



## Foreign Private Issuers of Equity Securities in the United States

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## ABOUT THIS GUIDEBOOK

This guidebook is written for non-U.S. companies that are considering entering the U.S. equity capital markets or already have equity securities that trade in the U.S. In a number of ways, U.S. securities laws treat foreign non-governmental issuers of securities differently from U.S. issuers.

U.S. securities laws and regulations generally apply equally to U.S. domestic issuers and foreign private issuers of securities issued or traded in the U.S. Such laws and regulations cover, among other things, registration of public offerings under the Securities Act of 1933 (the “Securities Act”), ongoing reporting by public companies under the Securities Exchange Act of 1934 (the “Exchange Act”), and anti-fraud and other types of liability.

However, over time the U.S. Securities and Exchange Commission (the “SEC”) has provided accommodations for foreign private issuers in the SEC’s rules, regulations and forms and, informally, in the SEC staff’s administrative review process. This was due, in part, in recognition of potential inconsistencies between U.S. and non-U.S. securities regulations, as well as to make the U.S. markets more attractive to foreign private issuers.

Historically, these accommodations have included:

- in presenting financial statements, the ability to use home country generally accepted accounting principles (“GAAP”), with a reconciliation to U.S. GAAP rather than full U.S. GAAP reporting;
- less extensive executive compensation disclosure than for U.S. domestic issuers;
- a later filing date for annual reports than for U.S. domestic issuers;
- no required quarterly reporting;
- less detailed periodic reports (Form 6-K) than for U.S. domestic issuers, based principally upon home country disclosure;
- an exemption from the U.S. proxy requirements; and

- an exemption from certain U.S. insider trading reporting requirements and rules.

More recent accommodations (within the last 15 years) have included:

- in presenting financial statements, the ability to use International Financial Reporting Standards (“IFRS”),<sup>1</sup> as issued by the International Accounting Standards Board (“IASB”), without a U.S. GAAP reconciliation;
- a “safe harbor” to facilitate the use of non-U.S. press releases and press conferences in connection with offerings in multiple jurisdictions;
- the ability to extend certain rights offerings and exchange offers to U.S. shareholders without SEC registration;
- relief from a number of the U.S. tender offer rules for certain cross-border business combinations;
- new rules making it easier to de-register and terminate SEC reporting requirements if a foreign private issuer wants to exit the U.S. public markets.

These accommodations were done in a manner that balanced the needs of protecting investors and also improving the competitiveness of the U.S. public and private capital markets.

In addition, the New York Stock Exchange and Nasdaq have provided foreign private issuers alternative listing criteria and exceptions from many of the exchanges’ corporate governance requirements.

The SEC has also adopted rules not specifically directed at foreign private issuers but that have had the effect of making the U.S. markets more attractive to them. For example, in 1990 the SEC adopted Rule 144A and Regulation S, which facilitated cross border capital raising and trading activity. Securities Offering Reform, adopted in 2005, liberalized the communications regime applicable to all U.S. public offerings, particularly facilitating post-IPO public offerings. In addition, amendments to Rule 144 shortened the holding period for securities sold in a private offerings.

As a result of the concessions discussed above, a foreign private issuer accessing the U.S. public or

private markets will find a U.S. regulatory structure that imposes the most material requirements upon both U.S. domestic and foreign private issuers, but with a number of important exceptions and accommodations that ease the burden for foreign private issuers.

There are currently a number of proposals pending in the U.S. Congress that would ease the U.S. securities regulatory burden for both U.S. domestic and foreign private issuers, including by raising the Section 12(g) record holder trigger for Exchange Act registration from 500 record holders to as high as 2000 record holders and eliminating the “no general solicitation” requirement for private offerings of securities. In addition, the SEC is considering additional action that would extend the application of Securities Offering Reform to more issuers, thereby further easing the burden of accessing the U.S. markets for both U.S. domestic and foreign private issuers. Although the fate of these initiatives is as yet uncertain, and while the SEC and U.S. Congress continue to impose laws and regulations necessary to protect the integrity of the U.S. securities markets, in general they remain sensitive to the need to provide exceptions and accommodations for foreign issuers where necessary to maintain the competitiveness of the U.S. capital markets.

For a company contemplating its first offering of securities in the U.S., we recommend the following approach. Read the introduction. Obtain a recent example of a prospectus. Review Part I, referring to the prospectus for illustration of the disclosure discussed in Section I.B. Read the introduction to, and Sections A through C, of Part III. If a private placement of securities is under consideration, read Part IV. Consult other parts of the guidebook for information about specific issues of interest or for a complete perspective.

## ABOUT JONES DAY

Jones Day is a global law firm with 38 locations in the most important centers of business and finance throughout the world. With more than 2,500 lawyers, including more than 400 in Europe and 200 in Asia, Jones Day ranks among the world’s leading law firms. Jones Day acts as principal outside counsel to, or provides significant legal representation for, more than half of the Fortune Global 500 companies. 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 various jurisdictions, including Belgium, Dubai, France, Germany, Hong Kong, India, Italy, Mexico, 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.

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## INTRODUCTION

Set forth below is a summary of this guidebook's content and organization:

### OVERVIEW

#### INTRO: THE BASIC LEGAL FRAMEWORK

Provides an overview of the choice between a public and private offering in the U.S., as well as the basic legal framework for U.S. regulation of foreign private issuers.

#### PART I: INITIAL PUBLIC OFFERINGS (IPOS)

Discusses the initial public offering of securities in the U.S. by a foreign private issuer, including the registration process and required financial and non-financial disclosures to be included in the offering material.

#### PART II : ONGOING REPORTING AND PUBLIC OFFERINGS AFTER AN IPO

Describes continuing reporting obligations of a foreign private issuer following an initial public offering of securities. These principally comprise the obligations to prepare an annual report on Form 20-F and furnish in the U.S., under cover of Form 6-K, material reports made elsewhere (for example, in compliance with the reporting rules of the issuer's home country). Form F-1 integrates with Form 20-F, so the Form 20-F filing obligation essentially requires that a foreign private issuer update its initial registration statement every year. For this reason, after an issuer has become a public reporting company, the process of making further public offerings is quicker and easier.

#### PART III: CORPORATE GOVERNANCE

Sets forth the corporate governance and accountability provisions that must be observed by foreign reporting companies in accordance with the Sarbanes-Oxley Act and stock exchange rules. Noteworthy requirements relate to (1) certifications of internal financial controls by senior management and auditors, and (2) audit committees composed of independent directors.

#### PART IV: PUBLIC VS. PRIVATE OFFERINGS

Explains private placements, comparing them with public offerings. A stock exchange listing in the U.S. usually accompanies an initial public offering of common stock. Market practice nevertheless dictates that the disclosure in the offering memorandum for a Rule 144A offering, the most common form of private

placement, be substantially similar to that contained in a prospectus for a registered public offering, even though the offering memorandum is not filed with the SEC. Continuing reporting obligations resulting from a private placement of equity securities are generally not applicable. Corporate governance provisions are inapplicable to private issuers.

#### PART V: LISTINGS; SHARE OWNERSHIP REPORTING

Includes information concerning the listing standards of the NYSE and Nasdaq, as well as related registration requirements for securities that are traded on a U.S. securities exchange or certain other markets. Registration subjects the public company to the ongoing reporting requirements described in Part II. Shareholders owning more than 5 percent of a public company must file certain reports regarding their ownership pursuant to Section 13(d) and 13(g) of the Exchange Act, as specified in Part V.

#### PART VI: POTENTIAL LIABILITY RELATING TO PUBLIC OFFERINGS

Summarizes the liability provisions of the Securities Act regarding public offerings. 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 examines the availability of indemnity to these persons.

#### PART VII: POTENTIAL LIABILITY RELATING TO PRIVATE PLACEMENTS

Summarizes the liability provisions of the Exchange Act relating to disclosure outside of the context of a public offering, such as a private placement. This discussion includes the general "anti-fraud" and "anti-manipulation" provisions of Rule 10b-5.

#### PART VIII: ANTI-CORRUPTION PROVISIONS

Details the requirements of the Foreign Corrupt Practices Act of 1977, which requires the maintenance of internal controls and imposes prohibitions on certain corrupt practices regarding payments to certain foreign officials.

#### PART IX: ADDITIONAL RELEVANT LAWS

Provides a brief overview of state securities and other relevant laws. In most significant cases, state securities laws are not a concern because they are preempted by the federal securities laws.



## A. The Choice Between a Public and Private Offering

All securities offerings in the U.S. must be registered with the U.S. Securities and Exchange Commission (the “SEC”) unless an exemption from registration is available. In planning a U.S. securities offering, a non-U.S. company must therefore decide whether it will

- (1) seek to register securities for an offering to the U.S. public or
- (2) offer securities only to institutional or other sophisticated U.S. investors in a private placement exempt from registration.

To make an informed choice between these two options, a non-U.S. company should have some understanding of a public offering and its consequences even if the company’s preliminary inclination is to do a private placement. Such an understanding is also helpful because many private placement practices and rules, such as the appropriate scope of disclosure, have been derived by reference to those for public offerings. Accordingly, this guidebook first focuses on initial public offerings (in Parts I through III) and then explains private placements in comparison to them (Part IV).

Many non-U.S. companies conclude that any capital raising above a certain size should at least include a private placement in the U.S., for example in conjunction with a public offering in a non-U.S. company’s home jurisdiction.<sup>2</sup> A significant number of non-U.S. companies have found that their cost of capital is further lowered and their profile further enhanced through a public offering and listing in the U.S.<sup>3</sup> Such companies may also benefit from the opportunities to use their publicly traded shares in the U.S., instead of cash, to provide employee compensation and pay for acquisitions in the U.S. The use of equity as acquisition currency often has tax, as well as financing, advantages.

## B. The Legal Framework

**1. Public Offerings.** A foreign private issuer making a public offering of its equity securities in the U.S. will be subject to three basic federal securities laws:

- (1) the Securities Act, which governs the offering and sale of securities to the public by an issuer or certain selling shareholders;
- (2) the Exchange Act, which, among other things, governs the trading of securities in the secondary market, imposes periodic reporting obligations on listed and other public companies, and imposes certain ownership reporting obligations on their directors, officers and major shareholders relating to their trading activities in their company’s equity securities; and
- (3) the Sarbanes-Oxley Act of 2002, which enacted corporate governance, corporate accountability and accounting oversight provisions into federal law in the U.S.

From the perspective of an issuer, the U.S. securities laws are essentially disclosure based. The theory is that full disclosure facilitates efficient capital markets and thereby reduces the cost of capital. In addition to rules prescribing the necessary disclosure, U.S. securities regulation includes provisions on corporate governance and controls relating to the generation of disclosure. Corporate law is generally a matter of the state or foreign law of the company’s jurisdiction of incorporation. If a company is already listed on a stock exchange in a non-U.S. market, the listing rules of that jurisdiction often also have requirements that apply.

The securities laws of individual states in the U.S. also regulate offerings of securities, to the extent they are not preempted by the federal securities laws. Furthermore, the rules of the national securities exchanges, such as the New York Stock Exchange (“NYSE”) and the Nasdaq Stock Market (“Nasdaq”), impose certain obligations on companies whose securities are listed on such exchanges or markets.

**2. Private Placements.** A private placement may meet conditions under which it is exempt from the registration requirements of the Securities Act. In particular, these conditions restrict the initial distribution and subsequent resales of the securities to certain institutional investors and other persons. A foreign private issuer is *not*, simply as a result of a private placement, required to become a public reporting company in the U.S., subject to (i) the reporting obligations described in Part II and (ii) the corporate governance and other provisions of the Sarbanes-Oxley Act. However, the

general anti-fraud provisions of the Securities Act and Exchange Act apply to a private placement of securities in the U.S.

**3. Underwriters.** 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 U.S., investment banking firms will take steps to assist the issuer’s compliance with applicable laws and to protect themselves, as underwriters, from potential liability. In particular, underwriters demand a comfort letter from the issuer’s accountants providing certain assurances about the financial disclosure in the offering documents. They also require a 10b-5 letter from underwriter’s and issuer’s legal counsel to the effect that such counsel have no reason to believe that the offering documents contain a material misstatement or omission. Investment banking firms often follow similar procedures when participating in a private placement.

### C. The Special Regime for Foreign Private Issuers

A company may be classified as a U.S., domestic issuer or a non-U.S., foreign private issuer. 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 guidebook:

- the applicable disclosures that must be contained in public offering documents are somewhat less stringent than those applicable to U.S. issuers;
- financial statement requirements for foreign private issuers vary from those for domestic issuers;
- periodic reporting requirements are less burdensome for foreign private issuers than domestic issuers;
- upon request, the SEC will review, on a confidential basis, the initial registration statement of a foreign private issuer if such issuer (1) is a foreign government registering its debt securities, (2) is listed or is concurrently listing its securities on a non-U.S.

securities exchange, (3) is being privatized by a foreign government, or (4) can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction (whereas filings of initial and subsequent registration statements by a domestic issuer or a foreign private issuer not listed above, as well as filings of subsequent registration statements by a foreign private issuer listed above, must be public); and

- various provisions of the federal securities laws are not applicable to foreign private issuers (*e.g.*, the proxy rules relating to disclosure and certain procedures for the solicitation of shareholder votes).

A company incorporated outside the U.S. may still be treated as a U.S., domestic issuer and, therefore, not be eligible for these benefits.

The term “foreign private issuer” is defined under the Securities Act and the Exchange Act as any foreign corporation or organization (other than a foreign government) except an issuer that meets the following conditions:

- (1) more than 50 percent of the outstanding voting securities of such issuer are directly or indirectly held of record<sup>4</sup> by residents of the U.S.; and
- (2) any of the following:
  - (i) the majority of the executive officers or directors are U.S. citizens or residents;
  - (ii) more than 50 percent of the assets of the issuer are located in the U.S.; or
  - (iii) the business of such issuer is administered principally in the U.S.

Under this definition, a company incorporated outside the U.S. will be treated as a “foreign private issuer” if more than 50 percent of its voting securities are held by non-U.S. residents (without considering the three tests in (2) above). Even if such a company has more than 50 percent of its shares held by U.S. residents, it still will be treated as a foreign private issuer, but only if it does not satisfy any of these three tests.

A company's qualification as a foreign private issuer is determined initially as of a date within thirty days prior to its filing with the SEC of an initial registration statement for its initial public offering or listing in the U.S. Subsequently, its status is assessed once a year, on the last business day of its second fiscal quarter. If a company determines that it has ceased to be a foreign private issuer, then it must comply with the requirements for a domestic issuer beginning on the first day of the fiscal year following the determination date.<sup>5</sup>

# PART I: INITIAL PUBLIC OFFERINGS REGISTERED UNDER THE SECURITIES ACT

## A. THE FILING AND DELIVERY OF THE REGISTRATION STATEMENT FOR AN IPO

Under the Securities Act, each issuer that publicly offers securities in the U.S. must adequately disclose material information concerning its business and financial condition as well as the security being offered. This objective is achieved through:

- (1) the filing of a “registration statement” by the issuer with the SEC (which becomes a public document available to anyone) and
- (2) delivery to investors of a “prospectus”<sup>6</sup> (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. Although a price range of the security will be included in the preliminary prospectus, other information relating to the pricing of the security (which has not been determined at the time preliminary prospectuses are being circulated) will not.

A final prospectus must be delivered to all purchasers of securities 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<sup>7</sup> when the issuer electronically files<sup>8</sup> with the SEC the final prospectus meeting the requirements of Section 10(a) of the Securities Act. The filing condition is satisfied if the issuer makes a good faith and reasonable effort to file the prospectus within the required time frame of Rule 424 (*i.e.*, two business days after determination of the offering price).<sup>9</sup>

## B. THE CONTENT OF THE REGISTRATION STATEMENT FOR AN IPO

**1. International Convergence of Disclosure Rules for Common Stock Offerings.** In the case of a foreign private issuer conducting an initial public offering, a registration statement on Form F-1 is required.<sup>10</sup> Because of successful efforts towards international convergence of securities regulation, the disclosure rules under Form F-1 are substantially similar to those of other jurisdictions for offerings of common stock. Consequently, the preparation of disclosure for the U.S. can be easily combined with that for other jurisdictions, facilitating securities offerings in multiple jurisdictions.

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, established 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 20-F, for the most part verbatim, the language as well as the format of the IOSCO standards. In 2005, IOSCO’s standards were adopted by the European Union under the EU’s Prospectus Directive. Numerous other jurisdictions have implemented disclosure requirements which are compliant with IOSCO’s standards, including Hong Kong and Japan. Notwithstanding modified language and significant reorganization, the disclosure requirements under the IOSCO standards are generally comparable to the prior disclosure requirements of U.S. rules.

With respect to accounting and financial disclosure, a large majority of securities regulators around the world now accept IFRS. This is a recent development in the U.S., where the SEC began accepting IFRS from foreign private issuers in 2008. In November 2008, the SEC issued for comment a proposed roadmap for initially allowing and eventually *requiring* domestic U.S. issuers to report financial results in accordance with IFRS rather than GAAP. The SEC only permits the use of IFRS as issued by the IASB, as opposed to home-country variations of IFRS.

## 2. Overview of the Disclosure Rules under Form F-1.

Part I of Form 20-F contains information regarding the issuer that must be included in the prospectus forming part of the registration statement on Form F-1:

- (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.
- (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.

Foreign private issuers usually find that the most demanding disclosure requirements are those concerning financial information. These requirements are discussed below. Also discussed below are the disclosure rules relating to executive compensation, which are different for foreign private issuers than domestic issuers and require significantly less extensive information and analysis.

**3. Financial Statement Requirements.** In the prospectus for an initial public offering in the U.S., a non-U.S. company must present:

- **five years of selected financial data:** selected financial information for the five most recent financial years, including revenues, income, assets and share capital;<sup>11</sup>
- **three years of financial statements:** audited financial statements that cover the latest three financial years (except that a balance sheet for the earliest year in the three-year period is unnecessary if the issuer is not required to supply it in a jurisdiction outside the U.S.);<sup>12</sup>
- **pro forma financial data:** with respect to significant business combinations or dispositions<sup>13</sup> that have occurred or, in certain cases, are probable, and have not yet been reflected in the historical financial statements for a complete financial year, pro forma financial data showing how such business combinations or dispositions might have affected historical financial statements if they had been consummated at earlier times (the date of the latest balance sheet in the prospectus or, for pro forma income data, the beginning of the most recently completed financial year);<sup>14</sup> and
- **financial statements of significant businesses acquired or to be acquired:** with respect to a significant business acquired or to be acquired,<sup>15</sup> its financial statements (1) for the interim periods covered by the acquirer's financial statements in the prospectus and (2) for a number of financial years which increases in proportion to the relative size of the acquisition (as determined by relative pre-tax

income and asset tests) and which, depending on the acquisition size, may consist of either

- ✦ the most recent financial year,
- ✦ the two most recent financial years or
- ✦ the two most recent financial years of balance sheet data and the three most recent financial years of income and cash flow statement data.<sup>16</sup>

In addition to the audited annual financial statements specified above, **unaudited interim financial statements** covering at least the first six months of the financial year are necessary if the prospectus is dated more than nine months after the end of the last audited financial year.<sup>17</sup> Unlike U.S. issuers, non-U.S. issuers are not generally required by the SEC to supply quarterly financial statements. However, inclusion of them in the prospectus may be advisable under certain circumstances, for example where an issuer's most important competitors report quarterly results.<sup>18</sup> Furthermore, underwriters will typically require the preparation of interim financial statements more recent than those legally required and often may delay the marketing or pricing of a transaction until they are available (even if they will not be included in the prospectus).

The financial statements are required to be presented in conformity with

- U.S. GAAP, *or*
- IFRS as issued by the IASB (without a reconciliation to U.S. GAAP),<sup>19</sup> *or*
- the accounting principles of the issuer's home country (or a home country variation of IFRS, not as issued by the IASB), *provided* they are audited in compliance with U.S. generally accepted auditing standards and contain a quantitative reconciliation of shareholders equity and net income to the amount that would have obtained under U.S. GAAP. A narrative discussion of the material differences between the accounting principles followed and U.S. GAAP must also be provided.

First time foreign issuers that reconcile their financial statements must reconcile only the two most recent fiscal years and any interim periods covered by the

financial statements in the prospectus.<sup>20</sup> 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. Similar relief is provided to first-time adopters of IFRS as issued by the IASB.

The financial statements may be reported in any currency the issuer deems appropriate.<sup>21</sup> If a foreign private issuer's financial statements (a) are denominated in a currency of a country that has experienced cumulative inflation exceeding 100 percent over the most recent three-year period and (b) 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.

A foreign private issuer generally is required to disclose industry and geographic segment information as to (a) revenues and sales (with sales to unaffiliated customers and sales or transfers to other segments of the issuer's business disclosed separately), (b) operating profit or loss and (c) 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.

**4. Operating and Financial Review and Prospects (the MD&A).** The financial statements in the prospectus must be accompanied by related analysis in the "Operating and Financial Review and Prospects" section. Based on the title of this section under the prior rules for Form 20-F and the current rules for U.S. domestic issuers, practitioners commonly refer to it as "Management's Discussion and Analysis of Financial Condition and Results of Operations," or "MD&A" for short.

The MD&A must contain an analysis of the issuer's historical financial results, as well as material information about known trends, commitments, events and uncertainties relating to operating results, liquidity and capital resources. For example, with respect to operating results, the MD&A should have a comparison of each

financial year and interim period to the corresponding period in the prior year, explaining the causes of material changes from period to period in major line items of the income statement.

With respect to liquidity and capital resources, the MD&A should include information on (a) the internal and external sources of liquidity, (b) an evaluation of cash flows, (c) the level of borrowings at the end of the period under review, the seasonality of borrowing requirements and the maturity profile of borrowings and committed borrowing facilities, (d) the type of financial instruments used, the maturity profile of debt, currency and interest rate structure, and funding and treasury policies, and (e) the company's material commitments for capital expenditures.<sup>22</sup> The MD&A should also provide an explanation of off-balance sheet arrangements in a separately captioned subsection of the MD&A and tabular disclosure, in a prescribed form, of all known contractual obligations, such as lease and purchase obligations and other long term liabilities. The amounts of payments due under such obligations must be shown in the table.

With respect to uncertainties relating to financial performance or condition, the MD&A should discuss critical accounting policies and estimates, especially cases in which materially different amounts would likely be reported under different conditions or assumptions.

The MD&A is required to disclose presently-known trends and other matters that are reasonably likely to have a material impact on future financial results, such as known future increases in costs of labor or materials. Except to this extent, and except for information about off balance sheet arrangements and known contractual obligations, issuers generally are not required to supply forward-looking data. Unlike in many other markets, the general practice in the U.S. market is to avoid giving financial projections in the prospectus and to strictly limit the amount of other quantitative projections. However, the prospectus typically will include a description of the intended use of proceeds from the securities offering, as well as a detailed qualitative description of the issuer's business strategy.

For further information, see Part II.A.2—MD&A Interpretive Release.

**5. Risk Factors.** A prospectus is required to contain a discussion of the risks relating to an investment in the offered securities. This disclosure addresses risks relating to the company's business and operations as well as risks relating to the securities being offered. Business risks typically include those generally impacting the industry in which the company operates (such as the risk of operating in a highly competitive market, the risk of operating in an industry that is subject to significant regulation or the risk that technological developments may reduce the demand for the products or services provided by companies in the industry in which the company operates) as well as company specific risks (such as the risk relating to the company's inability to develop innovative new products, the risk of significant ongoing litigation or the risk of losing a key customer or a key supplier). Risks relating to the securities offered generally address items such as the lack of an existing and active market for the securities being offered, the existence of large shareholders may provide investors with voting rights of limited effect and shareholder rights in the country in which the company is organized differ significantly from those that shareholders of U.S. companies have. This disclosure is not meant to address risks generally applicable to companies (such as the risk that its profits may decline during a period of generally weak economic activity), but instead focus on those risks which particularly impact the issuer. In order to be most meaningful to investors, the disclosure should not be excessively general, repetitive or overly detailed.

**6. Executive Compensation Disclosure.** A foreign private issuer must disclose the amount of compensation paid, and benefits in kind granted, for the last full financial year to its directors and members of its administrative, supervisory or management bodies. Unlike a domestic issuer, it may supply this information on a group basis unless individual disclosure is required by the foreign private issuer's home country or otherwise made public. The disclosure standard covers contingent or deferred compensation accrued for the year, even if payable at a later date. A description of bonus, profit sharing, stock option and retirement plans must also be given, but foreign private issuers are not obligated to provide the compensation discussion and analysis that is required of domestic issuers.

**7. 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 (a) an opinion of counsel as to the legality of the securities being registered, (b) consents of attorneys, accountants and other experts referenced in the prospectus as to the use of their names in the prospectus, and (c) certain material contracts.<sup>23</sup> Exhibits that are not in English must be filed together with an English translation or summary of material provisions.

**8. Signature of 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. Any director, whether or not he or she signed the registration statement, is subject to potential liability under the Securities Act as more fully described in Part VI of this guidebook.

**9. Plain English.** Since 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 front part 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.

The SEC may make 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. 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.

## C. THE PROCESSING OF THE REGISTRATION STATEMENT.

**1. SEC Review.** Confidential SEC review of an initial registration statement may be especially helpful in the case of a foreign private issuer whose IPO will involve a U.S./non-U.S. dual listing or that is a listed foreign private issuer whose securities trade publicly in its home market. The SEC regulatory review process typically commences with the first public filing of the registration statement. The registration statement that is first publicly filed should be as complete a document as possible. Preparation of this public filing generally entails some third party assistance and expense in converting the registration statement into an electronic format that is compatible with the SEC’s electronic database (EDGAR). Prior to the end of 2011, the SEC offered all foreign private issuers the ability to go through a confidential review process prior to the first public filing of any registration statement. The SEC has amended that policy and now only offers confidential review to a foreign private issuer that (1) is listed or is



concurrently listing its securities on a non-U.S. securities exchange, (2) is being privatized by a foreign government, or (3) can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.<sup>24</sup> A foreign private issuer that becomes an SEC reporting company is generally required to publicly file all drafts of any registration statement subsequently submitted to the SEC (similar to domestic issuers, which generally never have the ability to obtain a confidential review).

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.<sup>25</sup> An examiner makes the detailed review of the registration statement and provides 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. 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.

Upon completion of the initial staff review, which the staff of the SEC endeavors to complete within thirty 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 ten days or so, although this process may be longer or shorter based upon workload and the depth of the comments.

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.<sup>26</sup>

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 VI of this guidebook.)

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 must be filed with the SEC, although the filing is not subject to review.

**2. FINRA Review.** An underwritten public offering will also be subject to the review and approval of the Financial Industry Regulatory Authority ("FINRA"). FINRA is a self-regulatory organization that, among other things, governs the underwriting activities of U.S. underwriters. The FINRA review basically is limited to its review of the compensation arrangements between the issuer and the underwriter (broadly defined), 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.

FINRA recently proposed a new Rule 5123, applicable to certain private placements, that would require members to provide investors with information concerning the anticipated use of offering proceeds, offering expenses and offering compensation. In addition, this rule would require members to file certain offering documentation with FINRA.<sup>27</sup> This process

is undertaken by underwriter's counsel, although the issuer is typically required to pay the FINRA registration fee.

#### D. DISSEMINATION OF INFORMATION WHILE AN ISSUER IS IN REGISTRATION

The Securities Act imposes restrictions on dissemination of information while the issuer is "in registration" that are more stringent and complicated than those that apply in many other jurisdictions. The term "in registration" refers to the entire process of registration. It starts before a registration statement is even filed, when the issuer reaches a firm understanding with the firm that is to act as managing underwriter. It continues through the filing of the registration statement to end ninety days after the registration statement becomes effective (or in certain situations a shorter period, such as twenty-five days in the case of NYSE or Nasdaq securities).

Historically, communications restrictions under the Securities Act were designed to force issuers and underwriters to employ the prospectus as the sole means for publicly offering and selling securities in the U.S. These restrictions were liberalized by a major reform in 2005, known as the Securities Offering Reform. The reform relaxes the extent to which the prospectus must be the sole offering document, though it remains the primary and central written communication.<sup>28</sup>

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 public offering that have the effect of conditioning the market or generating public interest in the issuer or in its securities—called "gun jumping"—constitutes an offer in violation of the Securities Act.<sup>29</sup>

The rules relating to gun jumping distinguish between the period before a registration statement is publicly filed with the SEC, the period after the first public filing of the registration statement but before effectiveness

of the registration statement, and the period after effectiveness of the registration statement.

The SEC staff is vigilant in looking for signs of gun jumping. A major area of concern is pre-offering publicity involving electronic communications and the Internet, either on the issuer's website or elsewhere, such as Facebook, Twitter and other similar types of social media.<sup>30</sup>

**1. Ongoing Communications at any Time (including before filing).** Restrictions on gun jumping are not intended to inhibit continued disclosure of factual information by the registrant. Companies in registration are permitted throughout the registration process to (a) continue to advertise their products and services, (b) disseminate customary reports to shareholders, (c) make routine announcements to the press with respect to factual business and financial developments, and (d) 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 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 three separate non-exclusive safe harbors from the "gun-jumping" provisions for ongoing communications at any time:

- (1) ***Factual Business Communication to Non-Investors.*** Rule 169 establishes a safe harbor for the continued publication or dissemination at any time of factual business information<sup>31</sup> that is regularly released to persons other than investors or potential investors by all eligible issuers, including non-reporting issuers.<sup>32</sup>
- (2) ***Communication of Factual Business Information and Forward Looking Information to Any Person.*** Rule 168 goes further than Rule 169 and establishes a safe harbor for the continued publication or dissemination at any time, *to any person*, of regularly released factual business and *forward-looking information*<sup>33</sup> by certain non-reporting foreign issuers (as well as certain reporting issuers).<sup>34</sup> 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<sup>35</sup> for at least

twelve months or have a \$700 million worldwide public float.<sup>36</sup>

- (3) **Communications 30 Days Prior to Filing Registration Statement.** For all issuers (other than certain ineligible issuers) for most communications made by or on their behalf thirty days prior to filing a registration statement (provided certain steps are taken to avoid the subsequent republication of the communication during such thirty day period), Rule 163A establishes an exclusion from the definition of “offer” for purposes of Section 5(c) of the Securities Act.<sup>37</sup>

In addition, under Rule 135 of the Securities Act, a very limited notice may be 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. The notice 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: (a) the name of the issuer; (b) the title, amount and basic terms of the securities proposed to be offered; (c) the anticipated time of the offering; and (d) a brief statement of the manner and purpose of the offering without naming the underwriters.

**2. Communications During the Period After Filing and Before Effectiveness.** In the interval between the first filing with the SEC and the effective date of the registration statement, the registrant and the underwriters<sup>38</sup> may undertake oral selling efforts.<sup>39</sup> 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 prospectus (the “red herring”),<sup>40</sup> a “tombstone advertisement,”<sup>41</sup> and any free writing prospectus (discussed below). 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,” “road shows” and other oral offers or

presentations are made only after distribution of the preliminary prospectus to the 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:

- the issuer and its business, including where to contact the issuer;
- the title, amount, price and terms of the securities being offered;<sup>42</sup>
- 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;
- procedures for account opening and submitting indications of interest and conditional offers to buy the offered securities;
- procedures for directed share plans and other participation in offerings by officers, directors, and employees;
- the correction of inaccuracies in permissible information previously disclosed pursuant to the rule;
- whether, in the opinion of counsel, the security is exempt from specified taxes; and
- any statement or legend required by any state law or administrative authority.

In addition, all tombstone advertisements are required to contain “red herring” language, which includes the name and address of the person or persons from whom a preliminary prospectus may be obtained.

**3. Post-Filing Communications in the Form of a Free Writing Prospectus.** The Securities Offering Reform created a new prospectus category outside the statutory prospectus: the “free writing prospectus.” A free writing prospectus can take any form. It 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. Issuers (except for certain ineligible issuers)<sup>43</sup> or offering participants are permitted to use free writing prospectuses after the filing of the registration statement. Free writing prospectuses are generally required to be filed with the SEC on EDGAR contemporaneously with their first use.

**4. Communications outside of the U.S.** Whether a communication outside the U.S. will be deemed an offer in the U.S. subject to the federal securities laws depends on when and how the communication is made and the availability of other exemptions, such as those for offshore press conferences under Rule 135e. For a communication to be considered as being made outside the U.S., measures, such as restrictions on the access of U.S. residents to the issuer's web site, usually have to be taken to prevent it from flowing into the U.S.

Furthermore, underwriters and dealers that are selling group members typically will be prohibited from distributing in the U.S. research reports regarding an issuer in the period leading up to, during, or for some weeks following, an offering of the issuer's securities. In contrast, research reports are frequently distributed in non-U.S. offerings, often until the beginning of a short blackout period before the offering commences, although they are typically required to be prepared by an underwriter's research team independently of the group that prepares the prospectus.

## **E. AMERICAN DEPOSITARY RECEIPTS.**

Offerings of common equity securities of foreign private issuers in the U.S. are frequently issued in the form of American Depositary Receipts ("ADRs"). ADRs are negotiable receipts issued by a U.S. commercial bank functioning as a depository 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 potential advantages of ADRs include:

- (1) allowing holders to receive dividends in dollars rather than the currency of the issuer's home jurisdiction (as the depository 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 U.S. settlement procedures (e.g., settle electronically through DTC, the U.S. electronic book-entry settlement system) 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, which is typically prepared by the depository institution. 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.

## PART II: REPORTING OBLIGATIONS UNDER THE EXCHANGE ACT AND PUBLIC OFFERINGS UNDER THE SECURITIES ACT AFTER AN INITIAL PUBLIC OFFERING

### A. ONGOING REPORTING REQUIREMENTS AFTER A PUBLIC OFFERING

Following a public offering of securities under the Securities Act or a listing on a U.S. exchange, the issuer will be obligated to file with the SEC annual reports on Form 20-F and submit interim reports on Form 6-K.<sup>44</sup> These reporting obligations commence immediately upon the effectiveness of a registration statement or a listing, requiring the filing of an annual report with respect to the fiscal year in which the registration statement or listing became effective. They continue during each fiscal year thereafter unless and until the issuer deregisters or its reporting obligation is suspended. See Part II.D below.

In addition to filing with the SEC, an issuer must file its Form 20-F and 6-K reports with FINRA if the issuer's securities are quoted on Nasdaq, and with the NYSE if listed there.<sup>45</sup>

**1. Annual Reports on Form 20-F.** After a public offering, foreign private issuers must electronically file an annual report on Form 20-F within six months after the end of each fiscal year. In 2008, Form 20-F was amended in contemplation of accelerated filing of annual reports. For fiscal years ending on or after December 15, 2011, the annual report will have to be filed within four months after the end of the fiscal year.<sup>46</sup>

Unlike registration statements, the SEC does not routinely review annual reports on Form 20-F each time they are filed. The SEC may, however, elect at any time to review all or part of an annual report after it has been filed. 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 the 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.

Amendments to an annual report may be necessary to respond to SEC comments.<sup>47</sup>

Form 20-F requires an annual discussion and update of many items originally contained in the issuer's registration statement on Form F-1. Specifically, Form 20-F requires updates of all the items described in Part I.B.2 that do not specifically call for disclosures relating to a securities offering.<sup>48</sup> In addition to updating such items originally contained in the registration statement on Form F-1, the reporting company must make disclosures in the annual report concerning (a) any material modifications of the rights of its security holders and (b) any material default with respect to its indebtedness.

In August 2008, the Advisory Committee on Improvements to Financial Reporting issued its final report. The Committee recommends a short executive summary at the beginning of a company's annual report on Form 20-F that describes concisely the most important themes and includes a page index referring to more detailed information on particular subjects.<sup>49</sup>

Effective December 6, 2008, the SEC adopted amendments to Form 20-F.<sup>50</sup> The most significant of them concern added disclosure regarding (a) changes in the issuer's auditor and (b) certain departures from U.S. corporate governance practices. Annex A sets forth a summary of these amendments.

**2. MD&A Interpretive Release.** New financial statements and a new MD&A will usually be the most important and extensive updates from previous disclosure that have to be prepared each year for the annual report on Form 20-F. The required content of the MD&A is summarized above in Part I.B.4. Reporting companies should also be mindful of SEC guidance on the MD&A that it issued in an interpretive release

in 2003.<sup>51</sup> A 2010 interpretive release provided further guidance on liquidity and capital resources disclosure in the MD&A.<sup>52</sup> Among other things, the MD&A Interpretive Release and Liquidity and Capital Resources Interpretive Release seek enhancements to the understandability and usefulness of the MD&A as follows:

- **Overview.** The MD&A should begin with an executive level overview or introduction reviewing the key factors 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.
- **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.
- **Layered Development 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.
- **Disclosure of Key Indicators of Financial Performance.** As emphasized in the August 2008 recommendations of the Advisory Committee on Improvements to Financial Reporting as well as the MD&A Interpretive Release, the issuer should disclose key indicators of its financial condition and operating performance which management uses in running the business of the issuer, allowing the investor to further “see the company through the eyes of management.” If these key performance indicators comprise EBITD A or other non-GAAP financial measures, then a comparison of them to GAAP financial measures is required by Regulation G and Item 10 of Regulation S-K as described below in subsection 4.
- **Focus on Materiality.** The issuer should aim to disclose the most important material events, known trends, demands, commitments and uncertainties that make the 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.

- **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.
- **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 MD&A Interpretive Release provides additional guidance for issuers on determining whether a known trend or uncertainty exists and must be disclosed.
- **Liquidity and Capital Resources.** The MD&A Interpretive Release and Liquidity and Capital Resources Interpretive Release address 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.
- **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 MD&A Interpretive Release provides additional guidance regarding the required disclosure required relating to the issuer’s critical accounting policies.

**3. Form 6-K.** A non-U.S. reporting company must promptly furnish to the SEC material information made public in its home country (or elsewhere). Interim reports on Form 6-K must be in the English language. Specifically, 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 in its home country;
- (2) filed with and made public by any foreign securities exchange; or
- (3) distributed to security holders.

In addition, whether or not required by this rule regarding home country reporting, the company should be careful to promptly report on Form 6-K extraordinary events, such as material changes in the business, material acquisitions or dispositions or any change to or waiver from the code of ethics obligations of senior officers.<sup>53</sup>

Foreign private issuers are not subject to precise deadlines by which Form 6-Ks must be filed; rather they must “promptly” furnish information that has already been made public. Furthermore, interim reports on Form 6-K are not subject to detailed review by the SEC. In most cases, they are not deemed to be filed for purposes of the U.S. securities laws and are therefore subject to less stringent liability standards than the annual reports on Form 20-F.<sup>54</sup> This fact, together with Form 6-K’s acceptance of home country reporting standards, gives non-U.S. reporting companies significant relief from the quarterly reporting and related liability provisions applicable to U.S. companies.

**4. Required Disclosure about Non-GAAP Financial Measures.** Regulation G requires certain disclosure relating to non-GAAP financial measures that constitutes a potential exception to Form 6-K’s general acceptance of home country interim reporting. Adopted pursuant to the Sarbanes-Oxley Act, Regulation G applies to press releases, oral communications and all other public disclosure by an issuer, not just its SEC filings. It applies to foreign private issuers unless:

- (1) the disclosure of the non-GAAP financial measure is made by or on behalf of the foreign private issuer only outside the U.S., or is included in a written communication that is released by or on behalf of the foreign private issuer outside the U.S. (provided, however, that following this disclosure of the information outside of the U.S.,

the information may be included in a submission under cover of Form 6-K);<sup>55</sup>

- (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 U.S.; and
- (3) the securities of the foreign private issuer are listed or quoted on a securities exchange or inter dealer quotation system outside the U.S.

Specifically, if a foreign private issuer does not meet these conditions and publicly discloses non-GAAP financial measures in the U.S., it must include with them (a) a presentation of the most directly comparable GAAP financial measure, and (b) a reconciliation of the non-GAAP financial measures to the most directly comparable GAAP financial measures. If the non-GAAP financial measures are contained in an annual report on Form 20-F, then the issuer must comply not only with this requirement of Regulation G, but also with the provisions of Item 10 of Regulation S-K. These provisions demand a narrative description concerning the uses and purposes of the non-GAAP financial measures, including (a) the need to give the comparable GAAP measure required under Regulation G “equal or greater prominence” than the non-GAAP measure; (b) 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 (c) disclosure of any additional purposes for which management uses the non-GAAP measure.

**5. Company Web Sites.** In general, SEC rules do not require reporting companies to establish or maintain web sites. Nonetheless, the SEC encourages, and the NYSE generally requires, posting of required disclosures and certain governance documents on web sites.<sup>56</sup> SEC guidance clarifies that companies maintaining previously posted materials on their web sites will not be deemed to be republishing them, or assuming a duty to update them, just because they remain accessible to the public. The SEC recommends that these be separately identified as historical materials and located in a separate section of the web site from current materials.

The SEC cautions that the general anti-fraud provisions of the federal securities laws apply to all communications made by or on behalf of a public company, including on web sites. In particular, hyperlinks to third party information may make a company responsible for it if (a) the company has involved itself in the preparation of the information (the “entanglement” theory) or (b) explicitly or implicitly endorsed it (the “adoption” theory). To manage and mitigate this risk, the company should explain the context of the hyperlink and should be careful about selectively limiting hyperlinks only to positive news. Disclaimers, or individuals purporting to speak in their “individual” capacities, are not sufficient alone to insulate a company from responsibility for information that it makes available to investors, whether through a hyperlink, an electronic shareholder forum or blog, or otherwise.

**6. Use of eXtensible Business Reporting Language (XBRL) for the electronic filing of financial statements.** With the support of the Advisory Committee on Improvements to Financial Reporting, the SEC is engaged in efforts to phase in the use of eXtensible Business Reporting Language (XBRL) for the electronic filing of financial statements with SEC reports. XBRL is an interactive data format that allows information to be downloaded directly into spreadsheets and analyzed in a variety of ways using commercial off-the-shelf software. In 2009, the SEC adopted rules requiring, not just permitting, reporting companies to add to their SEC filings an exhibit with their financial statements in XBRL format.<sup>57</sup> (They would also continue to provide their financial statements in the current ASCII or HTML format).

This XBRL requirement currently applies to foreign private issuers that use IFRS, although the SEC staff has not posted the taxonomy to be used to produce XBRL financial statements and they have stated that foreign private issuers using IFRS will not be required to provide financial statements in XBRL format until such taxonomy is posted.<sup>58</sup> Large foreign private issuers using U.S. GAAP were required to become compliant sooner. The XBRL requirement does not extend to foreign private issuers that use home country accounting principles, together with a reconciliation to U.S. GAAP.

## B. REGISTRATION OF SUBSEQUENT PUBLIC OFFERINGS

**1. SEC Review.** Foreign private issuers complying with periodic reporting requirements under U.S. securities laws may benefit from rules that facilitate registered offerings by reporting companies. A foreign reporting company with a sufficiently large market capitalization and sufficient reporting history is, subject to certain conditions, entitled to use a simplified form of registration statement, Form F-3. (See subsection C below for a discussion of the eligibility criteria for Form F-3.) Many of the disclosure requirements for this simplified form of registration statement may be satisfied by incorporating by reference information previously provided in periodic reports.

**2. Shelf Registration Procedure in General.** If an issuer is eligible to use the simplified Form F-3 registration statement, it can take advantage of a procedure called “shelf registration,” pursuant to Rule 415 under the Securities Act.<sup>59</sup> Under the shelf registration procedure, an issuer may under certain circumstances register at one time an unlimited amount of securities<sup>60</sup> that the issuer intends to offer and sell on a delayed or continuous<sup>61</sup> basis in the future. The registration statement is filed and declared effective at one time, and then “pulled off the shelf” and supplemented with an SEC filing for a specific offering at a later time.

The principal benefit of a shelf registration statement is that it is, in effect, “pre-approved” for future securities offerings, enabling them to be quickly brought to market. Shelf registration significantly reduces, or in some cases completely eliminates, the risk of delay from an SEC review.

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<sup>62</sup> 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.<sup>63</sup> 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



some types of 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. Any unsold securities registered and unused fees paid thereon can be carried forward from an old registration statement to a new registration statement, where the shelf registration statement relates to primary or secondary offerings (whether immediate, delayed or continuous) by primary shelf eligible issuers.

**3. Automatic Shelf Registration for WKSIs.** The SEC has established a significantly more flexible version of shelf registration for offerings by eligible well-known seasoned issuers (“WKSIs”), known as “automatic shelf registration.” It involves filings of Form F-3 registration statements and can be used to register unspecified amounts of primary and secondary offerings<sup>64</sup> of different specified types of securities.<sup>65</sup> In brief, an issuer qualifies as a WKSI if it has a worldwide public float of \$700 million or more and has filed at least one annual report on Form 20-F. For further details about the definition of WKSI, see Part II.C below.

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.<sup>66</sup> Thus, 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. 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.

An issuer can file an automatic shelf registration statement if it meets the eligibility criteria for well-known seasoned issuer status 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 Section 10(a)(3) of the Securities Act (or on the due date thereof), which must be provided to reflect fundamental changes and periodic updates. (See footnote 70 for further explanation of this eligibility determination). So long as the issuer maintains its eligibility for automatic shelf registration, a new registration statement will be effective immediately.

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.<sup>67</sup>

**4. Safe Harbor for Forward Looking Statements.** 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.<sup>68</sup> 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.*

However, 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. In particular, as noted above, issuers usually seek to avoid the disclosure of projections in registration statements.

## C. CATEGORIES OF ISSUERS

As a result of the Securities Offering Reform, SEC rules grant to issuers varying amounts of flexibility in the registration, communications and offering processes depending on their market capitalization, age as a reporting company and other reporting history. As explained above, certain large issuers, called WKSIs, benefit from the ability to file a shelf registration statement that is automatically effective upon filing, with no review and comment by the SEC (*i.e.*, “automatic shelf registration”). In the case of certain reporting companies that have filed at least one annual report on Form 20-F, the simplified, Form F-3 registration statement is available.

Specifically, issuers are categorized into the following four tiers:<sup>69</sup>

- (1) a *well-known seasoned issuer* is a seasoned issuer that, as of a date within 60 days of its eligibility determination date,<sup>70</sup> either (a) has a worldwide public market value<sup>71</sup> of its outstanding voting and non-voting common equity<sup>72</sup> held by non-affiliates of \$700 million or more; or (b) 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 such date, does not fall in any of certain categories of ineligible issuers;<sup>73</sup>
- (2) a *seasoned issuer* is an issuer that has filed at least one annual report on Form 20-F and is eligible to use Form F-3 to register primary offerings of securities;
- (3) 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; and
- (4) 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.

Form F-3 is available for foreign private issuers that, among other requirements, (a) have a worldwide

aggregate market value of voting and non-voting common equity held by non-affiliates of the issuer that is the equivalent of \$75 million or more; (b) 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; (c) 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 filing of 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.

Form F-3 also is available to foreign private issuers with less than \$75 million in public float, provided that, among other things, they (a) meet the other Form F-3 registrant eligibility requirements, (b) have a class of common equity securities listed and registered on a national securities exchange, and (c) have not sold more than the equivalent of one-third of their public float in primary offerings pursuant to this Form F-3 eligibility condition over the previous twelve calendar months.

Depending on its categorization, a foreign private issuer may benefit from communications restrictions that are more lenient for its subsequent public offerings as compared to its initial public offering. (See Part I.D for the communications restrictions applicable to IPOs.) For instance, with regard to offers made by or on behalf of eligible WKSIs within the thirty day period prior to filing of the registration statement, 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. Under this rule, a WSKI can use a free writing prospectus at any time (subject to certain conditions regarding its filing with the SEC and excluding communications by underwriters or dealers, or in connection with certain types of offerings). In addition, as indicated above in Part I.D, all reporting issuers and certain foreign private issuers may use the Rule 168 safe harbor.

## D. DEREGISTRATION AND EXEMPTION FROM ONGOING REPORTING REQUIREMENTS

A foreign private issuer may, subject to certain conditions, deregister when its securities (a) if listed, have ceased to be listed and (b) either (1) are held of record by fewer than 300 persons resident in the U.S. or (2) have an average daily trading volume in the U.S. that

is 5 percent or less of the world-wide trading volume for the securities. In 2007, the SEC adopted Rule 12h-6 relating to foreign private issuer deregistration under the Exchange Act, which provided a trading volume eligibility test as an alternative to the historical U.S. holder test. This new alternative test has made deregistration much easier for foreign private issuers that decide U.S. investor interest in their securities is not sufficient to warrant continued listing and reporting in the U.S. public market.

In order to further facilitate flexibility for foreign private issuers, in 2008, the SEC amended Rule 12g3-2(b) of the Exchange Act and exempted foreign private issuers from having to register a class of equity securities under Section 12(g) of the Exchange Act if certain conditions were met.<sup>74</sup> This exemption allows a foreign private issuer to have its equity securities traded in the U.S. over-the-counter market (including in the form of ADRs) without registration of its equity securities (including those underlying ADRs) under Section 12(g) and without the reporting obligations that accompany such registration. The 12g3-2(b) exemption is available automatically and without application to the SEC.

## PART III: CORPORATE GOVERNANCE UNDER THE SARBANES-OXLEY ACT AND STOCK EXCHANGE RULES

The Sarbanes-Oxley Act, or “SOX”, was enacted in late July 2002 in the wake of massive corporate fraud by Enron and other public companies. The Act only applies to reporting companies, domestic and foreign.<sup>75</sup> It does not reach foreign private issuers that, as a result of a private placement or for other reasons, provide information under the reporting exemption afforded by Rule 12g3-2(b) under the Exchange Act (see Part IVC).

SOX has become a synonym for the corporate governance movement in the U.S. However, in fact, many of the more demanding corporate governance measures actually are embodied in the listing rules of the NYSE and Nasdaq. As certain of these measures are not dictated by the U.S. Congress, the SEC and the stock exchanges have been able to provide certain accommodations for foreign private issuers. With respect to a number of the corporate governance requirements imposed by U.S. national securities exchanges, foreign private issuers are allowed to follow home country procedures. Thus, in addition to home country practices, corporate governance for foreign private issuers mainly concerns SOX requirements for an independent audit committee, management and auditors attestations on internal controls and whistleblowing procedures.

### A. OVERVIEW OF THE SARBANES-OXLEY ACT (SOX)

The various provisions established by SOX can be grouped under five major goals:

- restoring confidence in the accounting profession by:
  - ✦ creating rules to protect auditor independence,
  - ✦ 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
  - ✦ creating the Public Company Accounting Oversight Board (“PCAOB”) to regulate and oversee the independence of outside auditors;<sup>76</sup>
- 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:
  - ✦ mandating that all members of audit committees be independent directors,
  - ✦ requiring the disclosure of whether a “financial expert” serves on the audit committee,
  - ✦ requiring the disclosure of whether the company has adopted a code of ethics for CEOs, CFOs, and other senior financial personnel, and
  - ✦ prohibiting public companies from extending, directly or through a subsidiary, most types of personal loans to their directors or executive officers;
- improving disclosure and financial reporting by:
  - ✦ establishing requirements for internal control over financial reporting (Section 404),
  - ✦ requiring CEO and CFO certifications relating to control systems and reports, including financial statements,
  - ✦ mandating auditors’ certification of the adequacy of internal control (Section 404),
  - ✦ regulating the use of non-GAAP financial measures,
  - ✦ 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, *by rule*, is necessary or useful, and
  - ✦ requiring the SEC to review at least once every three years each public company registered with the SEC;
- improving the performance of those who advise or analyze public companies by:

- ✦ establishing standards of professional conduct<sup>77</sup> for attorneys who appear and practice before the SEC in any way in the representation of an issuer (important exemptions exist for foreign attorneys), and
- ✦ addressing conflicts of interest faced by securities analysts; and
- enhancing the SEC's enforcement tools by increasing civil liabilities.<sup>78</sup>

Consistent with prior securities regulations, SOX's disclosure provisions, for example relating to non-GAAP financial measures and off balance sheet liabilities, were evolutionary in nature. To the extent they are noteworthy, they are discussed elsewhere in this guidebook.

With regard to issuers (as opposed to accountants, lawyers or research analysts), SOX is directly important, and revolutionary in the U.S. context, because it effectively creates national law of corporate governance. Traditionally, corporate law was the domain of state law and the U.S. securities laws focused on disclosure, not corporate governance.

However, many of SOX's corporate governance provisions are unexciting from the perspective of foreign private issuers that are incorporated in jurisdictions where corporate law is national and has been the focus of securities laws. (France, to cite just one example, is such a jurisdiction.) Thus, it is not surprising that, in most European countries and elsewhere, corporate governance laws and best practices have evolved under the influence of SOX and are now substantially similar to it.<sup>79</sup> The one notable exception is a requirement for an annual auditor's attestation regarding the effectiveness of an issuer's internal controls.<sup>80</sup> This requirement, and the other significant corporate governance provisions, of SOX are described below.

## **B. REQUIREMENTS FOR INDEPENDENT AUDIT COMMITTEE AND WHISTLEBLOWING PROCEDURE (SOX § 301)**

Under SOX, each public company with securities listed on a U.S. national securities exchange must have an audit committee consisting of independent members of its board of directors. The audit committee is responsible for overseeing financial reporting and the

relationship with independent auditors. In particular, the audit committee must be directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged for the purpose of preparing or issuing an audit report or performing other audit, review or attestation services for the issuer. This role includes (a) the resolution of any disagreements between management and such auditor regarding financial reporting and (b) compliance with the SOX provisions restricting the non-audit services provided by such auditor. Each such auditor must report directly to the audit committee and, as discussed further below, qualify as independent. These requirements may require some fine tuning to ensure compliance with home country securities laws, which often provide that shareholders must appoint the auditors.

All members of the audit committee must qualify as independent, except that foreign private issuers have been granted limited exemptions from the independence requirement. In addition to independent directors, audit committees of foreign private issuers may also include certain representatives of employees, foreign governments, and controlling shareholders.<sup>81</sup> Controlling shareholder representatives may only serve as non-voting observers.

Under stock exchange rules implementing SOX, the audit committee must be comprised of at least three independent members, subject to the following exception for a transition period after an IPO. Newly public companies must have:

- (1) at least one fully independent member of the audit committee at the time the issuer's initial registration statement becomes effective,
- (2) a majority of independent members within ninety days, and
- (3) a fully independent audit committee within one year.<sup>82</sup>

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,<sup>83</sup> or (ii) be an affiliated person of the issuer or any subsidiary thereof.

Under the NYSE and Nasdaq rules applicable to domestic issuers, at least one member of the audit committee must be a financial expert.<sup>84</sup> This requirement is not mandatory for a foreign private issuer, but it is obligated to 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.

Under SOX, the audit committee must establish “up the chain” reporting and “whistleblowing” 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.<sup>85</sup> If found to have taken retaliatory action against employee whistleblowers, public companies are subject to civil and, in certain circumstances, criminal liability. Whistleblowers are given protections against wrongful dismissal by their employers, such as rights to reinstatement, back pay and benefits, compensatory damages, abatement orders and reasonable attorney fees and costs.

### C. INTERNAL CONTROLS OVER FINANCIAL REPORTING (SOX § 404)

In accordance with SOX, all public companies must have adequate internal controls over financial reporting; that is generally, a 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 a reasonable possibility of leading to a material misstatement in the financial statements.<sup>86</sup> The generally accepted understanding of internal controls comes from the 1992 COSO report “Internal Control Integrated Framework.”<sup>87</sup>

As further described below, SOX requires a management evaluation report and auditor’s attestation on internal controls. Virtually all public companies are required to have their management issue the evaluation report. All issuers that are accelerated filers have to obtain the auditor’s attestation. Provision of an auditor’s attestation report is not required for foreign private issuers that are “non-accelerated filers.”

In addition, a transition period is provided for newly public companies. The management evaluation report

and auditor attestation is not required of such issuers in their IPO prospectus or first annual report. However, the first annual report must include a statement that they are not included.

**1. Management’s Report on Internal Controls.** 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 contain:

- a statement of management’s responsibility for establishing and maintaining adequate internal controls and procedures for financial reporting;
- an assessment by management of the effectiveness of the issuer’s internal controls and procedures as of the end of the issuer’s most recent fiscal year;
- an identification of the framework used by management to evaluate the effectiveness of the issuer’s internal controls;
- any changes of the issuer’s internal controls that occurred during the issuer’s most recent fiscal year; and
- a statement about the issuance of the auditor’s attestation on internal controls (see below) and a copy of such report.

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.

**2. The Auditor Attestation on Internal Controls.** Each registered public accounting firm that prepares or issues an audit report on an accelerated filer's annual financial statements must attest to, and report on, management's assessment of internal controls in accordance with standards set by the PCAOB. While U.S. auditors have traditionally reported to U.S. companies' audit committees on significant deficiencies in their internal controls, they had not been asked to opine on the effectiveness of internal controls prior to SOX.

**3. Recent Reforms Regarding the Evaluation of Internal Controls.** An effective system of internal controls has long been required in the U.S. to prevent and detect financial irregularities. Despite a long history of internal controls, dating back to 1977,<sup>88</sup> regulators, management and auditors have struggled for the past few years to determine exactly what it means to have effective internal controls and what is necessary to assess them.

Clearly, neither the Congress nor the SEC contemplated or intended that the assessment of internal controls be burdensome. However, there is wide consensus that the initial implementation costs were excessive. The SEC has indicated, though, that some initial compliance costs may have been unnecessary due to excessive, duplicative or misfocused efforts. Moreover, several SEC releases over the years have sought to promote solutions, including general guidance directed to accountants indicating that the accountants were being too inflexible, overly cautious and mechanical in interpreting SOX.

A reform in 2007 represents the culmination of attempts to ease the burden on companies and auditors relating to internal control requirements. The reform consists of interpretive guidance and rule amendments of the SEC regarding management's evaluation report,<sup>89</sup> and the adoption by the PCAOB of Auditing Standard No. 5 relating to auditor attestation reports (which replaced Auditing Standard No. 2).<sup>90</sup> The essence of these initiatives is a principles-based approach to internal control reporting and audits that is top-down and risk-based.<sup>91</sup> This approach focuses on high risk areas, eliminates unnecessary procedures and scales the internal control audit based on the size and complexity of the company. In particular, the SEC observes that management can now engage auditors in a dialogue to insure they are focused on what

matters—risk and materiality—and not on rote compliance with a rule book.

## **D. DISCLOSURE CONTROLS AND RELATED CEO AND CFO CERTIFICATIONS**

**1. Disclosure Controls of Issuers.** Issuers should be aware that they should not limit their focus just to financial accounting controls. They must cover the broader issue of disclosure controls and procedures, which extends beyond accounting to procedures for good business and legal disclosure.<sup>92</sup> 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.

**2. Disclosure Certifications by the CEO and CFO under Sections 302 and 906 of SOX.** In addition to certifications relating to internal controls, the principal executive and financial officer must provide:

- certifications to the effect that, based on their knowledge, the issuer's annual report on Form 20-F does not contain any material misstatements or omissions and fairly presents, in all material respects, the financial information; and
- acknowledgments to the effect that they are responsible for the effectiveness of the issuer's disclosure controls and procedures.

These are contained in mandatory forms for Section 302 and Section 906 certifications, copies of which are attached as Exhibits A and B, respectively. 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.

## E. CODE OF ETHICS

An issuer must 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 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.

## F. AUDITOR INDEPENDENCE REQUIREMENTS (SOX § 404)

SOX (and other regulation) prescribes rules on auditor independence.

**1. Prohibition on auditor's provision of certain non-audit services.** Under the SOX rules relating to auditor independence, 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.

**2. Pre-approval and disclosure of all (permitted) non-audit services.** 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 attestation 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 (a) they do not comprise more than 5 percent of the fees paid to the independent auditors for the year, (b) were not recognized as non-audit services at the time of the engagement and (c) 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 report on Form 20-F. In addition, the issuer must disclose:

- (1) the percentage of non-audit services that were approved by the audit committee under the "de minimus" test;
- (2) if greater than 50 percent, 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;
- (3) the amount of fees paid during the two most recent years to their independent auditors for audit services; and
- (4) the amount of fees paid during the two most recent years for audit-related services, tax services and all other services, together with a description of these services.



**3. Rotation of Audit Partners.** 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.<sup>93</sup>

The independence of a lead or concurring audit partner will be considered impaired if a one-year cooling-off period is not maintained between his provision of more than ten hours of audit, review or attest services or service on a company’s audit engagement team and his or her employment by such company in a “financial reporting oversight role.” In addition, the independence of an “audit partner” is deemed to be impaired if he receives compensation for an engagement to provide to the company any services other than audit, review or attest services.<sup>94</sup>

## G. CORPORATE GOVERNANCE REQUIREMENTS OF THE NEW YORK STOCK EXCHANGE AND NASDAQ

Although not directly mandated by the Sarbanes-Oxley Act, each of the NYSE and Nasdaq adopted rules in 2004 regarding the corporate governance standards for listed issuers. For example, they require listed issuers to (a) have a majority of independent directors on their board and (b) hold regularly scheduled meetings at which only independent directors are present. However, in regard to this standard and others, the rules provide certain accommodations for foreign private issuers that allow them to follow home-country corporate governance practices.

In essence, foreign private issuers must comply with the corporate governance standards of the relevant U.S. stock exchange or explain their departures from them. Thus, under recent amendments to Form 20-F, they must provide a concise summary of any significant ways in which their corporate governance practices differ from those followed by domestic issuers under the relevant U.S. stock exchange rules.<sup>95</sup> The same “comply or explain” requirement is also imposed by the NYSE and Nasdaq rules.

**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 corporate governance requirements set forth in Rule 303A. The only exception to this policy relates to the following requirements, which all listed foreign private issuers are required to follow:

- **Audit Committee.** 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.<sup>96</sup>
- **Differences in 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 the 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 U.S.), its annual report to shareholders or in its annual report filed with the SEC on Form 20-F.
- **Annual Certification relating to Observance of Corporate Governance Standards.** 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 the 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 the NYSE corporate governance standards.

**2. Nasdaq Corporate Governance Requirements.** The Nasdaq corporate governance rules permit a foreign private issuer to follow home country practice in lieu of certain Nasdaq corporate governance requirements. Such allowance is given if an issuer provides Nasdaq with a letter from outside counsel in the issuer’s home country certifying that the issuer’s practices are not prohibited by the issuer’s home country law. Each

Nasdaq requirement not followed 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, 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.

## PART IV: THE PRIVATE PLACEMENT ALTERNATIVE TO A PUBLIC OFFERING USING THE RULE 144A SAFE HARBOR

### A. ELIGIBLE PURCHASERS AND RESALE RESTRICTIONS

Foreign private issuers frequently access the U.S. capital markets by means of a Rule 144A private placement instead of a public offering. Securities offered in an SEC-registered public offering generally may be sold to all types of investors in the U.S. and, after initial distribution, generally may be freely traded among U.S. investors of any type. In contrast, securities offered in a U.S. private placement are subject to significant restrictions, both as to potential investors and regarding their resale. In general, the selling restrictions for the most common form of private placement, a Rule 144A offering,<sup>97</sup> limit offers and sales of the securities in the U.S. to “qualified institutional buyers” (QIBs)<sup>98</sup> for a period of one year.<sup>99</sup>

The sale restrictions relating to the U.S. private placement do not apply outside the U.S. to offers and sales of securities in an “offshore transaction” pursuant to the provisions of Regulation S under the Securities Act. Thus, when a Rule 144A offering is made in conjunction with an offering outside the U.S., the non-U.S. offering is structured to ensure that it complies with Regulation S.

The restricted securities distributed in a private placement typically are sold at a discount to the price that could be obtained for identical securities registered under the Securities Act. This illiquidity discount reflects three related conditions that necessarily reduce investor demand:

- the initial distribution in the U.S. of the restricted securities is limited to QIBs or other sophisticated investors;
- outside of this group of qualified investors, resales in the U.S. of the privately-placed securities are restricted, generally for one year after their initial issuance; and
- many U.S. institutions are constrained, by statute, regulation or internal policy, from holding more than

a specified percentage of unregistered, restricted securities.

In short, because of a combination of the smaller primary market for and resale limitations on restricted securities, issuers typically obtain less attractive pricing for them than comparable registered securities.

A registered public offering of equity securities is usually accompanied by a listing of those securities (often in the form of ADRs) on a U.S. stock exchange. The unregistered securities sold in a private placement are not permitted to be listed for public trading in the U.S., although they frequently are included in the PORTAL private placement market (in addition to any public listing they may have in their home market). They may also trade in the over-the-counter market in the U.S.

### B. DISCLOSURE FOR PRIVATE PLACEMENTS

For most forms of private placements, the U.S. securities laws impose very few specific disclosure obligations, based on the general notion that sophisticated private investors, with bargaining power to request information, need less protection than the general public. Accordingly, a more demanding standard of care applies to the disclosure for a public offering than a private placement. An issuer should, in both cases, be careful to provide disclosure that does not contain material misstatements or omissions. However, in brief, issuers are subject to a strict liability standard relating to a registration statement for a public offering (pursuant to Section 11 of the Securities Act), whereas a recklessness standard applies to an offering memorandum for a Rule 144A offering (pursuant to Rule 10b-5 under the Exchange Act). See Parts VI and VII below for further discussion of the applicable liability standards.

Despite the legal differences in the disclosure regimes for public offerings and private placements, market practice dictates that non-U.S. companies provide disclosure in the offering memorandum for a Rule 144A offering (the most common form of private placement) that is substantially similar to that included in a prospectus for a registered public offering. This practice reflects both a desire to satisfy investor expectations, as well as an attempt to reduce the legal and business risks associated with disclosure failures. In keeping with market practice, this means that the offering document for a Rule 144A private placement is typically

drafted in line with the technical requirements of Form 20-F.

Nevertheless, the absence of SEC review and specific U.S. disclosure requirements for an offering memorandum makes it quicker and easier to complete than a registration statement. Offering memoranda usually do not contain U.S. GAAP reconciliations, so the demands of preparing them may be avoided. In addition, there is flexibility to resolve disclosure difficulties with interim financial statements, financial statements for acquired businesses, other accounting issues, and the availability and nature of commercial information.

### **C. ONGOING REPORTING AFTER A PRIVATE PLACEMENT**

The completion of a private placement by a non-U.S. company entails only limited continuing obligations. If it has sold securities in a Rule 144A offering, a non-U.S. company is required to provide a holder or a prospective purchaser upon request:

- a very brief statement of the nature of its business and the products and services it offers; and
- its most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for the two preceding fiscal years (audited to the extent reasonably available).

An issuer could also become obligated to file a registration statement under Section 12(g) of the Exchange Act if, following the private placement, the issuer has a class of equity security held of record by 500 or more persons, 300 or more of which are resident in the U.S.<sup>100</sup> However, to accommodate non-U.S. issuers, the SEC has established an exemption from this obligation in Rule 12g3-2(b). Under this exemption, the non-U.S. company must publish in English, on its web site (or through an electronic information delivery system), information that it has made public since the beginning of its last financial year, and updates of that information, in accordance with its home country reporting standards. (More precisely, the reporting rules of Rule 12g3-2(b) are essentially the same as those of Form 6-K. See Part II.A.3 above.) The Rule 12g3-2(b) exemption is only available if the foreign private issuer maintains a listing of the subject class of equity securities on one or more foreign exchanges that, either singly or together, constitutes the primary trading market for those securities.<sup>101</sup>

Set forth in the table below is a summary comparison of public offering and private placements.

## PUBLIC VS. PRIVATE OFFERINGS: SUMMARY OF BENEFITS AND COSTS

	Public Offering	Private Placement
<b>Benefits</b>	<p>Better pricing</p> <p>Easier, quicker access to capital markets going forward (e.g., shelf registration)</p> <p>May use U.S. listed shares instead of cash as “currency” to pay for acquisitions</p> <p>May provide U.S. employees with share based compensation</p> <p>Enhanced profile</p>	<p>No possibility of delay from an SEC review</p> <p>Flexibility to address exceptional financial and other disclosure issues (although similar level of disclosure to a public offering)</p> <p>Minimal requirements for ongoing reporting</p> <p>Not subject to corporate governance requirements</p>
<b>Costs</b>	<p>SEC review</p> <p>Takes longer to effect</p> <p>Annual reporting requirements under Form 20-F</p> <p>Audit committee, internal control and other corporate governance requirements</p>	<p>Potential price discount due to distribution and resale restrictions</p>

## **PART V: STOCK EXCHANGE LISTINGS AND RELATED EXCHANGE ACT REGISTRATION REQUIREMENTS; SHARE OWNERSHIP REPORTING**

In addition to registration under the Securities Act discussed in Part I of this guidebook, an issuer (whether foreign or domestic) making a public offering of securities in the U.S. and/or listing securities on a U.S. national exchange, such as the NYSE or Nasdaq, is required also to register securities under the Exchange Act. A foreign private issuer may list equity securities for trading on the NYSE or on Nasdaq (even without a concurrent U.S. public offering) by filing with the SEC a registration statement pursuant to Section 12(b) of the Exchange Act, as applicable, with respect to such securities and by filing a listing application with the NYSE or Nasdaq as applicable.

### **A. LISTING ON THE NEW YORK STOCK EXCHANGE OR NASDAQ**

Eligibility criteria and corporate governance standards constitute the main requirements regulated by Nasdaq and the NYSE authorities. Eligibility criteria include financial and ownership conditions on the minimum:

- value of the applicant's net tangible assets,
- amount of its annual income,
- number of its shareholders,
- number and value of its publicly-held shares, and
- price per share of its shares.

These conditions for the various Nasdaq markets and the NYSE are summarized in Annex B. Listing and maintenance standards of the NYSE, which is generally considered a market for larger, seasoned issuers, are more demanding than the listing requirements of Nasdaq.

In addition to eligibility criteria, the NYSE and Nasdaq rules impose the corporate governance obligations discussed above in Part III.G. Furthermore, to continue to have its securities listed on the NYSE or Nasdaq, a company is required to maintain certain minimal

numerical criteria that are typically less than, but in no event greater than, the initial listing criteria.

A Nasdaq or NYSE company must, on an on-going basis, release quickly to the public in the U.S. any news or information which might reasonably be expected to materially affect the market for the company's securities. (This rule may demand prompt disclosure not strictly required under the Exchange Act.)

### **B. 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. The Regulation BTR prohibition, however, only applies to those situations where 50 percent or more of the participants or beneficiaries located in the U.S. in individual account

plans maintained by the issuer are subject to a temporary trading suspension in the issuer's equity securities, and the affected participants and beneficiaries represent 15 percent 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 prohibiting trading in 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.

### C. TENDER OFFER RULES

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, including equity securities of a foreign private issuer. 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 and 2008, 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 percent 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 percent, but no more than 40 percent, of the class of securities subject to the offer have limited relief from the U.S. regulatory scheme. The entire U.S. regulatory scheme applies in the event U.S. ownership exceeds 40 percent (subject to the possibility that the SEC may specifically grant exemptive relief in response to no action letters submitted by offerors).

### 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 the issuer and

other shareholders that there might be a change of control.

Specifically, 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 percent 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 percent (subject to certain exceptions relating to the timing of filings by certain passive financial investors). 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 percent 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:

- (a) 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;
- (b) 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
- (c) 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 VI: SECURITIES ACT LIABILITY AND INDEMNIFICATION

Various provisions of the Securities Act and the Exchange Act prohibit manipulation or fraud in connection with securities transactions. These provisions in Section 11, Section 12 and other sections of the Securities Act apply to public securities offerings. The Exchange Act provisions, Rule 10b-5 and other regulations pursuant to the Exchange Act apply not only to public securities offerings, but to private placements, reporting on Form 20-F and other public disclosure.

The applicability of one or more of causes of action pursuant to these various provisions depends not only on their standards of care, but on a complex set of other conditions emanating from, among other things, extensive, and sometimes inconsistent, case law. Defendants might, in any particular case, be protected by these other conditions necessary to establish liability. However, the extent of this potential protection is impossible to predict in advance given the wide range of possible factual scenarios and courts in which litigation might arise. Therefore, as a general guideline, issuers, control persons and underwriters planning a public offering should prospectively assume that they must simply satisfy Section 11's standard of care. This standard of care, described below, is the highest common denominator of the different private causes of action.

### A. LIABILITIES IMPOSED UNDER THE SECURITIES ACT

**1. Section 11 of 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 U.S.<sup>102</sup>);

- 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 strictly liable for material deficiencies in the registration statement irrespective of good faith or the exercise of due diligence. 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:

- (1) that 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
- (2) 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 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”<sup>103</sup> 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”<sup>104</sup> 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.<sup>105</sup>

Underwriters similarly have a “due diligence” defense to liability claims for misleading statements in or omissions from the registration statement. Their desire to establish such defense is, in part, the motivation behind their intensive involvement in the preparation and review of the registration statement, including the customary receipt of (a) 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 (b) legal opinions as to the adequacy of disclosure and various other matters.

**2. Section 12(a)(2) and other Liability Provisions of the Securities Act.** 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 VII of this guidebook. 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.<sup>106</sup>

## **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. 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 organizational document or in the employment contracts 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.C of this guidebook), it will refuse to accelerate the effective date if there is a charter provision, by-law, contract, statute or other arrangement<sup>107</sup> 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.<sup>108</sup> 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.

## PART VII: 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.<sup>109</sup> Because the conditions for a cause of action under Section 11 or 12 of the Securities are not always met, Rule 10b-5 is often the basis for disclosure claims relating to public offerings, as well as other contexts.

### 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. The cause of action under Rule 10b-5 is most likely to serve as the basis of liability for inadequate disclosure in an offering memorandum for a private placement. Its standard of care requires the plaintiff to prove that the material misstatement or omission in the offering

memorandum was intentional or made with reckless disregard for the truth.<sup>110</sup>

Rule 10b-5 liability can also be based on information contained in any report filed with the SEC, or upon any other public statements issued by the company, *i.e.*, its informal as well as formal 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 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 guidebook. 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. For further information about Regulation FD, see footnote 53 relating to Part II.A.3.

## B. 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,<sup>111</sup> (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).

In 2010, the U.S. Supreme Court overturned forty years of jurisprudence, holding that Section 10(b) of the Exchange Act does not apply extraterritorially in the case of private actions. In *Morrison v. National Australia Bank Ltd.*,<sup>112</sup> the Court created a new transactional test, holding that Section 10(b) applies “only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.”<sup>113</sup> In doing so, the Court essentially barred private plaintiffs from bringing “foreign cubed” cases—foreign investors suing foreign issuers in foreign securities transactions. *Morrison* does not apply to actions brought by the SEC or the United States. Under Section 929Y of the Dodd-Frank Act, the SEC is directed to conduct a

study to determine the extent to which private rights of action under the antifraud provisions of the Exchange Act should be extended to apply extraterritorially (such as currently applies to actions brought by the SEC and the U.S.). The consequences of the *Morrison* decision are far reaching as it not only essentially curtailed all foreign cubed claims, but also has barred “foreign squared” claims of American investors purchasing securities on foreign securities exchanges.<sup>114</sup>

## C. 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.

## PART VIII: 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”)<sup>115</sup> 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 U.S. In addition, the Foreign Corrupt Practices provisions would apply to the issuer’s officers, directors, employees and any shareholder acting on their behalf inside and outside the U.S.

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 (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 IX: ADDITIONAL RELEVANT LAWS

### A. STATE SECURITIES LAWS

All fifty U.S. states have laws regulating the offer and sale of securities. These laws, commonly known as “blue sky” laws,<sup>116</sup> must be complied with in addition to the applicable Federal laws. In general, blue sky laws contain three distinct types of regulatory provisions: (a) anti-fraud 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 NYSE or Nasdaq) 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.

### C. U.S. INVESTMENT COMPANY ACT OF 1940

The U.S. Investment Company Act of 1940 (the “Investment Company Act”) is a comprehensive regulatory regime that contains a number of restrictions on the activities and transactions of an investment company. The Investment Company Act defines an “investment company” as any issuer that (i) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities or (ii) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 percent of the value of such issuer’s total assets (exclusive of U.S. Government securities and cash items) on an unconsolidated basis. The Investment Company Act prohibits unregistered non-U.S. investment companies from issuing securities to the public in the U.S. Accordingly, a foreign private issuer that is contemplating a securities offering should examine the composition of its assets to determine whether it inadvertently falls within the definition of an “investment company.”

### D. U.S. FEDERAL TAX LAWS — PASSIVE FOREIGN INVESTMENT COMPANIES

A foreign private issuer may be considered a passive foreign investment company (“PFIC”), which would have adverse tax consequences for U.S. holders of the issuer’s equity securities. In general, a non-U.S. corporation will be treated as a PFIC for U.S. federal income tax purposes in any taxable year in which either (i) at least 75 percent of its gross income is “passive income” or (ii) on average at least 50 percent of the value of its assets is attributable to assets that produce passive income or are held for the production of passive income. Passive income for this purpose generally includes, among other things, dividends, interest, royalties, rents and gains from commodities, foreign currency and securities transactions and from the sale or exchange of property that gives rise to passive income. The likelihood that a foreign private issuer may be or become a PFIC should be disclosed to potential U.S. investors as it may have adverse implications for investors. In some circumstances, certain elections may be available to U.S. holders that mitigate some of the adverse U.S. tax consequences although some of these elections may require the company to take actions that are onerous or even not possible. A

foreign private issuer that is, or may become, a PFIC should consult U.S. tax advisors at an early stage of any proposed securities offering.

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The foregoing is a summary of the principal U.S. securities law requirements that would be applicable to a foreign private issuer making an initial public offering of its equity securities in the U.S. This guidebook 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. The views set forth in this guidebook are the personal views of the authors and do not necessarily reflect those of the firm with which they are affiliated.

**DANIEL BUSHNER, RICHARD M. KOSNIK, AND  
J. ERIC MAKI**

**March 2012**

# EXHIBIT A

## CERTIFICATION PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002<sup>117</sup>

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)) 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;
  - 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 B

### 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 , 20\_\_\_\_, 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: \_\_\_\_\_, 20\_\_\_\_\_

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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.

## ANNEX A

### 2008 AMENDMENTS TO FORM 20-F

Effective December 6, 2008, the SEC adopted amendments to Form 20-F. They are summarized below.

#### **Changes in and Disagreements with Certifying Accountant**

The SEC requires domestic issuers to report changes in and disagreements with their certifying accountants in a current report on Form 8-K and in certain registration statements. Because foreign private issuers currently are not required to disclose similar information, the SEC's amendments would require of foreign private issuers substantially the same type of disclosure currently provided by U.S. issuers relating to changes in and disagreements with their certifying accountants.

#### **ADR Fees and Payments**

Prior to the amendments, the SEC required disclosure of fees and other payments made by ADR holders to the depository in the Form 20-F that is filed to register the deposited securities under the Exchange Act as well as in the form of ADR. However, annual reports on Form 20-F did not require this disclosure. The SEC's amendments require disclosure of ADR fees on an annual basis, including any fee for general depository services. In addition, the issuer would be required to disclose in Form 20-F registration statements and annual reports all direct and indirect payments made by the depository to the foreign private issuer whose securities underlie the ADRs.

#### **Jurisdictional Differences in Corporate Governance Practices**

Recognizing that foreign private issuers are subject to home country corporate governance practices that are different than those applicable to U.S. companies, many U.S. securities exchanges exempt foreign private issuers from certain of their corporate governance requirements. A foreign private issuer taking advantage of this exemption must provide disclosure detailing the differences between its home country corporate governance standards and those applicable to a U.S. company listed on the relevant exchange. Under the rules of the exchanges, this disclosure must be provided either on the issuer's website or in its annual report. The SEC's amendments require a foreign private issuer to provide in its annual report a concise summary of the significant ways in which the

issuer's corporate governance practices differ from the corporate governance practices of U.S. companies listed on the same exchange.

#### **Financial Information For Highly Significant Acquisitions**

U.S. companies must present financial statements of significant acquired businesses and related pro forma financial information in current reports on Form 8-K and in registration statements under the Securities Act and the Exchange Act. Prior to the amendments, foreign private issuers provided this information only in registration statements under those Acts. The SEC's amendments require foreign private issuers to provide in their annual reports on Form 20-F financial information regarding acquisitions completed during the most recent fiscal year that are considered "significant" under Rule 1-02(w) of Regulation S-X at the 50 percent level. Under Rule 1-02(w) of Regulation S-X, the significance of an acquired business is assessed by comparing (i) the registrant's investment in the acquired business to the registrant's total assets, (ii) the acquired business' total assets to the registrant's total assets and (iii) the acquired business' pre-tax income to the registrant's pre-tax income.

## ANNEX B

### LISTING REQUIREMENTS OF THE NASDAQ STOCK MARKETS<sup>118</sup>

#### Nasdaq Global Select Market Initial Listing Requirements<sup>119</sup>

Nasdaq imposes certain listing standards on issuers desiring to have their securities trade on the Nasdaq Capital Market. Somewhat higher standards apply for inclusion in the Nasdaq Global and Global Select Markets.

For initial listing, companies must meet the criteria of at least one of the four financial standards and the applicable liquidity requirements. As the chart below indicates, one of these four entry standards is more likely to be satisfied than another depending on whether the applicant company:

- is young and profitable (entry standard 1),
- is established (entry standard 2),
- does not have stockholders equity that is worth much, or is young and unprofitable (entry standard 3), or
- has substantial shareholders' equity and market value but limited revenue and profitability (entry standard 4).

The NASD will conduct a confidential pre-filing review to determine whether a company satisfies one of the foregoing sets of criteria.

## FINANCIAL AND QUALITATIVE REQUIREMENTS

Requirements	Standard 1	Standard 2	Standard 3	Standard 4
Pre-tax earnings <sup>120</sup> (income from continuing operations before income taxes)	Aggregate in prior three fiscal years $\geq$ \$11 million and Each of the two most recent fiscal years $\geq$ \$2.2 million and Each of the prior three fiscal years $\geq$ \$0	N/A	N/A	N/A
Cash flows <sup>121</sup>	N/A	Aggregate in prior three fiscal years $\geq$ \$27.5 million and Each of the prior three fiscal years $\geq$ \$0	N/A	N/A
Market capitalization <sup>122</sup>	N/A	Average $\geq$ \$550 million over prior 12 months	Average $\geq$ \$850 million over prior 12 months	$\geq$ \$160 million
Revenue	N/A	Previous fiscal year $\geq$ \$110 million	Previous fiscal year $\geq$ \$90 million	N/A
Total assets <sup>123</sup>	N/A	N/A	N/A	\$80 million
Stockholders' equity	N/A	N/A	N/A	\$55 million
Bid price <sup>124</sup>	\$4	\$4	\$4	\$4
Market makers <sup>125</sup>	3 or 4	3 or 4	3 or 4	3 or 4
Corporate governance <sup>126</sup>	Yes	Yes	Yes	Yes

## LIQUIDITY REQUIREMENTS

New Company Listings			
Requirements	Initial Public Offerings and Spin-Off Companies	Seasoned Companies: Currently Trading Common Stock or Equivalents	Affiliated Companies <sup>127</sup>
Round lot shareholders <b>or</b> Total shareholders <b>or</b> Total shareholders and Average monthly trading volume over past twelve months <sup>128</sup>	450 <b>or</b> 2,200	450 <b>or</b> 2,200 <b>or</b> 550 and 1.1 million	450 <b>or</b> 2,200 <b>or</b> 550 and 1.1 million
Publicly held shares <sup>129</sup>	1,250,000	1,250,000	1,250,000
Market value of publicly held shares <b>or</b> Market value of publicly held shares and Stockholders' equity	\$45 million	\$110 million <b>or</b> \$100 million and \$110 million	\$45 million

## NASDAQ GLOBAL MARKET INITIAL LISTING REQUIREMENTS

Companies must meet the criteria of at least one of the four standards.

Requirements	Standard 1	Standard 2	Standard 3 <sup>130,131</sup>	Standard 4
Stockholders' equity	\$15 million	\$30 million	N/A	N/A
Market value of listed securities	N/A	N/A	\$75 million	N/A
Total assets and Total revenue (in latest fiscal year <b>or</b> in two of last three fiscal years)	N/A	N/A	N/A	\$75 million and \$75 million
Income from continuing operations before income taxes (in latest fiscal year <b>or</b> in two of last three fiscal years)	\$1 million	N/A	N/A	N/A
Publicly held shares <sup>132</sup>	1.1 million	1.1 million	1.1 million	1.1 million
Market value of publicly held shares	\$8 million	\$18 million	\$20 million	\$20 million
Bid price	\$4	\$4	\$4	\$4
Shareholders (round lot holders) <sup>133</sup>	400	400	400	400
Market makers <sup>134</sup>	3	3	4	4
Operating history	N/A	2 years	N/A	N/A
Corporate governance <sup>135</sup>	Yes	Yes	Yes	Yes

## NASDAQ CAPITAL MARKET INITIAL LISTING REQUIREMENTS

Companies must meet the criteria of at least one of the three standards.

Requirements	Standard 1	Standard 2 <sup>136</sup>	Standard 3
Stockholders' equity	\$5 million	\$4 million	\$4 million
Market value of publicly held shares	\$15 million	\$15 million	\$5 million
Operating history	2 years	N/A	N/A
Market value of listed securities <sup>137</sup>	N/A	\$50 million	N/A
Net income from continuing operations (in the latest fiscal year or in two of the last three fiscal years)	N/A	N/A	\$750,000
Publicly held shares <sup>138</sup>	1 million	1 million	1 million
Bid price	\$4	\$4	\$4
Shareholders (round lot holders)	300	300	300
Market makers <sup>139</sup>	3	3	3
Corporate governance	Yes	Yes	Yes



## LISTING REQUIREMENTS OF THE NEW YORK STOCK EXCHANGE FOR NON-U.S. COMPANIES<sup>140</sup>

A foreign private issuer may elect to qualify for a listing either under the NYSE's alternate listing standards for non-U.S. companies (the "Alternate Listing Standards") or the NYSE's domestic listing criteria. The Alternate Listing Standards are designed to encourage major non-U.S. companies to list their shares on the NYSE. The NYSE domestic listing requirements call for a minimum distribution of a company's shares within the U.S., or in the case of North American companies, within

North America. 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 NYSE. 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.

Note that foreign private issuers with non-voting common stock, or voting rights allocated disproportionately among equity interests, may be refused an NYSE listing.

Criteria	Requirements	Worldwide	Domestic May satisfy either A, B, or C:
<b>Distribution</b>	<b>Round-Lots Holders Total Shareholders</b>	5,000	A. 400 U.S. round lot shareholders  B. 2,200 total shareholders and 100,000 shares monthly trading volume (most recent 6 months)  C. 500 total shareholders and 1,000,000 shares monthly trading volume (most recent 12 months)
	Public Shares	2.5MM	1.1MM
	Public Market Value	\$100MM	
	IPO's, Carve-outs & Spin-offs	N/A	\$40MM
	All other listings	N/A	\$100MM
<b>Financials</b>	<b>Earnings</b>		
	Aggregate Pre-tax Income for last 3 years	\$100MM	\$10MM
	Minimum Pre-Tax Income in each of 2 preceding years	\$25MM	\$2MM (all 3 years must be positive)
	<b>OR</b>		
	Aggregate Pre-tax Income for last 3 years	N/A	\$12MM
	Minimum Pre-Tax Income in the most recent year	N/A	\$5MM
	Minimum Pre-Tax Income in the next most recent year	N/A	\$2MM
	<b>Valuation/Revenue Test</b> May satisfy either A or B		

*continued on the next page*

## LISTING REQUIREMENTS OF THE NEW YORK STOCK EXCHANGE FOR NON-U.S. COMPANIES CONT.

Criteria	Requirements	Worldwide	Domestic May satisfy either A, B, or C:
	<b>A. Valuation with Cash Flow Test</b>		
	Global Market Capitalization	\$500MM	\$500MM
	Revenues (most recent 12-month period)	\$100MM	\$100MM
	Aggregate Cash Flow for last 3 years	\$100MM	\$25MM (all 3 years must be positive)
	Minimum Cash Flow in each of 2 preceding years	\$25MM	N/A
	<b>B. Pure Valuation Test</b>		
	Global Market Capitalization	\$750MM	\$750MM
	Revenues (most recent fiscal year)	\$75MM	\$75MM
	<b>Affiliated Company</b> For new entities with a parent or affiliated company listed on the NYSE		
	Global Market Capitalization	\$500MM	\$500MM
	At least 12 months of operating history	Yes	Yes
	Affiliated listed company is in good standing	Yes	Yes
	Affiliated listed company retains control of the entity	Yes	Yes

## ENDNOTES

- 1 Over 100 countries now permit or require IFRS reporting. SEC Release No. 33-8831 and 34-56217, page 6.
- 2 For example, the Interim Report of the Committee on Capital Markets Regulation (the “Paulson Report”) observes that, for the first half of 2006, 94% (by value) of the global IPOs that did not involve a public offering and listing in the U.S. (57% by number) still made the choice to market their issues in the U.S. in connection with a U.S. private placement. Paulson Report, page 45 (November 20, 2006).

The U.S. capital markets are the biggest and most liquid securities markets in the world. A non-U.S. company can usually obtain superior pricing and placement for its securities by expanding its potential investor base through a U.S. offering.
- 3 As of December 31, 2010, there were 970 foreign registered and reporting companies. <http://www.sec.gov/divisions/corpfin/cfforeignissuers.shtml>. The Paulson report, and The Bank of New York Mellon sponsored studies of ADR programs, each found that a U.S. listing boosts the share prices of non-U.S. issuers. Paulson Report, pages 38 and 47.
- 4 The determination of residency is based on beneficial ownership rather than title. This follows the “held of record” approach of Rule 12g3-2(a) 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.
- 5 Rule 3b-4(d) and (e). These provisions regarding annual testing of foreign private issuer eligibility are rules which became effective in 2008. SEC Release Nos. 33-8959; 34-58620.
- 6 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 or a specific exemption from them. As a result of a broad definition of prospectus and offer, the Securities Act imposes restrictions on communications that are intended to make the prospectus the primary document for marketing the offering. See discussion in Part I.C.
- 7 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 a separate framework governing communications with investors.
- 8 Under 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>>>. For a discussion of the use of eXtensible Business Reporting Language (XBRL) reporting of certain financial information, see Part II.A.6.
- 9 In addition, as another element of the access equals delivery model, an SEC exemption from Section 5(b)(1) of the Securities Act 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. 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.
- 10 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 the “short form” described in the following sentence. Form F-3 provides for a streamlined disclosure regime that an issuer may be eligible to use after it has completed its IPO and become a reporting company. 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. See Part II.B.
- 11 Item 3.A of Form 20-F. Companies that have been in operation for a shorter period than five years need only provide selected financial information for this shorter period. In addition, the earliest two years of the five years of selected financial data may be omitted if the SEC receives from the company a representation that this information cannot be provided without unreasonable effort or expense, together with an explanation of the reasons for such omission. Item 3.A.
- 12 Item 8.A.2 of Form 20-F. The audited financial statements of a non-U.S. company are permitted, at the time of the offering (*i.e.*, the effective date of the registration statement), to be no older than fifteen months in general or twelve months in the case of an initial public offering by an issuer that is not already publicly traded in its home country. As a practical matter, market practice for IPOs will usually require financial statements for the most recent fiscal year.

Unlike Item 3.A of Form 20-F regarding selected financial data, Item 8.A of Form 20-F does not contain an explicit exception allowing financial statements for a shorter period than three years if the issuer has only been in operation for such shorter period. This sort of exception is provided in Rules 3-01 and 3-02 of Regulation S-K (applicable to both U.S. or non-U.S. issuers). Rules 3-01(d)

- and 3-02(d). By requiring young non-U.S. issuers to comply with these rules (in lieu of Item 8.A), the SEC obligates them to provide the same quarterly financial data as U.S. issuers and denies them the exemption from the quarterly-reporting requirement that is otherwise available to non-U.S. issuers. (Set forth below in this section is a discussion of the interim financial statements that are required of non-U.S. issuers under Item 8.A of Form 20-F). For discussion of an exception allowing non-U.S. issuers to supply only two years of audited financial statements, *see* footnote 21.
- 13 For purposes of the rules on pro forma financial data, a business combination is considered significant if (1) an issuer's investments in and advances to the businesses acquired or to be acquired (the "target") cumulatively exceed 20% of the issuer's total assets as of the end of the most recently completed financial year, (2) the issuer's proportionate share of the total assets of the target exceeds 20% of the issuer's total assets as of the end of the most recently completed financial year or (3) the issuer's equity in the income from continuing operations of the target exceeds 20% of such income of the issuer for the most recently completed financial year. A disposition of a business is considered significant if any of the above three tests are exceeded, where the company to be disposed of is considered as the target and 10% is substituted for the 20% levels. These financial tests for the issuer are calculated on a consolidated basis (*i.e.*, the investments, assets and income of the issuer include those of its subsidiaries). Rule 11-01(b) of Regulation S-X.
- 14 Article 11 of Regulation S-X.
- 15 For purposes of determining whether financial statements must be provided for it, a business qualifies as significant if it is acquired or to be acquired in a "significant business combination", as such term is defined for purposes of the rules regarding pro forma financial data. *Compare* Rule 3-05 of Regulation S-X with Rule 11-01(b) of Regulation S-X. *See* footnote 12. If the acquired businesses do not exceed any of the conditions of significance in these rules at the 50% level, and either have not yet been acquired or were acquired no more than seventy-four days prior to the date of the final prospectus, financial statements for them are not required. Rule 3-05(b)(4).
- 16 Rule 3-05 of Regulation S-X. Note that an exception permits financial statements for such shorter period as the business acquired or to be acquired has been in existence. *Compare with* footnote 12.
- 17 Item 8.A.5 of Form 20-F. The non-U.S. company must provide interim financial information which is more current than that demanded by this rule if this information was previously made public.
- 18 *But see* footnote 12. A non-U.S. issuer that finds it advisable to follow U.S. interim financial reporting practices would, assuming the financial year is a calendar year, give (1) first quarter financial results for a registered securities offering closing after May 15, (2) first half financial results for a registered securities offering closing after August 15 and (3) third quarter financial results for a registered securities offering closing after November 15. *See* Rule 3-01(e) and Rule 3-02(b) of Regulation S-X.
- 19 Foreign private issuers relying on this accommodation must state in a prominent footnote in their financial statements, and their independent auditors must opine in their report, that the financial statements are in compliance with IFRS as issued by the IASB. Financial statements that include any deviation from IFRS as issued by the IASB must be reconciled to U.S. GAAP. However, the SEC has provided transitional relief to registrants from the European Union ("EU") that have prepared their financial statements applying the EU's carve-out from International Accounting Standard No. 39 with respect to hedge accounting for certain financial statements.
- 20 U.S. GAAP reconciliation also is required for the earliest of the three fiscal years covered by the financial statements in the prospectus if this reconciliation was previously filed with the SEC. Item 17C.2.i of Form 20-F.
- To give non-U.S. issuers an incentive to fully prepare their financial statements in U.S. GAAP (rather than provide the required reconciliation to U.S. GAAP of financial statements prepared in accordance with home country accounting principles), the SEC only requires two years of audited financial statements from non-U.S. issuers that prepare full U.S. GAAP financial statements. Instruction 3 to Item 8.A.2 of Form 20-F (added to Form 20-F in June 2001 pursuant to Release No. 33-7983); footnote 37 to Release No. 33-7053, effective April 26, 1994.
- 21 Rule 3-20 of Regulation S-X. However, if the reporting currency is not the U.S. dollar, dollar-equivalent financial statements cannot be presented except for the most recent fiscal year and any subsequent interim period.
- 22 Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Rule 436(g) was repealed and companies can no longer refer to the ratings of their debt, convertible debt or preferred equity securities in registration statements, prospectuses and documents incorporated by reference in those documents without the written consent of a Nationally Recognized Statistical Rating Organization ("NRSRO"). However, disclosure of ratings for such securities without the consent of ratings agencies is still permissible if it relates to changes to a credit rating, the liquidity of the company, the cost of funds for the company, or the terms of agreements that refer to credit ratings. *See* SEC Division of Corporation Finance, *Compliance and Disclosure Interpretations*, Securities Act Rules, Question 233.04.
- 23 Other required exhibits include (a) the underwriting agreement with the underwriters, (b) the issuer's memorandum or articles of association and by-laws, (c) any deposit agreement pursuant to which American Depositary Receipts are to be issued, and (d) all outstanding long term debt instruments of the registrant under which indebtedness exceeds ten percent of total assets.
- 24 *See* Non-Public Submissions from Foreign Private Issuers (December 8, 2011) <http://sec.gov/divisions/corpfm/internat/nonpublicsubmissions.htm>.
- 25 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.

- 26 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.
- 27 See FINRA Proposed Rule Change, File No. SR-2011-057 (Oct. 4, 2011).
- 28 Note, in particular, that underwriters and dealers which are selling group members typically will be prohibited from distributing in the U.S. research reports regarding an issuer in the period leading up to, during, or for some weeks following, an offering of the issuer's securities.
- 29 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 "gun jumping" and may have adverse consequences, including severe delay 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.
- 30 In response to an inquiry from Congressman Darrell E. Issa questioning whether certain rules and regulations, including those relating to quiet periods during the registration process, were outdated and consequently inhibiting capital raising in the U.S., the SEC is currently reviewing restrictions on communications in initial public offerings. See letter from Congressman Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, United States House of Representatives, to Mary L. Schapiro, Chairman, Securities and Exchange Commission (March 22, 2011), <http://www.knowledgemosaic.com/resourcecenter/Issa.041211.pdf>. See also letter from Mary L. Schapiro, Chairman, Securities and Exchange Commission, to Congressman Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, United States House of Representatives (April 6, 2011), <http://www.sec.gov/news/press/schapiro-issa-letter-040611.pdf>. See also *The Future of Capital Formation: Hearing Before the H. Comm. on Oversight and Government Reform*, 112th Cong. (2011) (statement of Mary L. Schapiro, Chairman, Securities and Exchange Commission).
- 31 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; (ii) advertisements of, or other information about, the issuer's products or services; and (iii) dividend notices.
- 32 For this safe harbor, the following conditions must be satisfied:
- (i) The issuer has previously released or disseminated factual business information (as defined in Rule 169) in the ordinary course of business;
  - (ii) The timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations;
  - (iii) The information is released or disseminated for intended use by persons, such as customers and suppliers, other than in their capacities as investors or potential investors in the issuer's securities, by the issuer's employees or agents who historically have provided such information; and
  - (iv) The issuer is not an investment company registered under the Investment Company Act or a business development company as defined in section 2(a)(48) of the Investment Company Act.
- 33 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 Rule 168 and Rule 169 safe harbors. In addition, the Rule 168 and Rule 169 safe harbors are not available to underwriters or dealers.
- 34 Rules 168 and 169 are both 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).
- 35 A designated offshore securities market is defined as:
- (i) The Eurobond market, as regulated by the International Securities Market Association; the Alberta Stock Exchange; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bermuda Stock Exchange; the Bourse de Bruxelles; the Copenhagen Stock Exchange; the European Association of Securities Dealers Automated Quotation; the Frankfurt Stock Exchange; the Helsinki Stock Exchange; The Stock Exchange of Hong Kong Limited; the Irish Stock Exchange; the Istanbul Stock Exchange; the Johannesburg Stock Exchange; the London Stock Exchange; the Bourse de Luxembourg; the Mexico Stock Exchange; the Borsa Valori di Milan; the Montreal Stock Exchange; the Oslo Stock Exchange; the Bourse de Paris; the Stock Exchange of Singapore Ltd.; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; the Warsaw Stock Exchange, the Zurich Stock Exchange and the Bahamas International Securities Exchange; and
  - (ii) Any foreign securities exchange or non-exchange market designated by the SEC.
- 36 To be eligible for this safe harbor, the issuer cannot be an investment company registered under the Investment Company Act or a business development company as defined in section 2(a)(48) of the Investment Company Act.

- 37 However, a communication made in reliance on Rule 163A cannot reference a securities offering that is, or will be, the subject of a registration statement.
- 38 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.
- 39 However, graphic or broadcast communications do not qualify as oral communications for purposes of the SEC's communications restrictions. An exception is made for communications that originate live, in real time, to a live audience and do not originate in recorded form or otherwise as a graphic communication. Thus, face-to-face discussions, voice to voice telephone conversations and live roadshows constitute oral communications, but e-mails, "blast" voicemail messages and recorded roadshows are deemed to be written. Nevertheless, certain provisions are designed to encourage electronic roadshows that are open to the public even if they are recorded.
- 40 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.
- 41 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.
- 42 However, a Rule 134 notice is not allowed to provide a detailed description of securities being offered.
- 43 The categories of ineligible issuers include (i) issuers that at the time of the eligibility determination are not current for twelve 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. See footnote 73. Ineligible issuers, 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.
- 44 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.
- 45 This requirement is satisfied if the issuer files such documents through EDGAR. If the documents are not filed with the SEC or filed with the SEC but not via EDGAR, the company must provide to Nasdaq a hard copy of the report.
- 46 SEC Release Nos. 33-8959; 34-58620.
- 47 Note, in particular, that certain large and other issuers are required to disclose in their upcoming annual report on Form 20-F any unresolved SEC comments relating to their previous annual reports on Form 20-F if (a) they have received them not less than 180 days before the end of the fiscal year to which the upcoming annual report relates and (b) believe them to be material. Item 4.A of Form 20-F. 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.
- 48 The issuer should expect, consistent with customary practice in underwritten public offerings of securities in the U.S., 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 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 issuer may satisfy the earnings statement requirement (i) by filing with the SEC a Form 20-F, 40-F or 6-K containing such information, (ii) 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 (iii) by publishing a newspaper notice of its availability and furnishing a copy to security holders upon request and to the SEC.
- 49 The Committee's recommendation of an executive summary is intended to address the concern that many individual investors may find a company's SEC reports overly complex and detailed. Implicit in the Committee's recommendation of an executive summary instead of less extensive disclosure is a recognition that research and other financial analysts often are interested in detailed information. Companies must also have this audience in mind when preparing annual reports.
- 50 SEC Release Nos. 33-8959; 34-58620.

51 See SEC Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 8350, Exchange Act Release No. 48960 (December 29, 2003) ("MD&A Interpretive Release").

52 See SEC Interpretation: Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management Discussion and Analysis, Securities Act Release No. 33-9144 (September 28, 2010) ("Liquidity and Capital Resources Interpretive Release").

53 SEC enforcement actions make it clear that the SEC generally expects non-U.S. companies to disclose material information on Form 6-K promptly after it has become known. See *In the Matter of Sony Corporation and Sumio Sano*, 1998 SEC Lexis 1650 and *In the Matter of E.ON AG*, Securities Exchange Act Release No. 43372 (Sept. 28, 2000).

The importance to the SEC of prompt public disclosure of material information is also evident in its Regulation FD regarding selective disclosure. See Securities Act Release No. 33-7881, Exchange Act Release No. 34-43154 (Aug. 15, 2000). Under Rule 100 of Regulation FD, whenever an issuer, or person acting on its behalf, discloses material non-public information, to certain enumerated persons (in general, research analysts, other securities market professionals or holders of the issuer's securities who may well trade on the basis of the information), the issuer must make public that same information:

- (1) simultaneously in the case of intentional disclosure, or
- (2) promptly in the case of unintentional disclosure (*i.e.*, as soon as reasonably practicable, but no later than either (a) twenty-four hours after discovery of the unintentional disclosure or (b) prior to the commencement of the next day's trading, if later).

Although non-U.S. issuers are exempt from Regulation FD as it was finally adopted (Rule 101(b) of Regulation FD), the SEC initially proposed a version of it applicable to them and regards the regulation as generally consistent with insider trading prohibitions that all participants in the U.S. capital markets must observe. See Securities Act Release No. 33-7787, Exchange Act Release No. 34-42259 (Dec. 20, 1999).

Moreover, U.S. stock exchange rules require prompt reporting of material new information.

54 Specifically, 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. (However, other causes of action under the U.S. securities laws, with more demanding conditions of applicability for a plaintiff, may apply.) Section 18 of the Exchange Act imposes liability on any person who makes a false or misleading statement in any report or document filed pursuant to the Exchange Act.

55 This condition is met by a written communication released in the U.S. as well as outside the U.S., so long as the communication is released in the U.S.

contemporaneously with or after the release outside the U.S. and is not otherwise targeted at persons located in the U.S.

56 In particular, to promote web site communication by public companies, the Federal Advisory Committee on Improvements to Financial Reporting recommended that the SEC provide more guidance on this topic. Accordingly, in August 2008, the SEC provided additional interpretive guidance regarding means by which companies may use the Internet to disseminate information to the market in compliance with the U.S. federal securities laws. SEC Release No. 34-58288. This guidance, as it pertains to foreign private issuers, is reflected in the discussion immediately below in this subsection 5. In addition, to encourage issuers to maintain a company web site Nasdaq allows them to satisfy their requirement for the distribution of annual and interim reports to shareholders by posting such reports on or through the company web site.

57 SEC Release Nos. 33-9002; 34-59324.

58 This XBRL requirement for foreign private issuers using IFRS began with fiscal years ending on or after June 15, 2011. Foreign large accelerated filers with a worldwide public common equity float above \$5 billion using U.S. GAAP were required to comply for fiscal years ending on or after June 15, 2009. All other foreign large accelerated filers using U.S. GAAP became subject to XBRL beginning with the fiscal year ended after June 15, 2010.

Large accelerated filer means an issuer after it first meets the following conditions as of the end of its fiscal year:

- (i) The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter;
- (ii) The issuer has been subject to the requirements of section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months;
- (iii) The issuer has filed at least one annual report pursuant to section 13(a) or 15(d) of the Exchange Act; and
- (iv) The issuer is not eligible to use the requirements for smaller reporting companies in 17 CFR Part 229 for its annual and quarterly reports.

59 The term shelf registration is used, because the registration statement is filed and declared effective at one time, and then "pulled off the shelf" and used at a later time.

60 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.

- 61 A continuous offering is an offering that commences promptly after registration by the issuer and continues for more than thirty days from the day of initial effectiveness.
- 62 A seasoned issuer is one that is eligible to use Form S-3 or F-3 to register a primary offering of securities. SEC Release Nos. 33-8591; 34-52056.
- 63 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.
- 64 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.
- 65 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.
- 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.
- 66 Given that automatic shelf registration statements become effective immediately upon filing, they are not subject to the six-month extension described in footnote 63.
- 67 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. 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.
- 68 The safe harbor for forward looking statements is also available for ongoing reporting by issuers, which is helpful to companies including financial guidance in press releases. Such safe harbor language should also be included in the Internet version of such press releases.
- 69 Note that domestic issuers are also categorized according to the filing deadlines for their periodic reports (e.g., 60, 75 or 90 days after the end of the fiscal year for filing the annual report on Form 10-K). Large accelerated filers, accelerated filers and all other registrants, respectively, constitute these categories defined in Rule 12b-2 under the Exchange Act. These categories have been applied to foreign private issuers to determine when they are required to comply with the requirements relating to certifications of internal controls. See Part III.C. However, all foreign private issuers are subject to the same deadlines for filing their periodic reports.
- Accelerated filer means an issuer after it first meets the following conditions as of the end of its fiscal year:
- (i) The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of \$75 million or more, but less than \$700 million, as of the last business day of the issuer's most recently completed second fiscal quarter;
  - (ii) The issuer has been subject to the requirements of section 13(a) or 15(d) of the Act for a period of at least twelve calendar months;
  - (iii) The issuer has filed at least one annual report pursuant to section 13(a) or 15(d) of the Act; and
  - (iv) The issuer is not eligible to use the requirements for smaller reporting companies in 17 CFR Part 229 for its annual and quarterly reports.
- 70 Well-known seasoned issuer eligibility is measured on an approximately annual basis by reference to a determination date. If the issuer has not filed an automatic registration statement (or has not kept it sufficiently up to date by amending it in accordance with the requirements of Securities Act Section 10(a)(3)), the determination date is 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 due date). If the issuer has filed an automatic shelf registration statement, eligibility is determined by reference to the later of (i) the time of filing of the issuer's most recent shelf registration statement or (ii) the time of filing of 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). Section 10(a)(3) provides that, when a prospectus is used more than nine months after the effective date of the registration statement, the information contained in it shall be as of a date not more than sixteen months prior to such use. Under Form F-3, a Section 10(a)(3) update need not be made through a post-effective amendment; rather, the update is automatically deemed to occur 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 through the incorporation by reference of that annual report.
- 71 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.
- 72 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.



- 73 The following are ineligible issuers: (a) issuers who are not current in their Exchange Act reports and other materials required to be filed during the prior twelve months; (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; (d) 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 Securities Act Section 8 or Section 8A (generally, prohibiting offerings or violations of the Securities Act); or (e) 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.
- 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 Company Act, or a business development company. 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 twelve months.
- 74 To qualify for the exemption, a company must: (i) not be required to file or furnish reports under Section 13(a) or Section 15(d) of the Exchange Act, (ii) maintain a listing of each class of equity securities (including those underlying ADRs) on one or more exchanges in a foreign jurisdiction that, either singly or together with the trading of the same class of securities in another foreign jurisdiction, constitutes the primary trading market for those securities, (iii) publish on its Internet website, or through an electronic information delivery system generally available to the public in its primary trading market, in English, certain information made available since the first day of its most recently completed fiscal year.
- In addition, any Form F-6 registration statement relating to the ADRs in respect of the company's securities must contain a statement from the company that it publishes information in English required to maintain the exemption from registration under Rule 12g3-2(b) on its website or through an electronic information delivery system generally available to the public in its primary trading market.
- 75 Specifically, 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.
- 76 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.
- 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.
- 77 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, both 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.
- 78 SOX lengthened maximum jail sentences and increased maximum fines for corporate executives who knowingly and willfully misstate financial statements (e.g., SOX § 906). Since this kind of violation must be willful, it has not had a major impact on the risk of personal liability for the large majority of well intentioned and reasonably conscientious officers and directors.
- SOX added the following two civil sanctions against corporate officers. First, under certain conditions, the CEO and CFO of an issuer are required to reimburse it for their bonuses or stock options if the issuer restates its financial statements. (SOX § 304). Second, the SEC may permanently prohibit persons from acting as officers or directors of listed companies due to their unfit conduct. (SOX § 1105).
- 79 *E.g.*, Directive 2006/43/EC of the European Parliament and of the Council of 17 May, 2006, on Statutory Audits of Annual Accounts and Consolidated Accounts, Amending Council Directives 78/660/EEC and 83/349/EEC and Repealing Council Directive 84/253/EEC (September 6, 2006); Directive 2006/46/EC of the European Parliament and of the Council of 14 June, 2006, Amending Council Directives 78/660/EEC on the Annual Accounts of Certain Types of Companies, 83/349/EEC on Consolidated Accounts, 86/635/EEC on the Annual Accounts and Consolidated Accounts of Banks and Other Financial Institutions and 91/674/EEC on the Annual Accounts and Consolidated Accounts of Insurance Undertakings (August 16, 2006).
- 80 However, French securities laws also require an auditor's attestation.

81 These exemptions are 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 for foreign private issuers permitting alternative structures where these structures are provided for under local law, such as statutory auditors or Japan’s Statutory Board of Auditors.

82 SEC Release No. 33-8220.

83 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.

84 In addition to Section 10A, the NYSE and Nasdaq listing rules specify independence criteria for audit committee members that must be observed by foreign private issuers unless they disclose departures from these criteria. See subsection G. below. Domestic issuers are not given this comply or explain flexibility and must simply satisfy the independence criteria.

Under Item 16A of Form 20-F, “audit committee financial expert” means a person with the following attributes:

- (1) an understanding of generally accepted accounting principles (as used by the issuer in its primary financial statements filed with the SEC) and financial statements;
- (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;
- (4) an understanding of internal controls and procedures for financial reporting; and
- (5) an understanding of audit committee functions.

A person shall have acquired such attributes through:

- (1) education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;
- (2) experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;
- (3) experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(4) other relevant experience.

Under the NYSE and Nasdaq rules, each member of the audit committee must be financially literate and one of its members must have accounting or related financial management experience. Under the NYSE rules, the financial literacy qualification is interpreted by the company’s board of directors in its business judgment. Section 303A.07 (a) of the NYSE Listed Company Manual. The Nasdaq equivalent of the financial literacy requirement is that each member of the audit committee be able to read and understand fundamental financial statements. Nasdaq Stock Market Rule 5605(c)(2)(A). The NYSE rules allow a member of the audit committee to become financially literate within a reasonable period of time after his appointment to the audit committee, however the Nasdaq rules require financial literacy at the time of appointment. Section 303A.07 (a) of the NYSE Listed Company Manual and Nasdaq Stock Market Rule 5605(c)(2)(A).

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.

85 These must include procedures for retaining, as well as receiving and treating, any external complaints received by the company regarding accounting, internal accounting controls or auditing matters. European companies must be careful to design their retention and other whistleblowing procedures so that they comply with European data protection laws.

86 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 the normal course of performing assigned functions, to prevent or detect misstatements on a timely basis.

*Significant deficiency:* a deficiency or combination of deficiencies in internal control over financial reporting that is less severe than a material weakness, yet important enough to merit attention by those responsible for oversight of the registrant’s financial reporting.

*Material weakness:* a deficiency, or combination of deficiencies in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of annual or interim financial statements will not be prevented or detected on a timely basis. See footnote 91 regarding the change made to this definition in 2007.

87 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.

88 Public companies became subject to internal control requirements when they were incorporated into the U.S. securities laws by the U.S. Foreign Corrupt Practices Act

- (FCPA) (*see* Section 13(b)(2)(B) of the Exchange Act). *See* Part VIII.
- 89 Respectively, SEC Release No. 33-8810 published in 2007 and SEC Release No. 33-8809 adopted in 2007.
- 90 PCAOB Release No. 2007-005 adopted in 2007.
- 91 Note, in addition, that the SEC revised the definition of “material weakness” to read as follows: A deficiency, or combination of deficiencies, in internal controls such that there is a reasonable possibility that a material misstatement of the company’s annual or interim financial statements will not be prevented or detected on a timely basis by the company’s internal controls. The likelihood component of the material weakness definition was changed from “more than a remote possibility” to “reasonable possibility.”
- 92 Specifically, issuers must 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.
- 93 An “audit partner:” (a) 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; (b) includes all those who serve the company at the company or parent level, other than specialty partners; and (c) 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.
- 94 There is an exception to the one-year cooling-off period 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.
- 95 SEC Release Nos. 33-8959; 34-58620.
- 96 This general requirement is subject to various exemptions for foreign private issuers discussed in Part III.B, above.
- 97 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.
- 98 To qualify as a QIB, an entity must (1) in most cases, own and invest on a discretionary basis at least \$100 million in securities of other entities and (2) be one of the types of institutional investors defined in Rule 144A, such as an insurance company, pension plan, investment company (*e.g.*, a mutual fund) or bank. Rule 144A(a)(1).
- 99 In general, investors will not resell the restricted securities that were distributed in a private placement unless the resale meets the conditions in the Rule 144A or Rule 144 safe harbors. These safe harbors provide exemptions from the registration requirements of the Securities Act. Resales of the restricted securities among QIBs are allowed by the Rule 144A safe harbor. The Rule 144 safe harbor allows non-affiliates of a non-reporting issuer to resell the restricted securities to the public after the end of a one year holding period and subject to certain manner of sale requirements (*e.g.*, brokers transactions). This shortened holding period is a result of a major SEC reform, effective February 15, 2008, which also reduced other restrictions in Rule 144. SEC Release No. 33-8869.
- Even after the end of a one year holding period, affiliates of a non-reporting issuer may only resell a limited volume of securities under the Rule 144 safe harbor. A person’s affiliate status depends on a broad definition of its direct or indirect control relationship to an issuer, which uncertain definition may reach persons with representatives on the issuer’s board or who hold 10%, or even less, of an issuer’s outstanding shares. Affiliates of a reporting issuer will typically obtain contractual rights obligating it to prepare a registration statement for the resale of the affiliate’s securities. Affiliates of a non-reporting issuer suffer from the illiquidity discount discussed below (until they cease to be affiliates).
- 100 Technically, the SEC states the 12(g) registration obligation as follows: “When read in conjunction with Exchange Act Rules 12g-1 and 12g3-2(a), Exchange Act Section 12(g) requires an issuer to file an Exchange Act registration statement regarding a class of equity securities within 120 days of the last day of its fiscal year if, on that date, the number of its record holders is 500 or greater, the number of its U.S. resident holders is 300 or more and the issuer’s total assets exceed \$10 million.” Footnote 11 to SEC Release No. 34-58465.
- In response to Congressman Issa’s letter, the SEC is currently reviewing the threshold of 500 holders of record in triggering public reporting obligations.
- 101 Primary trading market means that at least 55% of the trading in the subject class of securities on a worldwide basis took place through securities markets in one or two foreign jurisdictions during the issuer’s most recently completed fiscal year. This determination is made by reference to average daily trading volume.
- 102 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 U.S.
- 103 “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.
- 104 “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.
- 105 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.
- 106 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.
- 107 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.
- 108 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.”
- 109 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 VI and VII of this guidebook.
- 110 Thus, with respect to an offering memorandum for a private placement, the same standard of care is applicable to issuers, underwriters and control persons (though the burden of meeting such standard may be higher for an issuer, who usually is, or should be, in the best position to know what should be disclosed in the offering memorandum). In contrast, with respect to a registration statement for a public offering, the issuer is subject to strict liability and underwriters and control persons are subject to a standard akin to negligence under Section 11 of the Securities Act. Note that the burden of proving a violation of Rule 10b-5’s recklessness standard is imposed on the plaintiff, whereas the defendant has the burden of establishing a due diligence defense against Section 11 and 12(a)(2) claims.
- 111 This condition will always be met in virtually any securities transaction.
- 112 130 S. Ct. 2869 (June 24, 2010).
- 113 *Id.* at p. 24.
- 114 *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758 (S.D.N.Y. July 27, 2010).
- 115 These provisions are incorporated in Section 13(b) of the Exchange Act.
- 116 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.”
- 117 Each of the principal executive officer and principal financial officer of the registrant must provide a separate certification. The required certification must be in the exact form set forth above.
- 118 Listing Standards & Fees (Nasdaq), October 2011, at 1-3, 8 and 12.
- 119 These requirements apply to all companies, other than closed-end management investment companies. A closed end management investment company, including a business development company, is not required to meet the financial requirements of Marketplace Rule 5315(f)(3). If the common stock of an issuer is included in The Nasdaq Global Select Market, any other security of that same issuer, such as other classes of common or preferred stock that qualifies for listing on The Nasdaq Global Market shall also be included in The Nasdaq Global Select Market. A company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time, as described

- in IM-5101-2, is not eligible to list on The Nasdaq Global Select Market.
- 120 In calculating income from continuing operations before income taxes for purposes of Rule 5315(f)(3)(A), Nasdaq will rely on an issuer's annual financial information as filed with the SEC in the issuer's most recent periodic report and/or registration statement. If an issuer does not have three years of publicly reported financial data, it may qualify under Rule 5315(f)(3)(A) if it has: (i) reported aggregate income from continuing operations before income taxes of at least \$11 million and (ii) positive income from continuing operations before income taxes in each of the reported fiscal years. A period of less than three months shall not be considered a fiscal year, even if reported as a stub period in the issuer's publicly reported financial statements.
- 121 In calculating cash flows for purposes of Rule 5315(f)(3)(B), Nasdaq will rely on the net cash provided by operating activities reported in the statements of cash flows, as filed with the SEC in the issuer's most recent periodic report and/or registration statement, excluding changes in working capital or in operating assets and liabilities. If an issuer does not have three years of publicly reported financial data, it may qualify under Rule 5315(f)(3)(B) if it has: (i) reported aggregate cash flows of at least \$27.5 million and (ii) positive cash flows in each of the reported fiscal years. A period of less than three months shall not be considered a fiscal year, even if reported as a stub period in the issuer's publicly reported financial statements.
- 122 In the case of an issuer listing in connection with its initial public offering, compliance with the market capitalization requirements of Rules 5315(f)(3)(B) and (f)(3)(C) will be based on the company's market capitalization at the time of listing.
- 123 In computing total assets and stockholders' equity for purposes of Rule 5315(f)(3)(D), Nasdaq will rely on a company's most recent publicly reported financial statements subject to the adjustments described in Rule 5310(j).
- 124 The bid price requirement is not applicable to a company listed on The Nasdaq Global Market that transfers its listing to The Nasdaq Global Select Market.
- 125 An electronic communications network (ECN) is not considered a market maker for the purpose of these rules. Note that the company must also have sufficient market makers to satisfy Rule 5315(e)(3), which may require four (4) market makers.
- 126 Marketplace Rules 5601, 5602, 5605, 5610, 5615, 5620, 5625, 5630, 5635 and 5640.
- 127 Companies affiliated with another company listed on The Nasdaq Global Select Market. For purposes of Rule 5315, an issuer is affiliated with another company if that other company, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control of the issuer. For purposes of these rules, control means having the ability to exercise significant influence. Ability to exercise significant influence will be presumed to exist where the parent or affiliated company directly or indirectly owns 20% or more of the other company's voting securities, and also can be indicated by representation on the board of directors, participation in policy making processes, material inter-company transactions, interchange or managerial personnel, or technological dependency.
- 128 Round lot and total shareholders include both beneficial holders and holders of record.
- 129 In computing the number of publicly held shares for purposes of Rule 5315(c), Nasdaq will not consider shares held by an officer, director or 10% shareholder of the issuer.
- 130 Under Marketplace Rule 5005(a)(21), listed securities is defined as "securities listed on Nasdaq or another national securities exchange."
- 131 Seasoned companies (those companies already listed or quoted on another marketplace) qualifying only under the market value of listed securities requirement of Standard 3 must meet the market value of listed securities and the bid price requirements for ninety consecutive trading days prior to applying for listing.
- 132 Publicly held shares is defined as total shares outstanding, less any shares held by officers, directors or beneficial owners of 10% or more.
- 133 Round lot holders are shareholders of 100 shares or more.
- 134 An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.
- 135 Marketplace Rules 5601, 5602, 5605, 5610, 5615, 5620, 5625, 5630, 5635 and 5640.
- 136 Seasoned companies (those companies already listed or quoted on another marketplace) qualifying only under the market value of listed securities requirement must meet the market value of listed securities and the bid price requirements for ninety consecutive trading days prior to applying for listing.
- 137 Under Marketplace Rule 5005(a)(21), listed securities is defined as "securities listed on Nasdaq or another national securities exchange."
- 138 Publicly held shares is defined as total shares outstanding, less any shares held by officers, directors or beneficial owners of 10% or more. In the case of ADRs, for initial inclusion only, at least 400,000 shall be issued.
- 139 An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.
- 140 NYSE Listing Standards, <http://usequities.nyx.com/regulation/listed-companies-compliance/listings-standards/non-us>. The NYSE offers two sets of standards — worldwide and domestic — under which non-U.S. companies may qualify for listing. Both standards include distribution and financial criteria. A company must qualify for both the distribution and financial criteria within that particular standard.

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## JONES DAY LOCATIONS

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ALKHOBAR

ATLANTA

BEIJING

BOSTON

BRUSSELS

CHICAGO

CLEVELAND

COLUMBUS

DALLAS

DUBAI

DÜSSELDORF

FRANKFURT

HONG KONG

HOUSTON

IRVINE

JEDDAH

LONDON

LOS ANGELES

MADRID

MEXICO CITY

MILAN

MOSCOW

MUNICH

NEW DELHI

NEW YORK

PARIS

PITTSBURGH

RIYADH

SAN DIEGO

SAN FRANCISCO

SÃO PAULO

SHANGHAI

SILICON VALLEY

SINGAPORE

SYDNEY

TAIPEI

TOKYO

WASHINGTON