "investment company" subject to regulation under the Investment Act is beyond the scope of this article.

3 The determination of residency is based on beneficial ownership rather than title. This follows the "held of record" approach of Rule 12g5-1 under the Exchange Act, which requires the issuer to "look through" the record ownership of brokers, dealers, banks and nominees holding securities for the accounts of customers to determine residency. An issuer also must take into account information regarding U.S. ownership derived from beneficial ownership reports that are provided to the issuer or filed publicly, as well as information that otherwise is provided to the issuer.

This article is designed to call attention to the areas of responsibility that apply under the Securities Act and the Exchange Act to a foreign private issuer and its officers and directors in connection with a public offering of equity securities in the United States. This article is intended to be used as a general outline only and is not intended to replace legal analysis with respect to specific facts and issues. Counsel should be consulted as to all questions that arise with respect to these laws.

In addition to issuers, "underwriters"—a defined term under the Securities Act that encompasses persons who act as participants with an issuer in distributing the issuer's securities to the public—also have obligations and potential liability under U.S. securities laws, some of which are summarized below. In agreeing to underwrite a foreign private issuer's securities in the United States, investment banking firms will take steps to assist the issuer's compliance with applicable laws and may request that the issuer make certain disclosures that might not be strictly required by law but that they deem necessary or appropriate in the circumstances to enhance the offering and to protect themselves, as underwriters, from potential liability.

This article consists of seven parts, as follows:

Part I Discusses the categories of issuers and the process of registering the offer and sale of securities for the initial issuance in the United States. The process includes filing a registration statement with the SEC. The applicable form for an issuer to register an initial public offering is a Form F-1. Form F-1 integrates with Form 20-F, which is the form on which foreign private issuers provide on-going annual public reporting.

Part II Describes continuing reporting obligations of an issuer following the initial offering of securities. This principally includes the annual report on Form 20-F as well as periodic reports on Form 6-K.

Part III Includes information concerning registration requirements for securities that are traded on a U.S. securities exchange or certain other markets. This registration subjects the issuer to continuing reporting requirements.

Part IV Describes the liability provisions of the Securities Act regarding the initial issuance of securities. In addition to the issuer, its officers and directors may be subject to liability for false or misleading statements in connection with the offer of securities. This section also discusses the availability of indemnity to these persons.

Part V Discusses the liability provisions of the Exchange Act relating to trading in securities following initial issuance. This discussion includes the "anti-fraud" and "anti-manipulation" provisions of Rule 10b-5.

Part VI Details the requirements of the Foreign Corrupt Practices Act of 1977 that imposes certain internal accounting control requirements on issuers, including foreign private issuers, and also imposes prohibitions on certain corrupt practices regarding payments to certain foreign officials.

Part VII Provides a brief overview of state securities laws.

Part I: Disclosure Obligations Relating to Initial Public Offerings and Other Offerings Registered under the Securities Act

A. Categories of Issuers

The SEC has adopted forms specifying the information and documents to be set forth in registration statements of foreign private issuers and in the prospectuses included therein. In the case of a foreign private issuer conducting an initial public offering, a registration statement on Form F-1 will be required.[4]

In July 2005 the SEC adopted new rules that significantly reform the registration, communications, and offering process under the Securities Act (the "Securities Offering Reform Rules"). The new Rules, which become effective as of December 1, 2005, are intended to:

- facilitate greater availability of information regarding issuers to investors and the market;
- remove barriers to communications in light of technological advances, that place greater emphasis on the electronic dissemination of information;
- make the capital formation process more efficient; and
- provider greater clarity as to the information and timeliness of the availability of information against which an issuer's statements are evaluated for liability purposes.

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[4] Form F-1 is the form specified for any type of offering by a foreign private issuer if no other form is required or allowed. Form F-4 applies to certain business combination transactions or exchange offers. The disclosure required in a Form F-4 is substantially the same as Form F-1 unless the parties to the transaction are eligible to use one of the "short forms" described in the following sentence. Form F-3 provides for a streamlined disclosure regime because the issuer is allowed to "incorporate by reference" its periodic filings into the prospectus to satisfy certain disclosure obligations rather than having such information set forth in the prospectus itself.

The Securities Offering Reform Rules grant to issuers varying amounts of flexibility in the registration, communications and offering processes depending on the characteristics of the issuer. The Securities Offering Reform Rules categorize issuers into the following four tiers:

1. a *non-reporting issuer* is an issuer that is not required to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act, regardless of whether such issuer files reports voluntarily;

2. an *unseasoned issuer* is an issuer that is required to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act, but does not satisfy the requirements of Form F-3 for a primary offering of its securities;[5]

3. a *seasoned issuer* is an issuer that uses Form F-3 to register primary offerings of securities; and

4. a *well-known seasoned issuer* is a seasoned issuer that, as of a date within 60 days of its eligibility determination date,[6] either (i) has a worldwide public market value[7] of its outstanding

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5 Form F-3 is available only for foreign private issuers that, among other requirements, (i) have a worldwide aggregate market value of the equivalent of $75 million or more of the voting and non-voting common equity held by non-affiliates of the issuer; (ii) are already subject to U.S. periodic reporting requirements and have filed at least one annual report on Form 20-F or Form 40-F; (iii) have filed in a timely manner all the material required to be filed pursuant to Sections 13, 14 or 15(d) of the Exchange Act for a period of twelve months immediately preceding the registration statement on Form F-3; and (iv) have not defaulted on any debt or lease, or failed to pay any dividend or sinking fund installment on preferred stock.

6 Well-known seasoned issuer eligibility is determined on an approximately annual basis. If the issuer has not filed an automatic registration statement for purposes of complying with Securities Act Section 10(a)(3) for 16 months, eligibility is determined as of the time of filing of the issuer's most recent annual report on Form 20-F (or, if such report has not been filed by its due date, such date). However, if the issuer has filed an automatic shelf registration statement for purposes of complying with Securities Act Section 10(a)(3) within the prior 16 months, eligibility is determined as of the later of (i) the time of filing of the issuer's most recent shelf registration statement on Form F-3 for a primary offering or (ii) the time of filing its most recent amendment to a shelf registration statement for purposes of complying with Section 10(a)(3) of the Securities Act (whether by post-effective amendment, incorporated Exchange Act report, or form of prospectus). Under Form F-3, the Section 10(a)(3) update need not be made through a post-effective amendment; rather, the update generally occurs when the issuer files its annual report on Form 20-F containing the issuer's audited financial statements for its most recently completed fiscal year by the due date of such annual report.

7 The determination of non-affiliate equity market capitalization, or "public float," of a reporting issuer is based on a public trading market. In other words, an entity with $700 million of common equity securities outstanding but not trading in any public trading market would not be a well-known seasoned issuer based on market capitalization.

voting and non-voting common equity[8] held by non-affiliates of $700 million or more; or (ii) has issued in the last three years at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not as an exchange of securities, registered under the Securities Act, and that, as of the date on which its status as a well-known seasoned issuer is determined, does not fall in any of the following categories of ineligible issuers:[9]

> (a) reporting issuers who are not current in their Exchange Act reports and other materials required to be filed during the prior 12 months;[10]
>
> (b) issuers who are or during the prior three years were (or any of their predecessors were) either blank check companies, shell companies (other than business combination-related shell companies) or issuers for an offering of penny stock;
>
> (c) issuers who are limited partnerships offering and selling their securities (other than through a firm commitment underwriting);
>
> (d) issuers who have filed for bankruptcy or insolvency during the past three years;
>
> (e) issuers who have been or are the subject of refusal or stop orders under the Securities Act during the past three years, or are subject of a pending proceeding under the Securities Act Section 8 or Section 8A; or
>
> (f) issuers who, or whose subsidiaries, have been convicted of any felony or misdemeanor described in the Exchange Act, have been found to have violated the anti-fraud provisions of the federal securities laws, or have been prohibited from certain activities under the anti-fraud provisions of the federal securities laws during the past three years.

According to SEC calculations, approximately 30% of listed issuers met the criteria for well-known seasoned issuers in 2004. Those issuers accounted for about 95% of U.S. equity market capitalization and over 96% of the total debt raised in registered offerings over the past eight years by issuers listed on a major exchange or equity market.

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8 For purposes of calculating the public float of a non-U.S. issuer, the SEC interprets "common equity" to include a class of participating voting or non-voting preferred stock of a foreign issuer where the issuance of the preferred stock results from requirements of the applicable foreign jurisdiction or market and where the class of preferred stock has liquidation or dividend preferences and other terms that cause it to be the substantial economic equivalent of a class of common stock.

9 Further, an issuer will not meet the definition of well-known seasoned issuer if it is an asset-backed issuer, an investment company registered under the Investment Act, or a business development company.

10 In the case of asset-backed issuers, the requirement includes the depositor, or any issuing entities previously established, directly or indirectly, by the depositor, who are not current in their Exchange Act reports and other materials required to be filed during the prior 12 months.

B. The Filing and Content of the Registration Statement

Under the Securities Act, each issuer that publicly offers securities in the United States must adequately disclose material information concerning its business and financial condition as well as the security being offered. This objective is achieved through (i) the filing of a "registration statement" by the issuer with the SEC (which becomes a public document available to anyone) and (ii) delivery to investors of a "prospectus"[11] (which forms a part of the registration statement) containing a description of the issuer and the offering conforming to the requirements specified by the Securities Act. Typically a prospective investor will actually be delivered a preliminary prospectus that has been filed with the SEC and most likely has been informally cleared by the staff of the SEC but has not been formally declared effective. The preliminary prospectus will contain substantially all of the information that a final prospectus is required to contain, other than certain information relating to the pricing of the security (which, of course, has not been determined at the time preliminary prospectuses are being circulated). All purchasers of securities are required to be delivered a final prospectus with or prior to the delivery of an order confirming their purchase of the security.

The SEC has adopted an "access equals delivery" prospectus delivery model, where final prospectus delivery obligations are satisfied[12] if the issuer files[13] the final prospectus meeting the requirements of Section 10(a) of the Securities Act with the SEC within the required Rule 424 prospectus filing time frame, including the cure period. The filing condition is satisfied if the issuer makes a good faith and reasonable effort to file the prospectus within the required time frame. The SEC has also established a parallel notification requirement for underwriters or dealers participating in a registered offering to provide, not later than two business days after the completion of the sale, to each purchaser a copy of the final prospectus or a specified notice.

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11 The term "prospectus" is broadly defined in Section 2(10) of the Securities Act to include any written communication offering to sell a security or confirming the sale of any security, as well as communications to the same effect transmitted through radio and television. Consequently, materials that describe the offered securities, even if not in the form of a traditional "prospectus" or "offering circular", must comply with the content requirements of the Securities Act. See Part I. C below.

12 Certain types of offerings, such as business combination transactions and exchange offers, are excluded from this delivery model because they are subject to additional informational and delivery requirements imposed by proxy rules and tender offer rules in conjunction with state laws. Also, registered investment companies and business development companies cannot rely on this delivery model because they are subject to separate framework governing communications with investors.

13 Under current SEC rules, registration statements and other documents filed with or furnished to the SEC by foreign private issuers must be filed electronically, utilizing the SEC's Electronic Data Gathering and Retrieval system ("EDGAR"). EDGAR filings are readily accessible by the public on a real-time basis via the Internet at the SEC's website: <<http://www.sec.gov>>.

However, compliance with the underwriter notification requirement is not a condition to the issuer's reliance on the prospectus delivery rule.

The SEC has also adopted an exemption from Section 5(b)(1) of the Securities Act that allows written confirmations of sale and notices of allocation to be sent after effectiveness of a registration statement without being accompanied or preceded by a final prospectus.[14]

1. *Form F-1*. In the context of an offering of equity securities of a foreign private issuer, Form F-1 integrates with the international disclosure standards of Form 20-F. Form 20-F was revised in 2000 to be consistent with the International Disclosure Standards for Cross-Border Offers and Initial Listings, adopted in 1998 by the International Organization of Securities Commissions ("IOSCO"). The objective of IOSCO was to develop a core set of nonfinancial disclosure provisions to serve as a basis for the adoption of an internationally accepted disclosure regime. The SEC incorporated into Form 20F, for the most part verbatim, the language as well as the format of the IOSCO standards. While the IOSCO standards in certain circumstances require disclosure of information not previously required of foreign private issuers, in many instances the disclosure requirements under the IOSCO standards are generally comparable to the prior disclosure requirements, notwithstanding the modified language.

Part I of Form 20-F contains information regarding the issuer that must be included in the prospectus forming part of the registration statement:

(1) Identity of directors, senior managers and advisers.

(2) Statistics regarding the offering (expected amount and offer price or the method of determining the price and the number of securities expected to be issued) and expected timetable.

(3) Key information—selected financial data; capitalization and indebtedness; reasons for the offer and use of proceeds; and risk factors.

(4) Company information—history and development of the issuer; business overview; organizational structure; property, plants and equipment.

(5) Operating and financial review and prospects—operating results; liquidity and capital resources; research and development, patents and licenses, etc.; and trend information.

(6) Directors, senior management and employees—directors and senior management, compensation, board practices, employees and share ownership.

(7) Major shareholders and related party transactions—major shareholders, related party transactions, and interests of experts and counsel.

(8) Financial information—consolidated statements and other financial information and significant changes since the most recent annual or interim financial statements.

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14 This exemption, set forth in Rule 172(a), is conditioned on the registration statement being effective and the final prospectus meeting the requirements of Securities Act Section 10(a) being filed with the SEC.

(9) The offer and listing—offer and listing details; plan of distribution; markets; selling shareholders; dilution and expenses of the issue.

(10) Additional information—additional specified information, most of which is of a statutory nature, not elsewhere covered in the filing.

(11) Quantitative and qualitative disclosures about market risk.

(12) Description of securities other than equity securities—debt securities, warrants and rights, American Depositary Shares, etc.

Further, in January 2003 the SEC adopted final rules under the Sarbanes-Oxley Act relating to the disclosure of off-balance sheet arrangements and known contractual obligations in registration statements, periodic reports and proxy or information statements that are required to include financial statements. These rules require an issuer to provide an explanation of its off-balance sheet arrangements in a separately captioned subsection of the "Operating and Financial Review and Prospects" section of an issuer's disclosure documents (U.S. custom and practice is to call this section "Management's Discussion and Analysis of Financial Condition and Results of Operations", or "MD&A" for short, and that is how we will refer to this section for the remainder of this article) that either have, or are reasonably likely to have, a current or future effect on the company's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that are material to investors.

These rules also require issuers to provide tabular disclosure prepared substantially in the form prescribed of all known contractual obligations, such as long-term debt, capital lease obligations, operating leases, purchase obligations, other long-term obligations reflected on the company's balance sheet and total contractual obligations, including the amounts of payments due under such obligations. The table of contractual obligations must contain information as of the latest fiscal year end balance sheet date and should be accompanied by footnotes describing the material terms and other material information to the extent necessary to an understanding of the timing and amount of the contractual obligations set forth in the table.

An interpretive release (the "Interpretative Release") issued by the SEC in December 2003 provides additional guidance regarding the preparation of MD&A to be included in an issuer's disclosure documents, including registration statements prepared on Form F-1. While the Interpretative Release does not create or modify any legal requirements, it does provide issuers with insights from the SEC as to how to present more informative and transparent MD&A.

Finally, with respect to non-shelf offerings of securities, the Securities Offering Reform Rules have expanded the circumstances under which eligible[15] unseasoned issuers and

[15] To be eligible, issuers must be current in their Exchange Act reports. In addition, issuers who are, or were or any of whose predecessors were during the past three years, blank check issuers, shell companies (other than business combination-related shell companies) or issuers for offerings of penny stock are non-eligible issuers.

non-reporting issuers may incorporate information from their Exchange Act reports into their Securities Act registration statements on Form F-1. The issuer must (i) make all the Exchange Act materials incorporated by reference readily accessible on a web site maintained by or for the issuer, (ii) provide in the registration statement live hyperlinks directly to such materials, and (iii) ensure that the materials are both available in the appropriate time frame as well as accessible free-of-charge.

For a more detailed description of the information required under Form 20-F, please see Part II.C—Annual Reports on Form 20-F, which includes a summary of the principal issues discussed in the Interpretative Release.

2. *Financial Statement Requirements*. A foreign private issuer generally is required to include in the prospectus financial information for the last five fiscal years (or such shorter period as the issuer has been in existence) with *audited* balance sheets as of the end of the two (or three, if required by the home jurisdiction) most recent fiscal years and *audited* statements of income and cash flows for the three most recent fiscal years (or such shorter period as the issuer has been in existence). These financial statements are required to be presented *either* in conformity with U.S. generally accepted accounting principles ("U.S. GAAP") *or*, if the financial statements are prepared based on accounting principles of the issuer's home jurisdiction, a narrative discussion of the material differences between the accounting principles followed and U.S. GAAP *and* a quantitative reconciliation of the material differences between the home country's generally accepted accounting principles and U.S. GAAP. First time foreign issuers are required to reconcile only the two most recent fiscal years of financial statements as well as financial statements for any interim periods required to be included in the registration statement. For each subsequent year that the foreign private issuer is subject to periodic reporting, it must include an additional year of reconciliation until five years of reconciled financial data is provided. The financial statements may be reported in any currency the issuer deems appropriate. The financial report must also include all material correcting adjustments identified by the foreign private issuer's independent auditors. "Material correcting adjustments" are adjustments proposed by the independent auditors to be made in order for the foreign private issuer's financial statements to conform to U.S. GAAP.

If more than three months have passed since the issuer's fiscal year end, the prospectus must include the audited balance sheets and audited statements of income and cash flows for the most recent fiscal year, except that the period is increased to six months for certain specified types of continuous offerings, such as outstanding warrants and convertible securities and dividend reinvestment plans. If more than nine months have passed since the issuer's fiscal year end, then the prospectus must also include interim financial statements. If interim financial statements are required, they must cover a period of at least six months and be reconciled to U.S. GAAP in the same manner as audited financial statements. These interim financial statements may be unaudited. Underwriters will typically require the inclusion of interim financial information more recent than those legally required and often may delay the marketing or pricing of a transaction to allow for the inclusion of more recent financial information.

Form 20-F includes a more stringent age of audited financial statements requirement for initial public offerings. An instruction, however, clarifies that this applies only where the issuer's securities are not publicly traded in any jurisdiction and also indicates that the SEC staff will waive this requirement where it is impracticable or involves undue hardship.

If the issuer releases more current financial information than the annual or interim financial statements otherwise required to be included in the prospectus, then such financial information must also be included in the prospectus, together with disclosures of any changes in the accounting principles used in the preparation of such financial information and quantification of the effects of any such changes on the reconciliation with U.S. GAAP.

A foreign private issuer generally is required to disclose industry and geographic segment information as to (i) revenues and sales (with sales to unaffiliated customers and sales or transfers to other segments of the issuer's business disclosed separately), (ii) operating profit or loss and (iii) assets. An industry segment divides an issuer's business into different groups of related products and services. A geographic segment divides the issuer's business into an individual country or group of countries.

If a foreign private issuer's financial statements (i) are denominated in a currency of a country that has experienced cumulative inflation exceeding 100% over the most recent three-year period and (ii) do not include constant currency or current cost basis information, the issuer must present supplementary information to quantify the effects of inflation on its financial condition and results of operations. For marketing purposes, this provision is typically complied with by issuers of countries that, although they may not reach the threshold set forth above, have exceeded that threshold in the recent past and accordingly may be at risk of hyperinflation in the future.

It has not been customary to include financial projections in a prospectus for an SEC-registered public offering because of concerns as to liability, particularly if future results of operations and financial condition fail to meet or exceed projections. However, the MD&A section of the prospectus is required to address material "trends" in the issuer's results of operations and financial condition and developments that could cause reported financial information not necessarily to be indicative of future results.

For issuers engaging in offerings subsequent to their U.S. initial public offering, the Private Securities Litigation Reform Act of 1995 provides a "safe harbor" that substantially increases the ability of the issuer to make reasonable "forward looking statements" without being subject to liability if the actual results do not conform with the issuer's belief or expectation when the statements were made. Forward looking statements include projections of revenues, income, earnings, capital expenditures, dividends or other financial items; statements of plans and objectives of management for future operations and statements of future economic performance, including those included in the MD&A section. The issuer will be entitled to the protections of this Act if it identifies the forward looking statements and also sets forth meaningful cautionary statements describing the major circumstances or events that could cause actual results to differ materially from the issuer's current belief. *It is important to note that this safe harbor is not available to an issuer in connection with an initial public offering of securities.* To date, this safe harbor has not greatly increased the amount of forward looking information provided by issuers in public offerings because of concerns that without a history of operating under this regime, there is insufficient precedent as to what type of disclosures and "meaningful cautionary language" are sufficient to satisfy the safe harbor and also because of concerns that litigants can get around the safe harbor by bringing securities claims in state courts.

3. *Additional Registration Statement Disclosure.* The registration statement (but not the publicly distributed prospectus) is also required to contain certain other information, including the following:

(1) Information regarding indemnification of officers and directors.

(2) A summary of all of the sales of securities not registered under the Securities Act by the issuer within the last three years and the bases for exemption from the registration requirements of the Securities Act.

(3) As exhibits, various documents and other items including (i) the underwriting agreement with the underwriters, (ii) the issuer's memorandum or articles of association and by-laws, (iii) the deposit agreement pursuant to which the American Depositary Receipts are to be issued, (iv) all outstanding long term debt instruments of the registrant under which indebtedness exceeds ten percent of total assets, (v) an opinion of counsel as to the legality of the securities being registered, (vi) consents of accountants and other experts referenced in the prospectus as to the use of their names in the prospectus, (vii) certain material contracts not made in the ordinary course of business or referred to in the prospectus and (viii) certificates from the issuer's principal executive and principal financial officers required under the Sarbanes-Oxley Act. Exhibits that are not in English must be filed together with an English translation or summary of material provisions. Please see Part II.C.5—Certifications, for additional details regarding the certifications required under the Sarbanes-Oxley Act.

4. *Processing the Registration Statement.* Each registration statement must be signed by the issuer and its principal executive officer, its principal financial officer, its principal accounting officer, at least a majority of its board of directors and, in the case of a foreign private issuer, a duly authorized representative in the U.S. These signatories, as well as any director who did not sign the registration statement, are subject to potential liability under the Securities Act as more fully described in Part IV of this article.

After the registration statement is filed with the SEC, it is assigned, on an industry basis, to a team that has principal responsibility for processing the registration statement through to effectiveness.[16] An examiner makes the detailed review of the registration statement and provides

16 During the review process, copies of the preliminary prospectus may be distributed to prospective purchasers and indications of interest to purchase the securities may be solicited. Actual purchase orders may not be accepted prior to effectiveness.

recommended comments thereon to a senior staff member. In addition, the financial information contained in the registration statement is reviewed and commented upon by staff accountants. Upon completion of the initial staff review, which the staff of the SEC endeavors to complete within 30 days but which may take longer depending upon the workload of the staff, the issuer will be advised in writing of the staff's comments. The registrant will then file an amended registration statement responding to the comments and otherwise updating the information set forth in the registration statement. An issuer may receive additional comments on its amended filing in which case a further amendment may need to be filed; this process often continues for several rounds of comments. In connection with the review of amendments, the staff endeavors to complete their review more quickly than the initial review, typically within 10 days or so, although this process may be longer or shorter based upon workload and the depth of the comments. It is important to note that the review of the staff is as to the adequacy of the disclosure contained in the registration statement; the SEC does not pass upon the merits of an offering nor does the successful completion of the registration process constitute the approval by the SEC of the offering or of the issuer. Historically, the staff has allowed foreign private issuers to submit registration statements throughout the review process on a confidential basis, thus keeping the registration statement and review process non-public until the issuer is prepared to make a public filing. The SEC has significantly cut back on this accommodation and generally will allow confidential submissions only in connection with initial public offerings or in extreme circumstances where confidentiality is critical.

Not every registration statement receives a full review by the SEC staff. The SEC's Offering Reform Rules categorize issuers and establish different registration processes that correlate to the level of regulatory protection deemed appropriate for each category. Thus, for example, a registrant requiring the least amount of oversight will be a "well-known seasoned issuer", who will be able to use an "automatic shelf registration" process. Follow-on offerings, especially those registered on Form F-3, may not be reviewed at all, but virtually all initial public offerings receive a full review.

If the staff is satisfied that the amended registration statement adequately addresses its comments, the SEC will not raise an objection to the registration statement, and the Securities Act provides that such registration statement, as amended, will automatically become effective twenty days after the amendment thereto is filed. However, upon written request of the registrant and the managing underwriter, the SEC may accelerate the effective date of the registration statement to the date requested by such persons. The registrant and the managing underwriters typically request the registration statement to be deemed effective upon the date on which the final amendment thereto is filed or shortly thereafter.[17]

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[17] In considering a request for acceleration, the SEC will take into account, among other things, the adequacy of the information respecting the issuer that has been made available to the public. In this regard, the SEC has stated that it would not accelerate the effectiveness of the registration statement of issuers for an initial public offering unless the managing underwriter submits a written statement that it has been informed that copies of the preliminary prospectus have been distributed to potential purchasers in compliance with applicable rules.

Sales to the public may commence as soon as the registration statement becomes effective. If the registration statement, at the time it becomes effective, contains any untrue statement of a material fact or omits to state a material fact that is necessary for the registration statement not to be misleading, the company, its officers and directors, the underwriters and certain other persons may be liable to anyone acquiring a security covered by the registration statement (see Part IV of this article).

The form of prospectus declared effective by the SEC may, using Rule 430A, omit certain information related to the pricing of the security being offered. Typically, subsequent to the declaration of effectiveness, the security will be priced and relevant information will be added to the prospectus. This final prospectus will be delivered to all purchasers and must also be filed with the SEC although the filing is not subject to review.

5. *Plain English*. Since October 1998, "plain English" rules have applied to registration statements filed under the Securities Act. The SEC adopted the plain English rules in order to address a perceived widespread problem that the average investor was not reading public offering prospectuses because they were generally written in a manner that made them difficult to understand.

Issuers must now use plain English writing principles in the organization, language and design of the forepart of the registration statement, namely, the front and back cover pages, the summary, and the risk factors section. These plain English principles consist of the use of short sentences, the use of definite, concrete everyday language, the use of the active voice, and tabular presentation of complex information. They also forbid use of legal jargon or multiple negatives. Furthermore, the information must be presented in a format that is visually inviting and easy to read.

Issuers must write the remaining portions of the registration statement in a clear and understandable manner. This means using clear and concise sections, paragraphs and sentences, and using descriptive headings and sub-headings. This also means the avoidance of legal and highly technical business terminology, frequent use of glossaries, legalistic or overly complex presentations, vague "boilerplate" language, complex information copied directly from legal documents, and repetitive disclosures that do not enhance the quality of the information.

In addition to the text of the registration statement, information incorporated by reference to satisfy a specific disclosure requirement also must adhere to plain English rules.

The SEC makes plain English comments when reviewing an issuer's filed registration statement, and has the power to deny effectiveness, or the acceleration of effectiveness, of a registration statement if plain English rules are not adhered to. Extensive rewrites of a prospectus after receiving SEC staff comments will delay the offering. Also, obvious noncompliance with the plain English rules may trigger full review of registration statements that might otherwise escape review. The transition to plain English writing initially posed a challenge to prospectus drafters as well as to the SEC in developing consistent standards. However, at this point issuers, as well as their counsel and investment bankers, have adjusted to this writing style and plain English comments, if any, are fairly easily addressed.

6. *Shelf Registration Procedure.* Rule 415 under the Securities Act permits under certain circumstances the registration at one time of an unlimited amount of securities[18] that an issuer intends to offer and sell on a delayed or continuous[19] basis—a so-called "shelf registration." In other words, a company may register securities that it or a selling shareholder does not intend to offer immediately to the public, but that the company or selling shareholder intends to sell over time on a non-fixed basis. The shelf registration procedure does not, in any respect, reduce the disclosure requirements applicable to foreign private issuers under the Securities Act. The principal benefit of Rule 415 is that a foreign private issuer would avoid the necessity of filing a completely new registration statement each time it wished to sell securities covered by the "shelf" filing. Any type of security can be covered by a shelf registration statement and, in fact, shelf registration statements often relate to a variety of different types of securities of the issuer. Primary offerings on a delayed basis may be registered by certain seasoned issuers only. A number of other delayed or continuous offerings may be undertaken or registered by any issuer.

The shelf registration statement can be used for three years after the initial effective date of the registration statement.[20] Many of the types of offerings contemplated by Rule 415 can be accomplished using a prospectus that is complete at the time of effectiveness of the related registration statement. However, in certain offerings, such as delayed offerings, the prospectus that is included in the registration statement at the time of effectiveness, the "base prospectus," must be supplemented at the time of takedown to reflect the final terms of the security and offering for each particular offering of securities. New registration statements need to be filed every three years, with unsold securities and fees paid thereon allowed to be included on the new registration statement, where the shelf registration statement relates to primary or secondary offerings (whether immediate, delayed or continuous) by primary shelf eligible issuers or offerings of mortgage-backed securities.

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18 In the case of business combination transactions registered under Rule 415(a)(viii) and continuous offerings under Rule 415(a)(ix) that are not registered on Form F-3, the amount of securities that can be registered on a shelf registration is limited to the amount of securities that the issuer reasonably expects to offer and sell over a three year period.

19 A continuous offering is an offering that commences promptly after registration by the issuer and continues for more than 30 days from the day of initial effectiveness.

20 The three-year expiration of a shelf registration statement is subject to a limited extension of up to six months until the next registration statement is declared effective.

The shelf registration procedure is not available for an initial public offering of securities of a foreign private issuer in the United States. However, foreign private issuers can use the shelf registration procedure for securities registered or qualified to be registered on Form F-3 and under certain other limited circumstances. Consequently, the issuer, if its meets the requirements to use a Form F-3 registration statement, may be able to use the shelf registration procedure in the United States.

The SEC has also established a significantly more flexible version of shelf registration for offerings by eligible well-known seasoned issuers, known as "automatic shelf registration," that involves filings of Form F-3 registration statements and can be used to register unspecified amounts of primary and secondary offerings[21] of different specified types of securities.[22] Issuers that are well-known seasoned issuers based only on their registered non-convertible security issuances can register on automatic shelf registration statements only non-convertible securities, other than common equity, unless they are also primarily eligible to use Form F-3 for a primary offering because they have a public float of $75 million or more.

Just like regular shelf registration, automatic shelf registration also requires a new registration statement every three years. However, unlike the regular shelf registration statement, automatic shelf registration filings are immediately effective.[23] Furthermore, eligible issuers can choose to pay automatic shelf registration filing fees at any time in advance of a takedown or on a "pay-as-you-go" basis at the time of each takedown off the shelf registration statement in an amount calculated for that takedown. The automatic shelf registration statement also allows eligible issuers to add additional classes of securities and to add eligible majority-owned subsidiaries as additional registrants after an automatic shelf registration statement is effective. Finally, securities of majority-owned subsidiaries of a well-known seasoned issuer parent can be included on the automatic shelf registration statement of the parent if the subsidiary satisfies the conditions for being considered a well-known seasoned issuer.

An issuer can file an automatic shelf registration statement if it meets the eligibility criteria for well-known seasoned issuer on the initial filing date. Thereafter, the issuer also must determine its eligibility at the time of each amendment to its shelf registration statement for purposes of providing its update under Securities Act Section 10(a)(3) (or on the due date thereof). So long as the issuer maintains its eligibility for automatic shelf registration, a new registration statement will be effective immediately and will carry forward to the new registra-

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21 A well-known seasoned issuer may register an unspecified amount of securities to be offered, without indicating whether the securities are being sold in primary offerings or secondary offerings on behalf of selling security holders.

22 Currently, business combination transactions, including exchange offers, cannot be registered on Form F-3 and automatic shelf registration is not available for Form F-4.

23 Given that automatic shelf registration statements become effective immediately upon filing, they are not subject to the six month extension.

tion statement, at the issuer's election, either (i) any unused fees paid or (ii) any unsold securities registered and fees paid attributable to such registered securities under the old registration statement.

The automatic shelf registration process provides the flexibility to take advantage of market windows, to structure securities on a real-time basis to accommodate issuer needs or investor demand, and to determine or change the plan of distribution of securities as issuers elect in response to changing market conditions. Thus, for example, the automatic shelf registration process allows eligible foreign private issuers to extend rights offerings to their U.S. security holders by accommodating the timing mechanics of rights offerings, which are typically announced and launched in a very short period of time.

7. *NASD Review*. An underwritten public offering will also be subject to the review and approval of the National Association of Securities Dealers (the "NASD"). The NASD is a self-regulatory organization that, among other things, governs the underwriting activities of U.S. underwriters. The NASD review basically is limited to its review of the compensation arrangements between the issuer and the underwriter, in order to determine that the compensation payable to the underwriter is fair and not excessive, and to determine whether certain relationships between the issuer and the underwriter are present, in which case certain procedures must be followed. This process is undertaken by underwriter's counsel, although the issuer is typically required to pay the NASD registration fee.

8. *American Depositary Receipts*. Offerings of common equity securities of foreign private issuers in the United States are typically issued in the form of American Depositary Receipts ("ADRs"). ADRs are negotiable receipts issued by a U.S. commercial bank functioning as a depositary that holds the underlying shares of the issuer either directly or through a correspondent in the issuer's home country serving as a custodian. Generally, an ADR holder has the right to exchange its ADRs for underlying shares at any time and holders of shares can deposit shares into the ADR facility and receive ADRs. The ADR mechanism addresses certain practical difficulties confronting U.S. residents wishing to invest in shares of foreign companies. The advantages that ADRs provide include:

(1) allowing holders to receive dividends in dollars rather than the currency of the issuer's home jurisdiction (as the depositary will receive dividends on behalf of ADR holders and convert those dividends into dollars prior to transmitting the proceeds to the ADR holders);

(2) avoiding complications relating to underlying shares that are issued only in bearer form;

(3) potentially creating enhanced liquidity as some institutional investors may only be able to invest in dollar denominated or exchange-traded securities; and

(4) allowing investors to buy and sell securities that trade and settle under United States settlement procedures rather than those of the issuer's home jurisdiction.

The establishment of an ADR facility requires the filing of a Form F-6 registration statement registering the offer and sale of the ADRs. A separate registration statement on Form F-1 or F-3 technically relates to the registration of the offer and sale of the underlying shares.

C. Dissemination of Information While an Issuer is In Registration

The Securities Act imposes restrictions on dissemination of information while the issuer is "in registration." The term "in registration" refers to the entire process of registration, from the time the issuer reaches a firm understanding with the firm that is to act as managing underwriter to the filing of the registration statement and thereafter during the period ending 90 days (or in certain cases a shorter period, and, in the case of New York Stock Exchange, American Stock Exchange or Nasdaq National Market securities, 25 days) after the registration statement becomes effective.

The Securities Act makes it unlawful for any person directly or indirectly to make use of any means or instruments of interstate commerce or of the mails to offer to sell a security unless a registration statement has been filed with the SEC as to such security. The phrase "offer to sell" is broadly defined by the Securities Act and has been liberally construed by the courts and the SEC. For example, the publication of information and statements and publicity efforts made in advance of a proposed financing that have the effect of conditioning the market or generating public interest in the issuer or in its securities—called "gunjumping"—constitutes an offer in violation of the Securities Act.[24] The SEC staff is vigilant in looking for signs of gunjumping. A major area of concern is pre-offering publicity involving electronic communications and the Internet, either on the issuer's website or elsewhere. In order to accommodate changes in the use of communications technology and to provide greater certainty to issuers disseminating regular course business information to the market, the SEC has created two separate non-exclusive safe harbors from the "gun-jumping" provisions for ongoing communications at any time: (i) Rule 168 establishes a safe harbor for the continued publication or dissemination at any time of regularly released factual business and forward-looking information[25] by reporting issuers and certain non-reporting foreign issuers;[26] and (ii) Rule 169 establishes a safe harbor for the continued

[24] No offers can be made unless a registration statement has been filed. No sales can be made until the registration statement is effective. Making offers, including deemed offers as described above, prior to the filing of a registration statement is referred to as "gunjumping" and may have adverse consequences including the fact that it may severely delay the timing of a proposed offering. In addition, the SEC may require the issuer to inform investors that there may be a risk that the issuer has violated the registration provisions of the Securities Act, meaning some investors may seek to exercise rescission rights in the event an issuer's stock price falls below the initial offering price.

[25] However, the release of information about a registered offering as part of the offering activities outside the registration statement or a prospectus in the course of a registered offering is explicitly excluded from the coverage of the safe harbor.

[26] To be eligible for the Rule 168 safe harbor, a non-reporting foreign private issuer must either have its equity securities be traded on a designated offshore securities market for at least twelve months or have a $700 million worldwide public float.

publication or dissemination at any time of factual business information[27] that is regularly released to persons other than investors or potential investors by all eligible issuers, including non-reporting issuers. Rules 168 and 169 are safe harbors from the definition of "prospectus" in Securities Act Section 2(a)(10) and, therefore, prevent the application of the prohibition in Securities Act Section 5(b)(1) on the use of a prospectus that is not a statutory prospectus. The rules are also safe harbors from the prohibitions on pre-filing "offers" in Securities Act Section 5(c).

The SEC has also created two separate non-exclusive exclusions from the "gun-jumping" provisions for communications not encompassed in the rules above that occur prior to the filing of a registration statement: (i) Rule 163A establishes an exclusion from the definition of "offer" for purposes of Securities Act Section 5(c) for all issuers for most communications[28] made by or on behalf of issuers 30 days prior to filing a registration statement; and (ii) Rule 163 establishes an exemption from the prohibition on offers for purposes of Securities Act Section 5(c) before the filing of a registration statement for offers made by or on behalf of eligible well-known seasoned issuers.

In addition, under Rule 135 of the Securities Act, a very limited notice given by an issuer prior to filing a registration statement that it proposes to make a public offering of securities to be registered under the Securities Act will not be deemed to constitute an offer of the securities for sale if certain conditions are met. The notice must state that the offering will be made only by means of a prospectus. Furthermore, such notice, in the case of an offering of equity securities, may contain no more than the following additional information: the name of the issuer; the title, amount and basic terms of the securities proposed to be offered; the anticipated time of the offering; and a brief statement of the manner and purpose of the offering without naming the underwriters.

In the interval between the first filing with the SEC and the effective date of the registration statement, the registrant and the underwriters[29] may undertake oral selling efforts. However, no contracts of sale may be made, the purchase price may not be paid or received, and offers to buy may be cancelled. In addition, no written sales literature is permitted other than the preliminary

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27 Under the safe harbor, factual business information is defined as (i) factual information about the issuer, its business or financial developments, or other aspects of its business; and (ii) advertisements of, or other information about, the issuer's products or services.

28 A communication made in reliance on Rule 163A cannot reference a securities offering that is or will be the subject of a registration statement.

29 Ordinarily, an underwriter becomes subject to restrictions on circulation of information when it commences participation in the preparation of the registration statement or otherwise reaches an understanding that it will become a managing underwriter. Other underwriters become subject to restrictions as soon as they are invited to participate in the offering or seek to participate. Underwriters and broker-dealers also have certain obligations with respect to delivery of preliminary and final prospectuses.

prospectus (the “red herring”)[30] and “tombstone advertisements.”[31] The preliminary prospectus that is distributed during this period must contain substantially all the information required to be included in the final prospectus except for the omission of information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds or other matters dependent upon the offering price. In practice, despite the permissibility of “oral selling efforts”, no “road show” or other oral offers or presentations will be made without distributing the preliminary prospectus to all offerees. As amended by the Securities Offering Reform Rules, Rule 134 permits publication of written communications in connection with an offering during the interval between the initial filing of the registration statement and its effective date and excludes them from the definition of “prospectus”, including communications about:

1. the issuer and its business, including where to contact the issuer;

2. the title, amount, price and terms of the securities being offered;[32]

3. the offering itself, including underwriter information, some details about the mechanics of and procedures for transactions in connection with the offering process, the anticipated schedule of the offering, and a description of marketing events;

4. procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities;

5. procedures for directed share plans and other participation in offerings by officers, directors, and employees;

6. the correction of inaccuracies in permissible information previously disclosed pursuant to the rule;

7. the security rating that is likely to be assigned;

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30 The term “red herring” derives from the legend which is required to be printed on the cover of any preliminary prospectus that is distributed before the effective date of the registration statement stating that the registration statement that has been filed with the SEC is preliminary in nature and is subject to completion and that sales may not be completed until the registration statement is effective.

31 The term “tombstone advertisements” derives from the fact that the limited Rule 135 notice that is permitted is often presented in a black box advertisement resembling a tombstone. Such advertisements are not considered sales literature. Although they may therefore be published during the initial filing of the registration statement, it is much more common for them to be published after the effective date to announce the successful completion of the offering.

32 However, the expansion does not permit the use of a Rule 134 notice to provide a detailed description of securities being offered.

8. whether, in the opinion of counsel, the security is exempt from specified taxes; and

9. any statement or legend required by any state law or administrative authority.

In addition, all tombstone advertisements are required to contain “red herring” language; a statement as to whether the security is being offered in connection with a distribution by the issuer or by a security holder, or both; a statement as to whether the issue represents new financing or refunding, or both; and the name and address of the person or persons from whom a preliminary prospectus may be obtained.

The foregoing restrictions concerning publicity are not intended to inhibit continued disclosure of factual information by the registrant. Companies in registration are permitted throughout the registration process to continue to advertise their products and services, to send out customary reports to shareholders, to make routine announcements to the press with respect to factual business and financial developments, and to respond to unsolicited requests for factual information about the company’s affairs from stockholders and financial analysts having a legitimate interest in the company’s affairs. In addition, a public company issuer may be required to make timely disclosures of material events affecting the issuer and its operations (see Part V of this article).

The SEC has created a new prospectus category outside the statutory prospectus: the “free writing prospectus.” The free writing prospectus is, except as otherwise provided specifically or otherwise required by the context, a written communication, including electronic communications, that (1) constitutes an offer to sell or a solicitation of an offer to buy securities that are or will be the subject of a registration statement and (2) does not fall under any other defined form of prospectus or specifically exempted form of communication.

The free writing prospectus comprises offers, including electronic communications, subject to specified conditions that will depend on the nature of the issuer and the offering (including, in specified cases, filing with the SEC). A free writing prospectus can take any form and is not required to meet the informational requirements otherwise applicable to prospectuses. A well-known seasoned issuer can use a free writing prospectus at any time. Any other eligible issuers or offering participants are permitted to use free writing prospectuses after the filing of the registration statement. Use of a free writing prospectus, however, does not extend to communications outside the United States. Accordingly, whether a communication outside the United States is considered an offer in the United States subject to the federal securities laws continues to depend on when and how the communication is made and the availability of other exemptions, such as those for offshore press conferences.

Ineligible issuers,[33] other than blank check companies, shell companies and penny stock issuers, are permitted to use free writing prospectuses that are limited to descriptions of the terms of the securities being offered and the offering.

D. Unregistered Distributions Pursuant to the Rule 144A Safe Harbor

For many foreign private issuers their first entry into the U.S. markets may be by means of a Rule 144A placement. As a technical matter, these are offerings that are exempt from the registration requirements of the Securities Act by application of the private placement exemption under Section 4(2) with respect to the initial placement and of the Rule 144A safe harbor with respect to subsequent trades. Rule 144A under the Securities Act has created a market for privately placed securities that may trade between "qualified institutional buyers," which are certain large institutions defined under the rule. A foreign private issuer that seeks to use the Rule 144A safe harbor also needs to meet the information requirements of the rule either by being a registrant under the Exchange Act, furnishing to the SEC pursuant to Rule 12g3-2(b) under the Exchange Act information that it files in its home country with securities regulators and stock exchanges or makes public or sends to its holders of securities, or by agreeing at the time of the original placement of the securities in the U.S. that it will furnish on request to the holder of the securities and the prospective purchaser specified information about the issuer at the time of any proposed transfer of the securities.

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33 As mentioned in Part I.A, above, the categories of ineligible issuers include (i) issuers that at the time of the eligibility determination are not current for 12 months in their Exchange Act reporting obligations, (ii) issuers that may raise greater potential for abuse (such as asset-backed issuers, registered investment companies, business development companies, blank check companies, shell companies, penny stock issuers and certain limited partnership offerings), and (iii) issuers that have violated the anti-fraud provisions of the federal securities laws.

Part II: Reporting Obligations under the Securities Act and the Exchange Act

Following a public offering of securities under the Securities Act or a listing on a United States exchange, the issuer will be obligated to file various reports on a continuing basis. These reporting obligations commence immediately upon the effectiveness of a registration statement or a listing and require the filing of an annual report with respect to the fiscal year in which the registration statement or a listing becomes effective and continue during each fiscal year thereafter until such time as the securities to which such registration statement relates are not listed or have ceased to be listed on an exchange or certain other markets and are held of record by fewer than 300 persons resident in the United States. The Exchange Act reports required to be filed by a foreign private issuer are annual reports on Form 20-F and reports on Form 6-K.[34]

A. The Sarbanes-Oxley Act

The Sarbanes-Oxley Act was enacted in late July 2002 in the wake of massive corporate frauds. The Sarbanes-Oxley Act applies to U.S. and non-U.S. issuers (a) that have securities registered under Section 12 of the Exchange Act, (b) that are required to file reports under Section 15(d) of the Exchange Act or (c) that have filed and not withdrawn a registration statement pursuant to the Securities Act that has not yet become effective. Foreign private issuers that have only furnished information to the SEC under the reporting exemption afforded by Rule 12g3-2(b) under the Exchange Act are not subject to the provisions of the Sarbanes-Oxley Act.

The various provisions established by the Sarbanes-Oxley Act can be grouped under five major goals:

1. restoring confidence in the accounting profession by:

    (i) creating rules to protect auditor independence,

    (ii) imposing certain obligations on public accountants who audit or review an issuer's financial statements, including the obligation to retain certain records relevant to that audit or review for seven years after such audit or review is concluded,

    (iii) requiring independent auditors to report certain matters to the audit committee, including critical accounting policies, alternative treatments within GAAP of material items and all material written communications the auditor has with management, and

[34] The periodic reports of both foreign and domestic issuers are periodically subject to review by the SEC, and the SEC amends the reporting requirements from time to time. Companies subject to reporting must, in general, comply with the disclosure items of a particular form in effect as of the date the report is to be filed.

(iv) creating the Public Company Accounting Oversight Board ("PCAOB") to regulate and oversee the independence of outside auditors;

2. improving executive responsibility and setting the proper example and culture of management and other insiders at the company (improving the "tone at the top") by:

(i) mandating that all members of audit committees be independent directors,

(ii) prohibiting personal loans by an issuer to any of its directors or executive officers,[35]

(iii) requiring the disclosure of whether a "financial expert" serves on the audit committee,

(iv) requiring the disclosure of whether the company has adopted a code of ethics for CEOs, CFOs, and other senior financial personnel, and

(v) requiring the CEO and CFO of an issuer to forfeit any bonuses, incentive or equity-based compensation and profits from the sale of the issuer's securities that they received during the 12 months following the first release of non-complying financial statements whenever an issuer restates its financial statements because of misconduct that causes material non-compliance with reporting requirements;

3. improving disclosure and financial reporting by:

(i) establishing internal control requirements (Section 404),

(ii) requiring CEO and CFO certifications relating to control systems and financial statements,

(iii) mandating auditors' certification of the adequacy of the internal controls (Section 404),

(iv) regulating the use of non-GAAP financial measures,

(v) requiring an issuer to disclose on a "rapid and current basis" any information relating to material changes in its financial condition or operations that the SEC determines is necessary or useful, and

(vi) requiring the SEC to review at least once every three years each public company registered with SEC;

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35 The SEC has adopted an exemption from the insider lending prohibition for qualifying foreign commercial banks that is comparable to the exemption provided under the Sarbanes-Oxley Act for U.S. banks whereby personal loans made by a bank to any of its directors or executive officers will be allowed if made on conditions (including rates of interest) substantially similar to terms and conditions prevailing in the market.

4. improving the performance of those who advise or analyze public companies (i.e. the "gatekeepers") by:

(i) establishing standards of professional conduct[36] for attorneys who appear and practice before the SEC in any way in the representation of an issuer (important exemptions exist for foreign attorneys),

(ii) addressing conflicts of interest faced by securities analysts, and

(iii) prohibiting stock exchanges from listing any security of any issuer not in compliance with the audit committee requirements of the Sarbanes-Oxley Act; and

5. enhancing the SEC's enforcement tools by:

(i) prohibiting an issuer from fraudulently influencing or misleading its auditors for the purpose of rendering that issuer's financial statements misleading,

(ii) freezing temporarily certain extraordinary payments to be made to alleged securities law violators during the course of an investigation,

(iii) increasing civil penalties,

(iv) establishing "fair funds" in the SEC's enforcement actions so that civil penalties levied against companies can be returned to harmed shareholders, in addition to any disgorgement that is ordered, and

(v) allowing the SEC to prohibit any person who has violated the anti-fraud provisions of the securities laws from serving as an officer or director of an issuer if that person's conduct indicates an "unfitness" to serve as an officer or director.

Many of the provisions of the Sarbanes-Oxley Act became effective immediately, while other provisions became effective upon the issuance of final regulations by the SEC and the PCAOB. In addition, various requirements of the Sarbanes-Oxley Act may be subject to further administrative and legislative action and judicial interpretation.

B. Earnings Statement

The issuer should expect, consistent with customary practice in underwritten public offerings of securities in the United States, to agree with the underwriters that it will make generally available to its security holders on a one-time basis, an earnings statement of the issuer covering

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[36] Attorneys are required to report evidence of a material violation of U.S. securities laws or a breach of fiduciary duty or similar violation by the issuer or any agent of the issuer "up the ladder" within the issuer's governance structure to the principal legal officer, the principal legal officer and the principal executive officer or a previously established qualified legal compliance committee, and, if an appropriate response is not received, report the evidence to the audit committee, another committee of independent directors or the full board of directors.

a period of at least twelve months after the effective date of the registration statement. The Securities Act provides that a person who acquires securities issued in a public offering may sue, among others, the issuer, its directors and the underwriters for false or misleading statements in the prospectus. However, after such an earnings statement has been made generally available to the issuer's security holders, such a claimant shall have a right of recovery in the case of a materially false or misleading registration statement only if the claimant can prove that the claimant acquired the securities in reliance on an untrue or misleading statement in the registration statement. The earnings statement requirement may be satisfied by simply providing a copy of the next succeeding annual report to all holders of the security that was publicly offered (assuming it covers the appropriate twelve month period) or, in the alternative, by publishing a newspaper notice of its availability and furnishing a copy to security holders upon request and to the SEC.

C. Annual Reports on Form 20-F

After a public offering, foreign private issuers must file an annual report on Form 20-F within six months after the end of each fiscal year. In addition to filing with the SEC, the report must be filed with the National Association of Securities Dealers if the issuer's securities are quoted on Nasdaq, and with the New York Stock Exchange if listed there.

Form 20-F requires an annual discussion and update of, *inter alia*, many items originally contained in the issuer's registration statement on Form F-1.

Form 20-F requires updates of items 1-11 described in Part I.B.1 not specifically calling for offering-related disclosures with respect to registration statements. In addition to the updating of the foregoing items originally contained in the registration statement on Form F-1, disclosures concerning any change in such rights occasioned by the issuance or modification of any other securities and any material default with respect to any indebtedness of the issuer exceeding five percent of the total assets of the issuer would be required in the annual report on Form 20-F.

Pursuant to the Sarbanes-Oxley Act, the SEC must review disclosures made by issuers in their annual reports, including their financial statements, at least once every three years. In determining the scheduling of these reviews, the SEC will consider the following:

- issuers that have had material restatements of their financial results;
- issuers with significant volatility in their stock price;
- issuers with the largest market capitalizations;
- emerging companies with disparities in price to earnings ratios;
- issuers whose operations significantly affect any material sector of the U.S. economy; and
- any other factors that the SEC deems relevant.

1. *Audit Committee Requirements and Disclosure*

The Sarbanes-Oxley Act required that all public issuers establish an audit committee composed entirely of independent directors that is directly responsible for appointing and overseeing the outside auditors. Specifically, the audit committee must be directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged (including the resolution of any disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attestation services for the issuer, and each such registered public accounting firm must report directly to the audit committee. The Act further requires all registered issuers, whether U.S. or foreign, to disclose whether their audit committee members are independent.

In order to be considered to be independent for purposes of Section 10A of the Exchange Act, a member of an audit committee of an issuer may not (i) accept any consulting, advisory, or other compensatory fee from the issuer,[37] or (ii) be an affiliated person of the issuer or any subsidiary thereof. However, the SEC has approved final audit committee listing standards that allow employees who are not officers of a company to serve as audit committee members, consistent with "co-determination" and similar requirements in some countries with a dual board system, such as Germany, that require corporate audit committees to include a labor representative. The SEC has also adopted rules permitting alternative structures where these structures are provided for under local law, such as statutory auditors or Japan's Statutory Board of Auditors.

Further, pursuant to the Sarbanes-Oxley Act, a foreign private issuer must now disclose in its annual report on Form 20-F whether it has at least one audit committee financial expert serving on its audit committee and, if so, the name of the expert. An "audit committee financial expert" is a person with the following attributes:

(1) an understanding of generally accepted accounting principles and financial statements;[38]

(2) the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(3) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to those that can reasonably be expected to be raised by the company's financial statements, or experience actively supervising one or more persons engaged in such activities;

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37 The SEC has clarified that a director can retain independent status when loans or payments are made from a financial institution to a director or family member in the ordinary course of business, on substantially the same terms as for the general public.

38 Audit committee financial experts of foreign private issuers can gain their expertise by demonstrating an understanding of the issuer's home country GAAP, rather than an understanding based solely on U.S. GAAP.

(4) an understanding of internal controls and procedures for financial reporting; and

(5) an understanding of audit committee functions.

A company that does not have an audit committee financial expert must disclose this fact and explain why this is the case. Companies may not satisfy this obligation by stating that they decided not to make such a determination.

An individual designated as an audit committee financial expert would not be deemed an "expert" for any other purpose (including Section 11 of the Securities Act) and would not have any duties or liabilities greater than those imposed on members of an audit committee generally. It is important to note, however, that this provision does not apply to state securities and corporate laws. While the SEC has indicated that it does not believe the designation of a director as an "audit committee financial expert" would increase that individual's exposure to liability under state law, it is possible that state courts will determine that, given the expert's knowledge and experience which led to his or her designation as an expert, the individual should be held to a higher standard of care than a director who does not have a similar background.

The Sarbanes-Oxley Act also requires the audit committee to establish procedures for the confidential submission of concerns regarding questionable accounting or auditing matters, such as appointing permanently a business practices officer to investigate complaints and to report directly to the audit committee. Companies are subject to civil and, in certain circumstances, criminal liability if found to have taken retaliatory action against employee whistleblowers.

2. *Disclosure Controls and Procedures*

Issuers must also maintain, and regularly evaluate the effectiveness of, disclosure controls and procedures designed to ensure that the information required in the Form 20-F is recorded, processed, summarized and reported on a timely basis. Issuers must disclose the conclusions of the issuer's principal executive officer and principal financial officer regarding the effectiveness of the company's disclosure controls and procedures as of the end of the period covered by the report. While the SEC has not mandated any particular procedures, it does recommend that issuers create a committee with responsibility for considering materiality of information and determining disclosure obligations on a timely basis. The SEC has suggested such a committee should include:

- the principal accounting officer or controller;
- the general counsel or other senior legal officer with responsibility for disclosure matters;
- the principal risk management officer;
- the chief investment relations officer; and
- other officers or employees, including individuals associated with the issuer's business units.

A sample charter for such a disclosure committee is attached to this article as Exhibit A.

3. *Section 404: Internal Controls over Financial Reporting*

Compliance with Section 404 of the Sarbanes-Oxley Act has been the dominant securities regulation issue during 2005. Companies representing over 95% of the total U.S. market capitalization are now obligated to comply with the Internal Control reporting provisions of Section 404. The overall purpose of Section 404 is to foster the preparation of reliable financial reporting. The internal controls over financial reporting refer generally to the process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP. A central purpose of this requirement is to identify material weaknesses that have more than a remote likelihood of leading to a material misstatement in the financial statements.[39] However, in evaluating their internal controls, the SEC allows foreign issuers to use foreign frameworks, such as the Turnbull Report published by the Institute of Chartered Accountants in England and Wales.

Each annual report on Form 20-F must contain a report that discloses management's involvement in, and opinion regarding the effectiveness of, the issuer's internal control procedures. The SEC implementing regulations require that the report state management's responsibilities for establishing and maintaining adequate internal controls and procedures for financial reporting for the issuer; management's conclusions about the effectiveness of the issuer's internal controls and procedures for financial reporting as of the end of the issuer's most recent fiscal year; a statement identifying the framework used by management to evaluate the effectiveness of the issuer's internal controls over financial reporting; any changes of the issuer's internal controls over final reporting that occurred during the issuer's most recent fiscal year; and a statement that the issuer's registered public accounting firm has issued an attestation report on management's evaluation of the issuer's internal controls for financial reporting and a copy of such report. The rules relating to the maintenance and evaluation of internal controls and the related disclosure (including the auditor's attestation report) took effect for accelerated filers[40] in the first fiscal year ending on or after July 15, 2005. The SEC has extended the

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39 The PCAOB has established the following typology of deficiencies:

Control deficiency: the design or operation of a control does not allow management or employees, in normal course of performing assigned functions, to prevent or detect misstatements on a timely basis.

Significant deficiency: a control deficiency or combination of control deficiencies, that adversely affects a company's ability to initiate, authorize, record, process or report external financial data reliably in accordance with GAAP such that there is more than a remote likelihood that a misstatement of the company's annual or interim financial statements that is more than inconsequential will not be prevented or detected.

Material weakness: a significant deficiency, or combination of significant deficiencies, that results in more than a remote likelihood that a material misstatement of annual or interim financial statements will not be prevented or detected.

40 Accelerated filers are issuers, either U.S.-based or foreign, that have a public float of at least $75 million, that have been subject to the Exchange Act's reporting requirements for at least 12 calendar months, and that previously have filed at least one annual report.

compliance date for issuers that are non-accelerated filers, including those that are foreign private issuers, to the first fiscal year ending on or after July 15, 2007. Foreign private issuers that are accelerated filers must begin to comply with the internal control over financial reporting and related requirements starting with the first fiscal year ending on or after July 15, 2006.

When a company identifies a material weakness, and such material weakness has not been remedied prior to its fiscal year-end, it must conclude that its internal control over financial reporting is ineffective. Such companies should consider including in their disclosure (1) the nature of any material weakness, (2) its impact on financial reporting and the control environment, and (3) management's current plans, if any, for remedying the weakness. However, neither Section 404 nor the SEC's implementation rules require that a material weakness in internal control over financial reporting must be found to exist in every case of restatement resulting from an error. Rather, both management and external auditors should use their judgment, based on all the facts and circumstances, in assessing whether the need for a restatement resulted from a material weakness in controls.

There is wide consensus that the initial Section 404 compliance has resulted in significant costs to issuers and has taken management's attention away from running their business, causing deferrals in product launches and hiring, postponements of IT-system installations and delays of strategic alliances. A sample of 90 Fortune 1000 companies audited by the Big Four public company accounting firms revealed that these companies spent an average of $1.9 million on external audit fees and $5.9 million on internal tasks as both registrants and public company accounting firms have faced a sharp learning curve.[41] These compliance costs have led some foreign issuers to declare that they may wish to leave the US capital markets altogether rather than have their internal controls certified. The SEC feels, however, some initial compliance costs may have been unnecessary due to excessive, duplicative or misfocused efforts.

Further, some auditors have been unwilling to accept management's testing and other procedures performed during the year as evidence that management's assessment of the effectiveness of internal control over financial reporting was fairly stated. However, the SEC and the PCAOB have released complementary sets of guidance holding that it is the responsibility of management to determine the form and level of controls appropriate for each company and to scope their assessment and the testing accordingly, and stating that accounting firms should understand that there is a zone of reasonable conduct by issuers that should be recognized as acceptable in the implementation of Section 404. The PCAOB has further instructed auditors to integrate the work of management in their attestation report by using a top-down approach that begins with company-level controls, to identify for further testing only those accounts and processes that are, in fact, relevant to internal control over financial reporting, and use the risk assessment required by the standard to eliminate from further consideration those accounts that have only a remote likelihood of containing a material misstatement.

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41 Section 404 implementation has been further complicated by the issuance of guidance from multiple sources, such as the SEC, the PCAOB and the Big Four accounting firms.

Finally, the SEC staff expects management to document and test relevant general IT controls in addition to appropriate application-level controls that are designed to ensure that financial information generated from a company's application systems can reasonably be relied upon. Some companies delayed the installation of new IT systems or upgrades due to time limitations for installing, testing and remedying control deficiencies before the company's fiscal year-end. The SEC staff does not believe it appropriate to provide an exclusion by management of new IT systems and upgrades from the scope of its 404 assessment.

4. *Section 404: Auditor's Role and Independence*

The Sarbanes-Oxley Act requires that each registered public accounting firm that prepares or issues an audit report on a company's annual financial statements must attest to, and report on, management's assessment of internal control over the financial reporting. The auditor's attestation report must be issued in accordance with standards set by the PCAOB.

The PCAOB is a private entity subject to the SEC's regulation and oversight: the SEC appoints the PCAOB, reviews and approves its rules, and approves its budget. The PCAOB is responsible for overseeing the auditing of U.S.-registered public companies and establishing auditing, quality control, ethics, independence and other standards relating to the preparation of audit reports. The PCAOB's Auditing Standard No. 2 governs the auditor's responsibilities under Section 404. Auditing Standard No. 2 establishes requirements and provides directions that apply when an auditor is engaged to audit both a company's financial statements and management's assessment of internal control over financial reporting.

While the SEC and the PCAOB are given authority to exempt any foreign public accounting firm from the provisions of the Sarbanes-Oxley Act, foreign public accounting firms are specifically made subject to the Sarbanes-Oxley Act and the rules promulgated by the PCAOB to the same extent as U.S. public accounting firms. The PCAOB is authorized to make a foreign public accounting firm subject to the Sarbanes-Oxley Act even if the firm does not issue an audit opinion to a reporting issuer, if the PCAOB determines such firm plays a "substantial role" in the preparation and furnishing of such audit opinions.

Pursuant to the SEC's final rules on auditor independence, foreign private issuers are also required to disclose in their annual reports on Form 20-F (i) the amount of fees paid during the two most recent years to their independent auditors for audit services and (ii) the amount of fees paid during the two most recent years for, together with a description of, audit-related services, tax services and all other services.

An auditor's independence with respect to a company will be considered impaired if a one-year cooling-off period is not maintained between an individual's provision of more than 10 hours of audit, review or attest services or service as lead or concurring partner on the company's audit engagement team and his or her employment by the company in a "financial reporting oversight role," or if an "audit partner" (defined below) receives compensation for an engagement to provide to the company any services other than audit, review or attest services.

Relationships existing prior to May 6, 2003 are exempted from these requirements. There is also an exception for emergency or unusual circumstances (*e.g.* for foreign audit firms in jurisdictions where compliance would be extremely difficult or costly), if the audit committee determines that invoking this exception is in the best interests of investors.

Under the Sarbanes-Oxley Act, auditors are prohibited from providing the following specified non-audit services to their clients:

- bookkeeping or other services related to the accounting records or financial statements;
- financial information systems design and implementation;
- appraisal or valuation services, fairness opinions or contribution-in-kind reports;
- actuarial services;
- internal audit outsourcing services;
- management functions or human resources;
- broker or dealer, investment adviser or investment banking services;
- legal services (although this provision is not intended to prevent foreign accounting firms from providing services that a U.S. accounting firm may provide solely because local law requires the service to be provided by someone licensed to practice law);
- expert services unrelated to the audit; and
- any other service that the PCAOB determines, by regulation, is impermissible.

Other non-audit services that are not specifically prohibited, including tax services, may be provided only if *pre-approved* by the issuer's audit committee. An issuer's audit committee must pre-approve all permissible non-audit services and all audit, review or attest engagements required under U.S. securities laws. Such approval can be in the form of specifically approved engagements or pursuant to pre-approval policies and procedures established by the audit committee. There is a "de minimus" exception for the approval of non-prohibited non-audit services, provided that they do not comprise more than 5% of the fees paid to the independent auditors for the year, were not recognized as non-audit services at the time of the engagement and are approved by the audit committee. The audit committee's policies and procedures for pre-approvals of services must be discussed in the issuer's annual reports. In addition, the issuer must disclose: (i) the percentage of non-audit services that were approved by the audit committee under the "de minimus" test; and (ii) if greater than 50%, the percentage of hours expended on the principal accountant's engagement to audit the issuer's financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees. The PCAOB has authority to grant exemptions from these rules. The SEC has indicated its willingness to consider granting relief to foreign regulatory agencies and foreign accounting firms on an ad hoc basis where conflicts arise between foreign regulatory requirements and the SEC's rules.

The auditor rotation provisions of the Sarbanes-Oxley Act require the lead and concurring partner on an audit engagement team to rotate off the team with respect to a particular company after five years, and then those individuals will be subject to a five-year "time out" period before they are permitted to return to the team. "Audit partners" are also subject to the rotation requirements, but with a requirement to rotate off the team after seven years and only a two-year "time out" period. An "audit partner": (i) is a partner (or equivalent) member of the audit engagement team with responsibility for decision-making on significant auditing, accounting and reporting matters that affect the financial statements or who maintains regular contact with management and the audit committee; (ii) includes all those who serve the company at the company or parent level, other than specialty partners; and (iii) includes the lead partner on subsidiaries of the company whose assets or revenues constitute 20% or more of the consolidated assets or revenues of the company. Time served in the capacity of lead partner prior to May 6, 2003, however, is not included in determining when an individual must rotate off the engagement team for a particular company.

Initial implementation of Section 404 and Auditing Standard No. 2 has had the unintended effect of chilling the level and extent of communication between auditors and the issuers' management regarding accounting and financial reporting issues. Management at times has hesitated to ask auditors technical accounting, auditing and financial reporting questions or to provide auditors with early drafts of financial statements because of concerns that these actions could result in unwarranted identifications of internal control deficiencies by auditors. Auditors also had a heightened concern that providing management with advice might impair the auditor's independence. However, the SEC and the PCAOB have issued guidance holding that errors in draft financial statements should not be the basis for the determination of a deficiency in internal controls over financial reporting and have concluded that management should not be discouraged from providing its auditors with draft financial statements.[42]

In addition, the SEC has encouraged frequent and frank dialogue among management, auditors and audit committees with the goal of improving internal controls and the financial reports upon which investors rely, adding that auditor's discussing and exchanging views with management, such as discussing the new accounting standards or the appropriate accounting treatment for complex or unusual transactions does not in itself violate the auditor independence rules, nor does it fall into one of the nine prohibited categories of services. Furthermore, providing advice

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42 See SEC "Commission Statement on Implementation of Internal Control Reporting Requirements" (May 16, 2005); SEC Division of Corporation Finance Office of the Chief Accountant "Staff Statement on Management's Report on Internal Control Over Financial Reporting" (May 16, 2005); and PCAOB Release No. 2005-009 "Policy Statement Regarding Implementation of Auditing Standard No. 2, An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial Statements" (May 16, 2005).

to management is itself not indicative of a deficiency as long as management determines the accounting to be used, including the determination of estimates and assumptions, and does not rely on the auditor to design or implement the controls. Accordingly, the PCAOB encourages auditors to exercise professional judgment in providing accounting advice and technical advice regarding application of GAAP to clients.

5. *Section 302 and 906 Certifications*

The financial statement requirements for annual reports on Form 20-F are substantially similar to those for a registration statement on Form F-1. Pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act, the issuer's principal executive and principal financial officers must each certify that the financial and other information contained in the issuer's Form 20-F fairly presents, in all material respects, the financial condition and results of operations of the issuer, and that the annual report fully complies with the requirements of Section 13(a) or 15(d) of the Exchange Act.

Further, pursuant to Section 302 of the Sarbanes-Oxley Act, they must additionally certify (A) that (i) they are responsible for establishing and maintaining the issuer's disclosure controls and procedures, (ii) they have made certain disclosures to the issuer's auditors and the audit committee of the board of directors about the issuer's internal controls and (iii) they have included information in the issuer's Form 20-F about their evaluation and whether there have been any changes in the issuer's internal controls or in other factors that occurred during the period covered by the annual report that has materially affected or is likely to materially affect, the issuer's internal controls and (B) that (i) the issuer's disclosure controls and procedures (discussed below) have been designed to ensure that material information relating to the issuer is made known to them, (ii) they have evaluated the effectiveness of the issuer's disclosure controls and procedures by the end of the period covered by the report being filed and (iii) they have presented in the report their conclusions about the effectiveness of such procedures. No modifications can be made to the SEC's mandatory form for Section 302 certification. The Section 302 and Section 906 certifications are filed as exhibits to the Form 20-F. Forms of such Section 302 and Section 906 certifications are attached to this article as Exhibits B and C, respectively. For accelerated filers, annual reports filed for the first fiscal year ending on or after July 15, 2006, must contain a Section 302 certification that includes additional certifications from the issuer's principal executive and principal financial officers regarding the design and effectiveness of the issuer's internal controls over financial reporting. For non-accelerated filers, the compliance date is the first fiscal year ending on or after July 15, 2007.

6. *Risk Factor Disclosure*

Form 20-F requires risk factor disclosure written in accordance with the same "plain English" standards as apply to risk factor disclosure in the Securities Act registration statements.[43] In addition, the SEC requires accelerated filers[44] and well-known seasoned issuers to disclose in their annual reports, including annual reports on Form 20-F, any written staff comments on the Exchange Act reports issued more than 180 days before the end of the fiscal year covered by report that the issuer believes to be material and that remain unresolved as of the filing date of the report. The disclosure must describe the substance of the comments. Staff comments that have been resolved, including those that the staff and the issuer have agreed will be addressed in future Exchange Act reports, do not need to be disclosed. Issuers can provide other information, including their positions regarding any such unresolved comments.

7. *Non-GAAP Disclosures and IFRS Convergence*

Pursuant to the Sarbanes-Oxley Act, the SEC has promulgated Regulation G, which requires issuers that publicly disclose or release non-GAAP financial measures to include, in that disclosure or release, a presentation of the most directly comparable GAAP financial measure and a reconciliation of such measure to the most directly comparable GAAP financial measure. Regulation G, however, does not apply to public disclosure of a non-GAAP financial measure by, or on behalf of, a foreign private issuer if:

(1) the securities of the foreign private issuer are listed or quoted on a securities exchange or inter dealer quotation system outside the United States;

(2) the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with generally accepted accounting principles in the United States; and

(3) the disclosure is made by or on behalf of the foreign private issuer only outside the United States, or is included in a written communication that is released by or on behalf of the foreign private issuer outside the United States.

In addition, the issuer is subject to the stricter requirements of Item 10 of Regulation S-K, which requires a reconciliation of non-GAAP financial measures to the most nearly comparable GAAP measure and also a narrative description concerning the uses and purposes of such

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43 The cover page of Form 20-F also includes boxes for an issuer to check if it is a well-known seasoned issuer or if it is filing reports voluntarily.

44 The requirement to disclose outstanding comments applies to both domestic and foreign registrants. The term "accelerated filer," which is defined in the Exchange Act rule 12b-2, does not distinguish between domestic and foreign issuers. Accelerated filers who file reports on Form 20-F are not subject to accelerated deadlines because that Form, unlike the form for annual reports by U.S. registrants (Form 10-K), does not include accelerated deadlines for filing. Nevertheless, any registrant that meets the definition of accelerated filer is subject to the disclosure requirement for outstanding comments.

non-GAAP financial measures, including (i) the need to give the comparable GAAP measure required under Regulation G "equal or greater prominence" than the non-GAAP measure; (ii) disclosure of the reasons why management believes that the non-GAAP measure provides useful information to investors regarding the issuer's financial condition and results of operations; and (iii) disclosure of any additional purposes for which management uses the non-GAAP measure.

While the SEC has consistently supported the convergence between U.S. GAAP and International Financial Reporting Standards ("IFRS") (formerly known as International Accounting Standards) as called for in the 2002 Memorandum of Understanding between the Financial Accounting Standards Board and the International Accounting Standards Board, it is unlikely that the SEC will eliminate in the near future the U.S. requirement that financial statements prepared under IFRS be reconciled to U.S. GAAP in the financial disclosures of foreign companies selling shares in the United States.[45] The SEC, however, has amended Form 20-F to allow a one-time accommodation for the use of IFRS by foreign private issuers. This amendment permits foreign private issuers that adopt IFRS without qualification and disclose such adoption prior to or for the first financial year starting on or after January 1, 2007, to file two rather than three years of statements of income, changes in shareholders' equity and cash flows prepared in accordance with IFRS in annual reports and registration statements filed during the first year in which they adopt IFRS[46]. In addition, foreign private issuers that change their basis of accounting to IFRS regardless of the year in which the change occurs will also have to disclose certain mandatory and elective accounting treatments that an issuer may use in applying IFRS for the first time as well as a reconciliation with its previous basis of accounting. Reconciliation to U.S. GAAP would continue to be required.

8. *Off-Balance Sheet Arrangements*

As discussed in Part I.B.1—Form F-1 above, the issuer is required to disclose its off-balance sheet arrangements in its MD&A. In defining the term "off-balance sheet arrangement", the SEC sought to capture the means by which companies typically structure off-balance sheet transactions or otherwise incur risks of loss that are not fully transparent to investors. An "off-balance sheet arrangement" means any transaction, agreement or other contractual arrangement to which an entity unconsolidated with the company is a party and under which the company has:

(1) any obligation under a guarantee contract having certain specified characteristics, such as a standby letter of credit that guarantees payment of a specified financial obligation,

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45 See "Statement by SEC Staff: A Securities Regulator Looks at Convergence", Donald T. Nicolaisen, Chief Accountant, SEC (April 2005)

46 An issuer, however, that has published audited IFRS financial statements for three years must include all three years of IFRS financial statements in its SEC filings.

a contract requiring payment to an indemnified party based on the failure of another entity to perform or an indemnification agreement that contingently requires payments to the indemnified party based on changes in an underlying obligation related to an asset, liability or equity security;

(2) a retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support to such entity for such assets;

(3) any obligation, including a contingent obligation, under a contract that would be accounted for as a derivative instrument but is indexed to the company's own stock and is classified in stockholders' equity in the company's statement of financial position; or

(4) any obligation, including a contingent obligation, arising out of a variable interest in an unconsolidated entity that is held by, and material to, the company, where such entity provides financing, liquidity, market risk or credit risk support to, or engages in leasing, hedging or research and development services with, the company.

9. *Code of Ethics*

An issuer must also disclose whether it has adopted a written code of ethics that applies to the company's principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions, or amended or waived any provision of such code. The issuer must file the code of ethics with its annual report or post the code on its web site. The issuer must also describe the nature of any amendment to, or waiver of, any provision of the code. A company disclosing that it has not adopted such a code must explain why it has not done so.

10. *Management's Discussion and Analysis of Financial Condition and Results of Operations Interpretative Release*

The Interpretive Release provides guidance regarding the Management's Discussion and Analysis of Financial Condition and Results of Operations section included in the disclosure documents of reporting companies. The Interpretive Release does not create new legal requirements or modify existing rules. The SEC's guidance is intended to elicit more meaningful disclosure in MD&A in a number of areas, including the overall presentation and content of MD&A, liquidity and capital resources and critical accounting estimates. Among other things, the Interpretive Release addresses the following issues:

(1) *Overview*. The MD&A should begin with an executive level overview or introduction reviewing the key matters management uses to evaluate business and financial performance. The principal executive officer and principal financial officer should have early involvement in identifying the key disclosure themes and items to be included in this section, as well as the overall MD&A.

(2) *Headings and Tables*. The issuer should use headings to assist readers in following the flow of the MD&A and include tables with regard to quantitative disclosure, followed by a narrative analysis.

(3) *Placement of Information*. The MD&A should give the greatest prominence to the most material information and significant analysis. The issuer should consider using a "layered" approach to emphasize the most important items before exploring and explaining further details of the information.

(4) *Use of Key Indicators*. The issuer should disclose key indicators of financial condition and operating performance of the issuer which management uses in running the business of the issuer, allowing the investor to further "see the company through the eyes of management."

(5) *Focus on Materiality*. The issuer should aim to disclose the most important material events, known trends, demands, commitments and uncertainties that make this historical information indicative of the issuer's future performance and de-emphasize or omit disclosure that is duplicative or no longer relevant. Likewise, line items that are not material to an understanding of financial condition do not need to be discussed.

(6) *Review Informal Communications*. The issuer should evaluate information disclosed in the principal executive officer's annual letter to shareholders, earnings press releases, investor calls, analysts' calls, website materials and other informal communications to determine whether material information contained therein should be included in the MD&A.

(7) *Quantification of Material Trends and Uncertainties*. The SEC reiterated the importance of a discussion and analysis of known trends, demands, commitments, events and uncertainties to an understanding of the issuer's performance and the extent to which reported financial information is indicative of future results. The Interpretive Release provides additional guidance for issuers on determining whether a known trend or uncertainty exists and must be disclosed.

(8) *Liquidity and Capital Resources*. The Interpretive Release addresses several issues intended to elicit more meaningful disclosure regarding the underlying trends and conditions relating to liquidity and cash flow that are not otherwise readily apparent from the statement of cash flows or other financial statements, particularly in the areas of cash requirements, sources and use of cash, debt instruments, guarantees and related covenants, and cash management.

(9) *Critical Accounting Policies*. The issuer should continue to address material implications of uncertainties associated with the methods, assumptions and estimates underlying the issuer's critical accounting measurements. The Interpretive Release provides additional guidance regarding the disclosure required relating to the issuer's critical accounting policies.

D. Form 6-K

A foreign private issuer subject to reporting obligations under the Exchange Act is required periodically to transmit reports on Form 6-K to the SEC upon the occurrence of certain events. A Form 6-K report consists of a cover page, a signature page and a copy of certain reports or documents that are:

(1) required to be made public by the issuer in its home country;

(2) filed with and made public by any foreign securities exchange; or

(3) distributed to security holders.

Unlike U.S. reporting companies, a foreign private issuer is not required to file quarterly reports unless it would otherwise be required under clauses (1) through (3) above or if the issuer contractually agreed with the underwriter to file such reports. It would not be unusual for an underwriter to insist that an issuer file quarterly reports on an ongoing basis in the future notwithstanding that the issuer would not otherwise be required to do so in order to assure that there is a continuous flow of information relating to the issuer available in the aftermarket.

Not all such reports or documents need to be filed with the SEC. Form 6-K only requires the filing with the SEC of reports or documents that contain information that is material to the issuer and its subsidiaries concerning:

(1) changes in business, management or control;

(2) acquisitions or dispositions of assets;

(3) bankruptcy or receivership;

(4) changes in the issuer's certifying accountants;

(5) the financial condition and results of its operations;

(6) material legal proceedings;

(7) changes in securities or in the security for registered securities;

(8) defaults upon senior securities;

(9) material increases or decreases in the amount outstanding of securities or indebtedness;

(10) the results of the submission of matters to a vote of security holders;

(11) transactions with directors, officers, or principal security holders;

(12) the granting of options or payment of other compensation to directors or officers; and

(13) any other information which the issuer deems to be of material importance to security holders.

In addition to disclosure on Form 20-F, the SEC "strongly encourages" foreign private issuers to disclose any change to or waiver from the code of ethics obligations of their senior officers on a Form 6-K or its Internet website.

The Form 6-K is not deemed to be "filed" for the purpose of Section 18 of the Exchange Act or otherwise subject to the liabilities of that Section.[47] If the securities of the issuer are listed on a national securities exchange or with the Nasdaq National Market, a copy of the Form 6-K must be filed with such exchange or market. Foreign private issuers are not subject to precise deadlines by which Form 6-Ks must be filed; rather they must "promptly" file information that has already been made public.

E. Corporate Governance Requirements of the New York Stock Exchange and Nasdaq

Although not directly mandated by the Sarbanes-Oxley Act, each of the New York Stock Exchange ("NYSE") and Nasdaq adopted new rules in November 2004 and in June 2004, respectively, regarding the corporate governance standards for listed issuers. In each case, the new rules provide certain accommodations for foreign private issuers that allow them to follow home-country corporate governance practices.

1. *New York Stock Exchange Corporate Governance Requirements*

The NYSE has granted substantial flexibility to listed foreign issuers by allowing them to follow their home country corporate governance practices, rather than the NYSE's new corporate governance requirements set forth in Rule 303A, where the NYSE's requirements are inconsistent with the issuer's home country practices. The only exception to this policy relates to the following requirements, which all listed foreign issuers are required to follow:

- *Audit Committee—Sarbanes-Oxley Act*. Listed foreign issuers must have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act, including the requirement that each member of the audit committee be an independent member of the board of directors.[48] Listed foreign issuers had until July 31, 2005 to comply with this requirement.
- *Corporate Governance Practices*. Listed foreign issuers must disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards. Such disclosure may be provided on the issuer's web site (provided it is in the English language and accessible from the United States), its annual report to shareholders or in its annual report filed with the SEC on Form 20-F.

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47 Section 18 of the Exchange Act imposes liability on any person who makes a false or misleading statement in any registration statement or in any document or report filed with respect to such registration statement.

48 This general requirement is subject to various exemptions for foreign private issuers discussed in Part II.C.1. above.

- *Certification Requirement and Notification of Noncompliance*. The CEO of a listed foreign issuer must certify to the NYSE each year that he or she is not aware of any violation by the company of NYSE corporate governance listing standards, qualifying the certification to the extent necessary. This certification must be disclosed in the company's annual report to shareholders or, if the company does not prepare an annual report to shareholders, in the company's annual report on Form 20-F filed with the SEC. In addition, the CEO of a listed foreign issuer must promptly notify the NYSE in writing after any executive officer of the issuer becomes aware of any material non-compliance with the applicable NYSE corporate governance standards.

2. *Nasdaq Corporate Governance Requirements*

The new Nasdaq corporate governance rules permit a foreign private issuer to obtain an exemption from Nasdaq from certain provisions where the Nasdaq rules would require the issuer to take actions contrary to its home-country laws, rules and regulations applicable to the issuer, or that are contrary to general business practices in the issuer's home country. Any exemptions granted by Nasdaq must be disclosed in the issuer's annual report on Form 20-F, together with a description of the alternative corporate governance practices followed by the issuer. However, Nasdaq will not consider any exemptions that would be contrary to the U.S. securities laws or to the rules promulgated by the SEC pursuant to the Sarbanes-Oxley Act. Accordingly, as with NYSE-listed companies, all Nasdaq-listed companies will need to comply with the audit committee requirements of Rule 10A-3 under the Exchange Act. Foreign private issuers had until July 31, 2005 to comply with this requirement.

Part III: Stock Exchange Listings and Exchange Act Registration-Related Requirements

In addition to registration under the Securities Act discussed in Part I of this article, an issuer (whether foreign or domestic) will normally be required also to register securities under the Exchange Act. This obligation will arise if the securities offered in the United States are to be listed on a national securities exchange such as The New York Stock Exchange as well as the Nasdaq National Market.[49] A foreign private issuer may list equity securities for trading on the New York Stock Exchange or on the Nasdaq National Market by filing with the SEC a registration statement pursuant to Section 12(b) or Section 12(g) of the Exchange Act, as applicable, with respect to such securities and by filing a listing application with the New York Stock Exchange or the Nasdaq National Market, as applicable.

Foreign issuers and their officers and directors, however, are largely exempt from the proxy solicitation and the insider reporting and short-swing trading provisions of the Exchange Act.

A. Listing on the New York Stock Exchange

A foreign private issuer may elect to qualify for a listing either under the New York Stock Exchange's alternate listing standards for non-U.S. companies (the "Alternate Listing Standards") or the New York Stock Exchange's domestic listing criteria. The Alternate Listing Standards are designed to encourage major non-U.S. companies to list their shares on the New York Stock Exchange. New York Stock Exchange domestic listing requirements call for a minimum distribution of a company's shares within the United States, or in the case of North American companies, within North America.[50] This is a major obstacle for many large non-U.S. companies which may otherwise fulfill the aggregate market value and earnings requirements for listing on the New York Stock Exchange. The principal Alternate Listing Standards criteria focus on worldwide rather than U.S. or North American distribution of a non-U.S. company's shares and apply only where there is a broad, liquid market for the company's shares in its country of origin.

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49 A foreign company with 300 or more shareholders resident in the United States who acquired the company's securities through secondary trading or through a private placement in the United States has the choice of either registering or establishing the exemption under Rule 12g3-2(b). This requirement applies even if the company has no assets in the United States, did not actively sell its securities to U.S. shareholders, and has no other connection with the United States.

50 New York Stock Exchange domestic listing criteria requires either one of the following: (1) at least 2,000 U.S. holders of 100 shares or more; (2) 2,200 U.S. stockholders as well as an average monthly trading volume of 100,000 shares; or (3) (i) 500 U.S. stockholders, (ii) an average monthly trading volume of 1 million shares, and (iii) 1.1 million U.S. publicly-held shares.

A foreign private issuer must meet the following criteria to qualify under the Alternate Listing Standards:

(1) 5,000 holders of 100 or more shares worldwide;

(2) 2.5 million publicly-held shares worldwide; and

(3) $100 million market value of publicly-held shares worldwide.[51]

In addition, an issuer must satisfy one of the following four standards to qualify for listing under the Alternate Listing Standards:

(1) at least an aggregate $100 million in pre-tax earnings for the last three fiscal years (a minimum of $25 million in each of the two most recent fiscal years); or

(2) (i) at least $500 million in global market capitalization, (ii) at least $100 million in revenues during the most recent 12 month period, and (iii) an aggregate $100 million operating cash flow for the last three fiscal years (a minimum of $25 million in each of the two most recent fiscal years); or

(3) at least $750 million global market capitalization ($75 million for the most recent fiscal year); or

(4) (i) at least $500 million in global market capitalization, (ii) at least 12 months of operating history, (iii) parent or affiliated company is a listed company in good standing, and (iv) a parent or affiliated company retains control of the entity or is under common control with the entity.

B. Listing on the Nasdaq National Market

Listing and maintenance standards of the New York Stock Exchange, which is generally considered a market for larger, seasoned issuers, are significantly higher than the listing requirements of the Nasdaq National Markets. Therefore, a foreign private issuer may decide to qualify its equity securities for trading on the Nasdaq National Market by filing a listing application with the Nasdaq National Market. A draft of such listing application should be submitted prior to the date upon which it is desired to have the application approved. The listing application does not require significant information in addition to that which appears in the final prospectus included in the registration statement filed under the Securities Act.

Nasdaq imposes certain listing standards on issuers desiring to have their securities trade on Nasdaq. Somewhat higher standards apply for inclusion in the Nasdaq National Market.

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51 Companies listing under item (4) below are only required to have $60 million market value of publicly-held shares worldwide.

For common stock (or ADRs representing such common stock) to be eligible for initial inclusion in Nasdaq, there must be:

(1) at least 1,000,000 publicly-held shares worldwide (this calculation excludes shares held by officers, directors and 10% shareholders) or in the case of ADRs, at least 100,000 ADRs issued;

(2) 300 holders of record of the shares (this requirement does not apply to ADRs); and

(3) three registered market makers for the shares or ADRs.

In addition, an issuer must have a market capitalization of $50 million or stockholders' equity of $5 million or net income of $750,000 in its most recently completed fiscal year (or two of three of its most recently completed fiscal years).

For inclusion in the Nasdaq National Market, an issuer must have at least 1,100,000 publicly-held shares worldwide and 400 holders of record of its shares and the initial bid price of its securities must be at least $5.00 per share (or ADR). In addition, for inclusion in the Nasdaq National Market, an issuer must satisfy one of three alternate standards:

(1) the market value of publicly-held shares must be at least $8 million and the issuer must have stockholders' equity of at least $15 million and pre-tax income of at least $1 million in its most recent fiscal year (or two of three of its most recent fiscal years);

(2) the market value of publicly-held shares must be at least $18 million and the issuer must have stockholders' equity of at least $30 million and a two-year operating history; or

(3) the market value of publicly-held shares must be at least $20 million and the issuer must have either a market capitalization of at least $75 million or total assets and total revenues of at least $75 million each in its most recently completed fiscal year (or two of three of its most recently completed fiscal years).

Upon inclusion in the Nasdaq National Market, an issuer must comply with certain maintenance standards to remain eligible for trading; these standards are somewhat less than those for initial listing. Nasdaq may require the prompt public disclosure by listed companies of material developments that may not otherwise require prompt disclosure under the Exchange Act.

C. Non-Applicability of Proxy Rules and Certain Insider Trading Provisions to Foreign Private Issuers

U.S. domestic companies having securities registered under the Exchange Act become subject to the requirements of Sections 14 and 16 of the Exchange Act. Section 14 sets forth the requirements with respect to any voting proxies submitted to holders of securities registered under the Exchange Act and with respect to tender offers for equity securities registered under the Exchange Act. Section 16(a) requires certain share ownership disclosure reports to be filed by directors and officers of any company with a class of equity securities registered under the

Exchange Act and also by beneficial holders of more than ten percent of any class of such securities. Section 16(b) subjects such reporting persons to certain "short-swing profit" recapture provisions whereby any such person realizing any profit on a purchase and subsequent sale, or sale and subsequent purchase, of any class of registered equity securities within a six-month period will be required to pay such profit over to the company. However, securities of a foreign private issuer are not subject to the proxy solicitation provisions of Section 14 or to the provisions of Section 16. Rule 3a12-3 under the Exchange Act exempts from the operation of Section 14 (except for the tender offer provisions) and Section 16 of the Exchange Act securities registered by foreign private issuers.

In accordance with the Sarbanes-Oxley Act, the SEC has promulgated Regulation BTR, which prohibits an issuer's directors and officers from trading in an issuer's equity securities during a pension plan blackout period. Unlike the insider trading provisions of Section 16 of the Exchange Act, Regulation BTR does apply to foreign private issuers. Regulation BTR, however, limits such application to those situations where 50% or more of the participants or beneficiaries located in the United States in individual account plans maintained by the issuer are subject to a temporary trading suspension in issuer equity securities, and the affected participants and beneficiaries represent 15% or more of the issuer's worldwide employees or more than 50,000 people. To the extent an issuer does issue any notice required under Regulation BTR to its directors and executive officers concerning any equity security subject to a blackout period, the issuer must file a copy of such notices with its annual report on Form 20-F relating to the fiscal year in which such notice is given.

The tender offer provisions of Section 14 and Regulation 14D under the Exchange Act regulate tender offers in respect of equity securities registered pursuant to Section 12 of the Exchange Act and thus would be applicable to an issuer of equity securities in the United States. In addition, other provisions of the Exchange Act (see Part V) apply so as generally to prohibit fraudulent, deceptive or manipulative acts in connection with purchases by an issuer of its own equity securities.

In 1999, the SEC modified the rules relating to tender offers, exchange offers and rights offers applicable to securities of foreign private issuers. Foreign private issuers in which U.S. security holders hold 10% or less of the class of securities subject of the offer are exempt from most of the U.S. regulatory scheme. Foreign private issuers in which U.S. security holders hold more than 10% but no more than 40% of the class of securities subject to the offer have limited relief from the U.S. regulatory scheme; the entire U.S. regulatory scheme will apply in the event U.S. ownership exceeds 40%.

D. Disclosure Requirements for Shareholders Pursuant to Section 13(d)

The SEC requires, pursuant to Section 13(d) of the Exchange Act, that when a shareholder or a group of shareholders acquire a large percentage of any class of equity securities of an issuer, that the shareholder file a statement disclosing this ownership. This disclosure is intended to provide warning to other shareholders that there might be a change of control. Any person, or group acting in concert that acquires any equity security, which is registered pursuant to Section 12 of the Exchange Act, so that the person owns more than 5% of the class of securities, is required to file a disclosure statement with the SEC. The statement must be filed within ten days of the acquisition that puts their ownership over 5%. The statement must be sent to the issuer, each exchange where the security is traded, and the SEC. The statement filed is either (a) Schedule 13G, available to investors who do not have a purpose of changing or influencing the control of the issuer, and that own 20% or less of the class, or (b) Schedule 13D, where Schedule 13G is not available. Schedule 13G requires disclosure of the following information:

(1) the identity of the owners of the securities, including their residence and citizenship; and

(2) the number of shares owned, and the amount of any rights owned to acquire shares either by the person filing the statement or by each associate of such person.

Schedule 13D requires, in addition to the information required by Schedule 13G, the following:

(3) the source and amount of the funds that will be used to make the purchase; in particular, disclosure of funds that were borrowed in order to acquire the securities;

(4) if the purpose of the acquisition is to acquire control of the issuer, any plans to liquidate the issuer, sell its assets, merge the issuer, or make major changes to the business of the issuer; and

(5) information on any contracts, arrangements, or understandings entered into with respect to the issuer's securities.

If there are any material changes with regard to the above information, an amendment must be sent to the issuer and the exchanges where the security is traded, and filed with the SEC.

Part IV: Securities Act Liability and Indemnification

Various provisions of the Securities Act and the Exchange Act prohibit manipulation or fraud in connection with securities transactions.

A. Liabilities Imposed under the Securities Act

Under Section 11 of the Securities Act, if at the time the registration statement became effective it contained any untrue statement of a material fact or omitted to state a material fact required to be stated or necessary to make the statements therein not misleading, any person acquiring a security covered by an effective registration statement may sue every person who signed the registration statement (which generally includes the issuer, its principal executive officer, its principal financial officer, its principal accounting officer and at least a majority of its board of directors and its duly authorized representative in the United States[52]); every person who is, or has consented to be named as a person who is about to become, a director at the time the registration statement became effective; every accountant, engineer, appraiser or other professional person who has with his consent been named as having prepared or certified any part of the registration statement; and every underwriter of the security. Any person controlling an issuer liable under Section 11 shall also be liable to the same extent as the issuer, unless the controlling person had no knowledge of or reasonable ground to believe the facts by which the issuer was held liable.

Under Section 11, the issuer is absolutely liable for material deficiencies in the registration statement irrespective of good faith or the exercise of due diligence.[53] By contrast, the standard of liability imposed upon directors, officers and others under Section 11 is not absolute. With respect to any part of the registration statement purporting to be based on the authority of an expert (for example, financial statements to the extent certified by independent public accountants) or purporting to be a copy or an extract from a report or valuation of an expert (collectively, the "expertized portions" of the registration statement), the officer or director may avoid liability if such person had *no reasonable grounds to believe* at the time such part of the registration statement became effective that (i) the statements were untrue or that there was an omission to state a material fact required to be stated or necessary to be stated in order to make the statements made therein not misleading or (ii) that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy or extract from the report

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52 Section 6(a) of the Securities Act provides that the registration statement of a foreign private issuer must also be signed by a duly authorized representative of such issuer in the United States.

53 The issuer, in preparing the registration statement, will send a questionnaire to its officers and directors that will require such persons to furnish information that may have to be disclosed in the registration statement in order to ensure its completeness and accuracy.

or valuation of the expert. With respect to any non-expertized portion of the registration statement (for example, the general description of the issuer and its business, *i.e.*, the majority of the document), on the other hand, the officer or director must have had, after reasonable investigation, *reasonable grounds to believe* at the time the registration statement became effective that the statements in such non-expertized portion of the registration statement were true and that there was no omission to state a material fact required to be stated or necessary to make the statements not misleading.

Thus, officers and directors must exercise "due diligence" with respect to the preparation of the registration statement to avoid liability; they may not avoid liability by solely relying upon counsel or some other person to prepare the registration statement. Typically, the "outside"[54] directors read the registration statement prior to its initial filing with the SEC and prior to the date it is declared effective, and are given an opportunity at both stages to ask questions of appropriate persons or to make comments; officers and "inside"[55] directors typically are more involved in the preparation of the registration statement, reading each draft of the registration statement, including the version filed with the SEC and the version that becomes effective, and are given an opportunity to ask questions and make comments.[56] Underwriters similarly have a "due diligence" defense to liability claims for misleading statements in or omissions from the registration statement and, accordingly, their intensive involvement in the preparation and review of the registration statement (including the customary receipt of a "comfort letter" from the issuer's auditors which generally confirms that certain financial disclosures are consistent with an issuer's books and records and legal opinions as to the adequacy of disclosure and various other matters) is motivated in part by their desire to establish such defense.

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54 "Outside" directors are usually considered to be directors who have no affiliation with the company other than through their position as director of the company.

55 "Inside" directors include persons who serve as officers of the corporation or who in some other way are affiliated with the company in a capacity other than merely through their position as directors.

56 Rule 176 lists the following factors as among those pertinent to any determination as to whether or not a person has discharged his "due diligence" under Section 11 of the Securities Act: (1) the type of issuer, (2) the type of security, (3) the type of person, (4) the office held when the person is an officer, (5) the presence or absence of another relationship to the issuer when the person is a director or proposed director, (6) reasonable reliance on officers, employees and others whose duties should have given them knowledge of the particular facts (in light of the functions and responsibilities of the particular person with respect to the issuer and the filing) and (7) when the person is an underwriter, the type of underwriting agreement, the role of the particular person as an underwriter, and the availability of information with respect to the issuer. It should be noted that, as indicated above, there is variation in the nature of the duty to the public on the part of the different persons subject to liability under Section 11. Accordingly, not every specified factor would apply to every person, nor would each factor have the same weight upon every person to whom it applied. In any event, the list of factors listed in Rule 176 is not meant to be exhaustive, and the Rule is not a safe harbor.

In addition, under Section 12(a)(2) of the Securities Act, sellers have liability to purchasers for offers or sales of a security by means of a prospectus or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading. Section 12(a)(2) provides that the persons liable under the Section will only be liable "to the person purchasing such security from him"; however, courts have, under certain circumstances, imposed liability in the absence of strict privity between the parties. Section 15 imposes liability upon any person held to control any person found liable under Sections 11 or 12 of the Securities Act. Liability is imposed "to the same extent as the controlled person", unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which liability of the controlled person is found to exist. The Securities Act also contains an anti-fraud provision, Section 17, similar in effect to Section 10(b) of the Exchange Act discussed in Part V of this article. Liability under Section 17(a)(2) attaches to an untrue statement of a material fact or an omission to state a material fact necessary to make the statement made, in light of the circumstances in which they were made, not misleading, by means of which money or property is obtained.

The Securities Offering Reform Rules have clarified the Securities Act liability treatment of information provided in a prospectus supplement and Exchange Act reports incorporated by reference. Section 12 and Section 17 liability determination must be made as of the time the investor has taken the action the investor must take to become committed to purchase the securities; so that any information conveyed to the investor only after the time of the sale (including a contract of sale) will not be taken into account. However, information contained in a prospectus or prospectus supplement that is part of a registration statement that is filed after the time of the contract of sale will be part of and included in a registration statement for purposes of liability under Section 11 at the time of effectiveness, which may be at or before the time of the contract of sale. Finally a free writing prospectus that is not part of a registration statement will not be subject to Section 11 liability, although it will be subject to Section 12(a)(2) and Section 17(a)(2) liability.[57]

B. Indemnification from Liability under the Securities Act

Many companies indemnify, under certain circumstances, their employees against any liability that may be imposed upon such employees by reason of their service to the company.

[57] A free writing prospectus, while considered to relate to a registered securities offering, is not included in and does not become part of the registration statement unless the issuer files it as part of the registration statement or includes it in a filing that is incorporated by reference into the registration statement. Thus, the responsibility and liability of offering participants for a particular free writing prospectus that is not incorporated or included in the registration statement can arise only under Section 12(a)(2) and Section 17(a)(2) and the other anti-fraud provisions. This is true regardless of whether the free writing prospectus contains information from the registration statement including information that has been included with the consent of an expert.

Such indemnity may be provided in various forms. In jurisdictions that give companies the express power to indemnify their employees, such indemnity provisions may be found in the company's charter, by-laws, or other organic document or in the employment contracts entered into between the company and the employee. Companies may also obtain officers' and directors' liability insurance from third party insurance carriers. These provisions expressly provide for indemnification not only for judgments or fines that may be imposed upon an officer or director, but also for attorneys' fees and expenses incurred in such actions.

If the company has made provision for the indemnity of its officers and directors, these arrangements must be disclosed in the registration statement. In addition, any arrangements between the issuer and underwriter providing for indemnification by the registrant of the underwriters or their controlling persons against liabilities under the securities laws must also be disclosed in the prospectus.

The SEC has taken the position that indemnification of officers, directors or controlling persons by the issuer for liability arising under the Securities Act is against public policy and, therefore, unenforceable. The SEC has indicated that in ruling upon requests for acceleration of the effective date of a registration statement (see Part I of this article) it will refuse to accelerate the effective date if there is a charter provision, by-law, contract, statute or other arrangement[58] providing for indemnification by the registrant of any of its officers, directors or controlling persons, unless (a) a waiver is obtained from such person of the benefits of such indemnification with respect to the proposed offering or (b) an undertaking in a specified form is contained in the registration statement.[59] It is customary to include the undertaking in the registration statement rather than to obtain waivers of indemnity. In those rare instances where acceleration is not requested, the undertaking language must be included in the prospectus.

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[58] Insurance provided by a third–party carrier against liabilities under the Securities Act, whether the cost of such insurance is borne by the issuer, the insured or some other person, is not a bar to acceleration of the effective date of the registration statement.

[59] The undertaking reads as follows: "Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the [specified indemnification] provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any such action suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue."

Part V: Liability under the Exchange Act: Prohibition of Fraud, Deception, and Misleading Statements

The most significant provision in the federal securities laws seeking to prohibit manipulation or fraud in connection with securities transactions is Section 10(b) of the Exchange Act, which forbids the use of any "manipulative" or "deceptive" device in connection with the purchase or sale of any securities.[60]

A. Rule 10b-5

The most significant area of litigation under Section 10(b) has involved Rule 10b-5 promulgated thereunder by the SEC. This Rule prohibits the use of any device, scheme or artifice to defraud; the making of any untrue statement of a material fact or the omission of a material fact necessary to make the statements made not misleading; or the engaging in "any act, practice or course of business" that would operate to deceive any person in connection with the purchase or sale of any securities. Information is "material" if a reasonable investor would consider it important, in the total mix of facts, to an investment decision, *e.g.*, whether to buy, sell or hold the security.

The scope of this Rule is extremely broad and has given rise to substantial litigation in U.S. courts. Suits often take the form of "class actions" purporting to represent all purchasers or sellers of an issuer's securities during a period when the issuer's disclosures to the market were, in the view of the plaintiffs, false or misleading.

Under Rule 10b-5, the issuer (whether domestic or foreign) and its employees or agents may be liable for disseminating false or misleading information or suppressing material information about the issuer. Liability can be based on information contained in any report filed with the SEC, *i.e.*, the issuer's formal disclosure, or upon any other public statements issued by the company, *i.e.*, its informal disclosure. In this regard, it is particularly important that press releases and other public information be carefully reviewed prior to release both with a focus on what is included as well as what is omitted. Liability under Rule 10b-5 may not be avoided by not making information publicly available in many circumstances because the issuer may be under an affirmative obligation to make public disclosure of material information. This is especially the case when the issuer is offering or trading in its own securities in the market. Certain

[60] Civil liability may also be imposed under Section 9(e) of the Exchange Act, which prohibits certain securities transactions deemed to be manipulative (*i.e.*, stabilization of market prices in contravention of SEC rules) and Section 18 of the Exchange Act, which permits suits by persons who relied upon false or misleading statements contained in documents filed with the SEC. However, those sections are attenuated versions of the anti–fraud and anti–manipulation sections discussed in greater detail in Parts IV and V of this article.

information, which would clearly be material, may nevertheless be kept confidential in appropriate circumstances. It is very important that all corporate personnel be aware of their responsibility not to disclose any such confidential material information in an informal or improper manner to "outsiders." Such confidential information must be disclosed by the issuer at an appropriate time and in an appropriate way (such as a public filing of one of the forms described herein or in a press release such that the news is likely to reach the public). Personnel should be particularly cautious when answering inquiries from such persons as analysts, brokerage houses and institutional investors about material developments such as earnings expectations, acquisitions, securities offerings or major changes in management. It is important to not make "selective" disclosure of material, non-public information.

Furthermore, liability may arise under Rule 10b-5 from "insider" trading in securities of the issuer while material information remains undisclosed. In this connection there will be times when insiders will be prohibited from trading entirely, such as when a material event exists but has not been publicly disclosed. A corporate insider also may be held liable for the actions of his "tippees," those persons who receive the tip of the non-public information, even though the insider has not personally profited. Concerns about improper tipping or use of material non-public information is most critical in connection with equity securities. However, certain non-public information concerning debt securities could also have an impact on the market, such as an imminent default or plans to redeem securities at a premium.

A full discussion of how a "public company" should manage its release of information that could be material to the securities markets is beyond the scope of this article. It should be noted, however, that while Regulation FD (Fair Disclosure), which expressly prohibits selective disclosure to analysts and others, does not apply to foreign private issuers, the actions that are prohibited under Regulation FD nevertheless may be the foundation of a claim under Rule 10b-5. Foreign private issuers also may wish to consult Regulation FD for guidance as to the SEC's views in the sensitive area of selective disclosure.

B. Regulation M

Regulation M under the Exchange Act makes it unlawful for participants in a distribution of securities to purchase any such security, or any securities of the same class or series, until completion of their participation in the distribution. This is an anti-manipulation rule designed to prevent market priming or manipulation of the price in a distribution. The prohibition extends to underwriters, brokers, dealers, the issuer, persons who control the issuer, selling stockholders and, possibly, officers and directors. Certain exemptions exist, *e.g.*, specified stabilizing transactions by underwriters are permitted, and the SEC may grant additional exemptions upon application.

C. Liability under Section 10(b)

Although there is no language in the Exchange Act's Section 10(b) or Rule 10b-5 that explicitly provides for any civil liabilities for violations, the U.S. Supreme Court has confirmed that the use of manipulative or deceptive devices in connection with the sale of securities creates a civil liability under Section 10(b) that may be remedied in the courts by a private right of action. Plaintiffs must allege and prove four elements in order to make a case under Section 10(b): (a) the use of mails or instrumentalities of interstate commerce,[61] (b) the purchase or sale by such plaintiff of a security, (c) the use of a manipulative or deceptive device by the defendant and (d) the intent of the defendant to deceive, manipulate or defraud. In general, common law concepts of damages in fraud actions are applied in assessing claims under Section 10(b).

61 This condition will be met in virtually any securities transaction.

Part VI: The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act of 1977 ("FCPA") requires companies to maintain accurate books, records and accounts and to devise and maintain a system of internal accounting controls (the "Accounting Standards provisions")[62] and prohibits companies and their officers, directors, shareholders and employees from engaging in certain corrupt practices with respect to foreign officials (the "Foreign Corrupt Practices provisions").

A foreign private issuer will be subject to both the Accounting Standards provisions and the Foreign Corrupt Practices provisions upon making a public offering of securities in the United States. In addition, the Foreign Corrupt Practices provisions would apply to the issuer's officers, directors, employees and any shareholder acting on their behalf in the United States.

The Accounting Standards provisions require public companies:

(1) to make and keep books, records and accounts that, in reasonable detail, accurately and fairly reflect the transactions in and dispositions of the assets of the company; and

(2) to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

(a) transactions are executed in accordance with management's authorization;

(b) transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles or other applicable criteria and to maintain accountability for assets;

(c) access to assets is permitted only in accordance with management's general or specific authorization; and

(d) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

The Foreign Corrupt Practices provisions prohibit the use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay or authorization of the payment of any money or an offer, gift, promise to give or authorization of the giving of anything of value to a foreign official, a foreign political party or an official thereof or any candidate for foreign political office for purposes of (a) influencing any act or decision of such foreign official or foreign political party or party official or candidate in his or its official capacity, including a decision to fail to perform his or its official functions, or

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62 These provisions are incorporated in Section 13(b) of the Exchange Act.

(b) inducing such foreign official or political party or party official or candidate to use his or its influence with a foreign government or instrumentality thereof to influence any act or decision of such government or instrumentality in each case in order to assist a company in obtaining or retaining business for or with, or directing business to, any person.

The definition of "foreign official" includes officials and employees of foreign governments except those employees whose duties are essentially ministerial or clerical. The FCPA's legislative history states that payments for purposes such as expediting shipments through customs, securing required permits or obtaining adequate police protection usually should not be considered violations of the FCPA. The Foreign Corrupt Practices provisions also prohibit the offering of anything of value to any person while knowing or having reason to know that all or a portion of such thing of value will be used for the proscribed purposes described above.

Companies and their controlling persons (and, in the case of the Foreign Corrupt Practices provisions, their officers, directors or shareholders acting on behalf thereof) that are found to have violated the FCPA may be subject to criminal penalties, including fines and imprisonment. The fine imposed upon an individual for violation of the Foreign Corrupt Practices provisions may not be paid by such individual's employer. Companies violating the FCPA provisions are also subject to the Exchange Act's various civil enforcement mechanisms, including an action for injunctive relief by the SEC.

Part VII: State Laws

A. State Securities Laws

All 50 U.S. states have laws regulating the offer and sale of securities. These laws, commonly known as "blue sky" laws,[63] must be complied with in addition to the applicable federal laws. In general, blue sky laws contain three distinct types of regulatory provisions: (a) antifraud provisions, (b) provisions requiring the registration or licensing of certain persons engaging in the securities business and (c) provisions requiring the registration or qualification of securities. In 1996, Congress enacted The National Securities Markets Improvement Act of 1996 that provides for federal preemption of state laws and regulations requiring registration of securities or securities transactions in many cases. As a result, the need to register securities at the state level has been eliminated in connection with offerings of securities meeting certain standards. Section 18 of the Securities Act provides exemptions for four categories of "covered securities" (which includes securities listed on the New York Stock Exchange or Nasdaq National Market) that are exempt from all state requirements with respect to (i) registration and qualification of securities or securities transactions, (ii) prohibitions, limitations or conditions on the use of any offering document in connection with the offering of such security and (iii) prohibitions, limitations or conditions on offers or sales of the security based on the merits of the offering or the issuer.

B. State Legal Investment Laws

The various state legal investment laws govern the investment of funds of insurance companies, banks and fiduciaries. These laws may severally circumscribe the type or amount of investments such institutional investors may make in the securities of foreign issuers. Counsel for the underwriters must undertake to determine whether those large institutional investors that generally provide the market for the securities being offered by the issuer will be permitted legally to invest in the offering. In addition to legal restrictions, the internal policies of such institutional investors regarding the investment of their funds in foreign private issuers may also restrict investment in the offering. In practice, the number of potential purchasers who are either not restricted by these laws or who would be permitted under the laws and their own policies to invest is sufficiently large that the restrictions will impose no serious impediment to the offering.

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63 The term derives from early efforts to control door-to-door securities salesmen who were said to be able to sell unsuspecting farmers "the blue sky."

The foregoing is a summary of the principal U.S. securities law requirements that would be applicable to a foreign private issuer making a public offering of its equity securities in the United States. This article is intended to be used as a general outline only and is not intended to replace legal analysis with respect to specific facts and issues. Securities counsel should be consulted as to all questions that arise with respect to these laws.

KEVIN D. CRAMER, RICHARD M. KOSNIK AND J. ERIC MAKI

October 2005

Exhibit A

[COMPANY]
DISCLOSURE COMMITTEE CHARTER

This Disclosure Committee Charter has been adopted by the chief executive officer and chief financial officer of [Company] (the "Company") as a committee of the Company's management. The Disclosure Committee shall report to, and be subject to the supervision and oversight of, the chief executive officer and the chief financial officer of the Company and shall meet as frequently as circumstances require, and as the members deem necessary or appropriate.

Membership

The membership of the Disclosure Committee shall consist of the following officers of the Company: [the principal accounting officer (or the controller), the general counsel or senior legal officer with disclosure responsibilities who reports to the general counsel, the principal risk management officer, the client-investor relations officer (or an officer with equivalent responsibilities), and such other officers or employees, including individuals associated with the Company's business units, as the Company deems appropriate], and any such other officer or officers of the Company or its subsidiaries that may be appointed by the chief executive officer and the chief financial officer of the Company to serve on the Disclosure Committee.

[One member of the Disclosure Committee will be appointed by the chief executive officer and the chief financial officer as chairperson. The chairperson will be responsible for scheduling and presiding over meetings and preparing agendas. The chief executive officer and the chief financial officer shall also have the power at any time to change the membership of the Disclosure Committee.]

The chief executive officer and the chief financial officer may, at any time, assume any or all of the responsibilities of the Disclosure Committee identified in this Charter, including, for example, determining the Company's disclosure obligations, when time does not permit the full Disclosure Committee to meet. The Disclosure Committee may designate two or more Disclosure Committee members, at least one of whom shall be an attorney knowledgeable about SEC rules and regulations with respect to disclosure and at least one of whom shall be knowledgeable about financial reporting, who can, acting together, consider the Company's disclosure obligations (subject to the approval of the chief executive officer and the chief financial officer) in exceptional circumstances when time does not permit the Disclosure Committee to meet. Decisions made by these designated members shall be communicated to the full Disclosure Committee as soon as reasonably practicable after the decisions have been made.

Purpose and Duties

The purpose of the Disclosure Committee is to provide assistance to the chief executive officer and the chief financial officer in fulfilling their responsibilities relating to:

(1) The certification of disclosures and reporting procedures established by the Securities and Exchange Commission (the "SEC") and the Sarbanes-Oxley Act of 2002;

(2) Consideration of the materiality of information required to be disclosed in, and review and supervision of the preparation of, the Company's periodic reports under the Securities Exchange Act of 1934 (the "Exchange Act") and other public disclosure;

(3) The design, establishment, maintenance, review and evaluation of the effectiveness of the disclosure controls and procedures of the Company[64] that ensure that material information is made known to the Disclosure Committee and is able to be provided, processed, summarized, and reported to the SEC on a timely basis;

(4) Disclosure of any significant deficiencies in the design or operation of the Company's disclosure controls and procedures and internal controls that could adversely affect the Company's ability to record, process, summarize, and report financial and other significant data;

(5) The evaluation of, and report of their conclusions about, the effectiveness of the Company's disclosure controls and procedures as required by the Exchange Act; and

(6) The discharge of the Company's disclosure obligations in such a way that disclosure is made (a) without any untrue statement of a material fact or omission to state a material fact necessary to make the statements made, in the light of the circumstances under which such statements were made, not misleading with respect to the period covered by the disclosure, (b) in a way that fairly presents in all material respects the Company's financial condition, results of operations and cash flows as of, and for, the periods presented in the disclosure, and (c) on a timely basis.

The Disclosure Committee shall also consider any such other matters, and take any such other actions, in relation to the Company's disclosure controls and procedures, as the Committee may, in its discretion, determine to be advisable to ensure that information required to be disclosed by the Company in its SEC periodic reports is recorded, processed, summarized, and reported in an accurate and timely manner.

The Disclosure Committee will encourage open communication among its members, the Company's external auditors, the internal auditors and the Company's management. In discharging its duties, the Disclosure Committee shall have full access to all the Company's books, records, facilities, and personnel, including the internal auditors.

64 As defined by the SEC, "disclosure controls and procedures" are the controls and other procedures of the Company that are designed to ensure that information required to be disclosed by the Company in the reports filed or submitted by the Company under the Exchange Act is recorded, processed, summarized, and reported within the time periods specified in the SEC's rules and forms.

Exhibit B

CERTIFICATION PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002[65]

I, [identify the certifying individual], certify that:

1. I have reviewed this annual report on Form 20-F of [identify company];

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the company as of, and for, the periods presented in this report;

4. The company's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) [and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f))][66] for the company and have:

a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the company, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b) [Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;]

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65 Each principal executive officer and principal financial officer of the registrant has to provide a separate certification. The required certification must be in the exact form set forth above.

66 The bracketed language may not need to be included in the 302 Certification. The bracketed language concerns internal control over financial reporting and appears in the published form of the 302 Certification. A certifying officer is permitted to omit the bracketed language until the new rules requiring a management report on internal control over financial reporting become effective as to the company (fiscal years ending on or after July 15, 2006 for foreign private issuers that are accelerated filers, and July 15, 2007 for non-accelerated filers). However, any company that adopts the internal controls prior to the deadline will need to file the certification that includes the bracketed language.

c) Evaluated the effectiveness of the company's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

d) Disclosed in this report any change in the company's internal control over financial reporting that occurred during the period covered by the annual report that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting; and

5. The company's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the company's auditors and the audit committee of the company's board of directors (or persons performing the equivalent functions):

a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the company's ability to record, process, summarize and report financial information; and

b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the company's internal control over financial reporting.

Date: ______________________ By: ______________________

[Signature]

____

[Title]

Exhibit C

CERTIFICATION PURSUANT TO 18 U.S.C. SECTION 1350, AS ADOPTED PURSUANT TO SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002

In connection with the annual report of [Company] (the "Company") on Form 20-F for the year ended , 200 , as filed with the Securities and Exchange Commission on the date hereof (the "Report"), each of the undersigned officers of the Company certifies, pursuant to 18 U.S.C. §1350, as adopted pursuant to §906 of the Sarbanes-Oxley Act of 2002, that, to such officer's knowledge:

(1) The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and

(2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company as of the dates and for the periods expressed in the Report.

Date: , 200

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Name:
Title: [Chief Executive Officer]

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Name:
Title: [Chief Financial Officer]

The foregoing certification is being furnished solely pursuant to 18 U.S.C. § 1350 and is not being filed as part of the Report or as a separate disclosure document.

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RR DONNELLEY
GLOBAL CAPITAL MARKETS

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