

CHADBOURNE
& PARKE LLP

Accessing the U.S. Capital Markets

Selected Legal and Practical
Considerations for Foreign Companies

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- Help us to better understand the issues our clients face
- Enable us to provide solutions tailored to specific needs

- Allow us to enhance the customers' positive views of client services

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- Active partner participation in client transactions
- Responsiveness
- Effective communication
- Creative and pragmatic business-oriented approach
- Teamwork
- Efficiency
- Focus on quality

Chadbourne is committed to working as your business partner and, as such, we have carefully selected our team to serve your needs today and for the long term. The qualifications of our team members, knowledge of key subject areas and willingness to understand your business will exceed your expectations. We look forward to collaborating with you.

**Accessing the U.S. Capital Markets:
Selected Legal and Practical Considerations for Foreign Companies
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INTRODUCTION

Foreign business enterprises have historically looked to the U.S. capital markets as an important source of financing. Although the global financial marketplace has been significantly impacted by recent financial uncertainty and will undoubtedly continue to evolve in unforeseen ways, the U.S. market is likely to remain one of the most robust and deepest markets in the world. While local and alternative international markets have continued to develop over the past several years, non-U.S. companies continue to seek access to the U.S. markets through new securities offerings, both public and private, as well as through stock exchange listings and American depository receipt programs.

The laws and regulations governing capital raising and public companies in the United States are complex. This guide is intended to give non-U.S. companies a general overview of some of the more significant legal and practical considerations related to offerings and listings of securities in the United States.

Financing arrangements that do not involve the offering or sale of securities, such as bank credit facilities, are not covered in this guide. Although the determination of what constitutes a “security” under the U.S. securities laws sometimes requires close analysis, the equity and debt instruments discussed in this guide fall clearly within this definition.

FOREIGN PRIVATE ISSUERS

What is a Foreign Private Issuer?

A “foreign private issuer” is a defined category of foreign company under the U.S. securities laws. Foreign companies that meet the definition of a foreign private issuer have certain benefits not available to U.S. companies.

Test of Foreign Private Issuer Status

Any issuer (other than a government) incorporated or organized under the laws of a jurisdiction outside the United States is considered to be a foreign private issuer as long as U.S. residents do not beneficially own a majority of the issuer’s outstanding voting securities. If a majority of the issuer’s outstanding voting securities are directly or indirectly owned by residents of the United States, *and* any of the following conditions exist:

- ⦿ the majority of its directors or senior management are U.S. citizens or residents;
- ⦿ more than 50% of its assets are located in the United States; or
- ⦿ its business is run principally in the United States,

then the issuer will *not* be considered a foreign private issuer and will be subject to the same U.S. securities law requirements as U.S. companies. To determine what percentage of its voting securities are held by U.S. residents, a foreign private issuer is required to “look through” brokers and other nominees holding securities to determine the residency of the beneficial owners of those securities.

In the past, foreign private issuers had to constantly monitor their status and were immediately subject to U.S. domestic reporting requirements if their status changed. Recent Securities and Exchange Commission (“SEC”) rule amendments now permit foreign companies to determine their foreign private issuer status once a year as of the last business day of their second fiscal quarter, thus effectively allowing six months’ advance notice to prepare for the more onerous reporting regime applicable to U.S. issuers if their status changes.

Significance of Foreign Private Issuer Status

In an effort to attract more foreign companies to the U.S. market, the U.S. securities laws have made a number of accommodations to the regulatory requirements applicable to foreign private issuers that

are not available to purely U.S. domestic issuers. These differences in treatment have been reduced over the years and this convergence is likely to continue except for certain areas where the local law of the foreign private issuer dictates the relevant requirements. However, foreign private issuer status is still significant for a number of reasons, including the following:

- ⦿ *Reporting Requirements*: foreign private issuers face less onerous periodic reporting requirements. They have more time to file annual reports and can submit interim reports in accordance with home country requirements rather than filing mandatory quarterly and other reports which U.S. companies are required to file with the SEC;
- ⦿ *Financial Statement Disclosure*: foreign private issuers may use International Financial Reporting Standards (“IFRS”), as adopted by the International Accounting Standards Board (“IASB”), without U.S. Generally Accepted Accounting Principles, or GAAP, reconciliation. Alternatively, home country GAAP can be used, with U.S. GAAP reconciliation. Because many countries are mandating the use of IFRS by companies whose securities are locally listed, the ability to use IFRS in registration statements filed with the SEC is a significant benefit, particularly for many companies that are already public in their home market.
- ⦿ *Scope of Disclosure*: foreign private issuers may rely on home country rules for certain technical disclosure requirements (e.g., aggregate executive compensation disclosure rather than the extensive compensation discussion and analysis disclosures required for U.S. issuers);
- ⦿ *Confidential Submissions*: many first-time foreign private issuer registrants may submit registration statements on a confidential basis to the SEC staff for review prior to public filing, thus shielding the SEC comment process from public scrutiny until significant disclosure issues are resolved. Although the SEC has recently adopted a new policy limiting the availability of this accommodation, companies that are public or going public in their home jurisdiction can continue to use the confidential review procedure;
- ⦿ *Corporate Governance*: the U.S. national securities exchanges allow foreign private issuers to follow

home country corporate governance practices in most respects, subject to disclosing the differences in treatment;

- ⊙ *Exemptions from Certain Disclosures and Filings:* foreign private issuers are exempt from the SEC’s proxy rules, the insider reporting provisions and the requirement applicable to corporate insiders to forfeit short-swing profits when buying or selling securities of the issuer; and
- ⊙ *Selective Disclosure Rules:* foreign private issuers are not subject to the technical requirements of Regulation FD relating to selective disclosure by the issuer of material nonpublic information (although “best practices” encourage most issuers to comply in many respects and many non-U.S. jurisdictions have equivalent rules).

Multijurisdictional Disclosure System

This guide discusses the legal and regulatory framework for foreign private issuers generally, without emphasis on distinct rules for particular jurisdictions. For example, since 1991 the Multijurisdictional Disclosure System, or MJDS, has enabled eligible Canadian foreign private issuers to file a registration statement with the SEC and have it declared immediately effective without SEC review. The MJDS was designed to facilitate cross-border offerings of securities between the United States and Canada and is a reciprocal initiative adopted by the SEC and the Canadian Securities Administrators, allowing issuers to meet disclosure obligations in the United States and Canada by complying with their home country’s disclosure rules, including review by their home country regulator.

OVERVIEW OF LEGAL FRAMEWORK

The fundamental premise underlying U.S. securities law is full and fair disclosure. A company is required to disclose all material information about itself and its business to the public so that all investors, whether large institutions or private individuals, have a common source of knowledge to evaluate whether to buy, sell or hold a security of that company.

The principal securities laws are the Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”). The SEC administers the provisions of both laws and has adopted numerous disclosure rules and regulations to further implement the statutory provisions. Below is a brief summary of the Securities Act and the Exchange Act, as well as certain other related laws that may apply to foreign companies in the United States as a result of accessing the U.S. securities market.

Securities Act of 1933

The Securities Act requires that any offering or sale of securities in the United States be registered with the SEC, unless an exemption is available. In the case of nonexempt offerings, the issuer of the securities must file with the SEC a registration statement which includes a prospectus with extensive disclosures about

the company and the securities to be issued. The filed registration statement is publicly available and generally distributed by underwriters to prospective investors.

An exemption from registration may be used to avoid registration. There are two general categories of exemptions: exempt transactions and exempt securities. Foreign private issuers seeking to avoid registration of an offering under the Securities Act would typically use one of the following transaction exemptions:

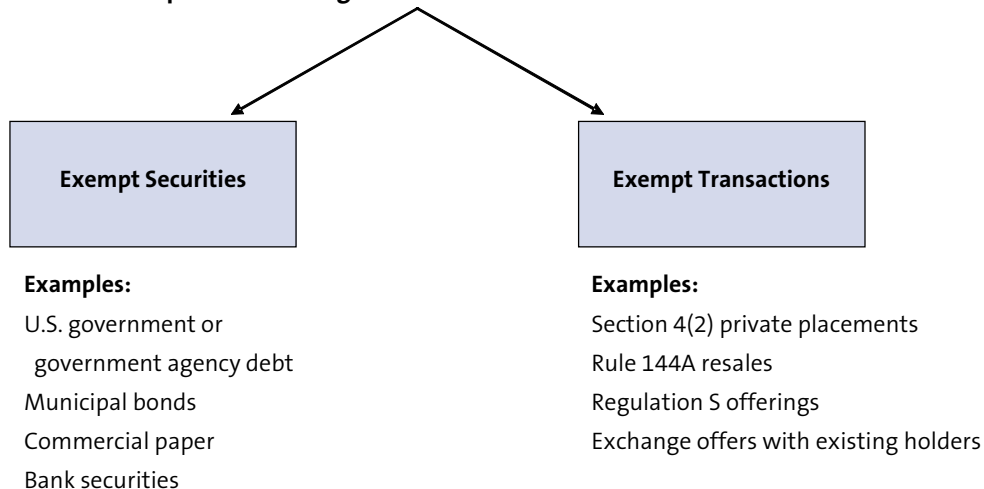
- the exemption for private placements under Section 4(2) of the Securities Act, including the Regulation D safe harbor;
- sales to intermediaries under Section 4(2), who then resell to qualified institutional buyers (“QIBs”) under the Rule 144A resale exemption; and
- the exemption under Regulation S for offshore offerings.

For exempt securities, the nature of the security itself rather than the type of offering qualifies them as exempt. Exempt securities include U.S. government or government agency debt, certain municipal bonds,

THE SECURITIES AND EXCHANGE COMMISSION

The securities markets in the United States are regulated principally by the SEC, an independent regulatory agency of the U.S. government. The SEC is responsible for enacting rules to implement federal securities laws and for enforcing those laws and rules. The SEC also has oversight authority over self-regulatory organizations, including the New York Stock Exchange (“NYSE”) and The NASDAQ Stock Market (“NASDAQ”).

Exemptions from Registration under the Securities Act



commercial paper (short-term corporate debt) and securities issued or guaranteed by U.S. banks.

The Securities Act imposes liability for fraud and other violations in connection with the offer and sale of securities. It is important to note that the U.S. securities laws generally, and the Securities Act in particular, do not require a review by the SEC of the merits of investing in the securities being offered and sold, only that appropriate disclosures are made to allow investors to make an informed decision.

Securities Exchange Act of 1934

The Exchange Act governs the trading of securities and requires the registration of certain classes of securities. Foreign private issuers that have made a public offering under the Securities Act become subject to the requirements of the Exchange Act, including periodically filing reports regarding their business and financial matters with the SEC and compliance with the anti-bribery provisions of the Foreign Corrupt Practices Act (the “FCPA”).

In addition, the Exchange Act requires that a foreign private issuer register any class of securities that will be listed or quoted on a U.S. national securities exchange (even if the company has not made any public offering). This registration is in addition to any Securities Act registration; however, if the Exchange Act registration is required in connection with a Securities Act registration, it simply incorporates by reference the information in the Securities Act registration statement.

A foreign private issuer could also be required to register securities under the Exchange Act if it has assets in excess of \$10 million and a class of equity securities held by at least 500 shareholders worldwide (of whom at least 300 are U.S. residents). This obligation can be triggered without any affirmative conduct by the issuer. However, an exemption from registration is available, as long as a foreign private issuer satisfies the conditions of Rule 12g3-2(b) under the Exchange Act by providing the same information as provided in the home country.

Sarbanes-Oxley Act of 2002

In response to various corporate accounting scandals, including those involving Enron and WorldCom, the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act” or “SOX”) was enacted on July 30, 2002. The Sarbanes-Oxley Act applies to all “issuers” (including any foreign private issuers), which is defined to include any company that:

- has securities registered under the Exchange Act;
- is required to file reports with the SEC under the Exchange Act; or
- files, or has filed, a registration statement that has not yet become effective under the Securities Act.

SOX imposes corporate conduct requirements on issuers and also mandated the SEC and the national securities exchanges to enact rules on corporate governance matters. In Appendix A, we have highlighted some of the significant provisions of SOX as well as the rules adopted pursuant to SOX requirements.

Compliance with SOX, and the costs, management burden and increased liability resulting from SOX and the associated rules, have been frequently cited as significant reasons why foreign companies have avoided registering or listing securities in the United States.

Trust Indenture Act of 1939

The Trust Indenture Act of 1939 (the “Trust Indenture Act”) generally requires that in connection with a registered public offering of debt securities, such securities be issued pursuant to a trust indenture containing certain required provisions for the protection of holders, including provisions that define the liabilities and responsibilities of the trustee. There are also special SEC filing requirements that apply to trust indentures.

Listing Requirements

Any non-U.S. company listing its securities on a national securities exchange in the United States must meet the listing qualifications of that exchange and comply with the rules applicable to listed companies, including certain corporate governance requirements (see Appendix B). However, both the NYSE and NASDAQ allow foreign private issuers to follow home country practices in most respects, provided adequate disclosure is made about the differences in treatment.

State “Blue Sky” Laws

In addition to U.S. federal securities laws, every state in the United States has its own securities laws, commonly known as “Blue Sky” laws. Most Blue Sky laws typically require registration of securities offered within the state’s borders. Securities that are exempt from registration under the Securities Act are generally exempt from registration under Blue Sky laws, although certain disclosures may be required. Further, federal law exempts almost all registered public offerings from

state regulation and prohibits state governments from regulating any offerings of securities that will be listed on a U.S. national securities exchange.

Investment Company Act of 1940

The Investment Company Act of 1940 (the “Investment Company Act”) governs the offer and sale of securities by, and the regulation of, investment companies such as mutual funds, unit trusts and similar types of issuers, as well as certain non-U.S. financial institutions. However, the definition of what constitutes an “investment company” under the Investment Company Act is broad and includes any company engaged primarily in the business of investing, reinvesting or trading in securities, which generally encompasses a company that has more than 45% of its assets invested in securities, or more than 45% of its income from securities investments. Foreign private issuers might inadvertently fall under the definition of an investment company in a number of ways, such as if a large portion of the issuer’s assets are minority ownership interests in other entities, or if the issuer invests its offering proceeds in securities pending its purchase of operating assets. However, there are some exemptions and many foreign private issuers take advantage of an exemption that allows an issuer, which is otherwise an operating company, to invest the majority of its assets in securities for a period of up to one year. There are certain exemptions from the definition of “investment company” but certain foreign private issuers, including those with significant equity investments in other entities, or who have raised or are raising significant amounts of cash, may encounter

issues under this regulation in connection with a securities offering in the United States.

Passive Foreign Investment Company Rules

An adverse tax regime applies to U.S. holders of equity securities in so-called “passive foreign investment companies,” or PFICs. PFIC status is largely a function of how much gross income of the company is passive or how much of the company’s assets produce passive income, calculations that are often complex. Non-U.S. companies offering equity securities in the United States will inevitably face difficulties if they fall within the definition of a PFIC, since PFIC shareholders are subject to an increased tax rate on certain distributions as well as on gains realized upon dispositions. This becomes punitive to U.S. shareholders and thus a strong disincentive for them to participate in the offering. A foreign private issuer contemplating an equity offering in the United States should therefore consider whether it might qualify as a PFIC, as PFIC status might become a roadblock to a successful offering.

Financial Industry Regulatory Authority Rules

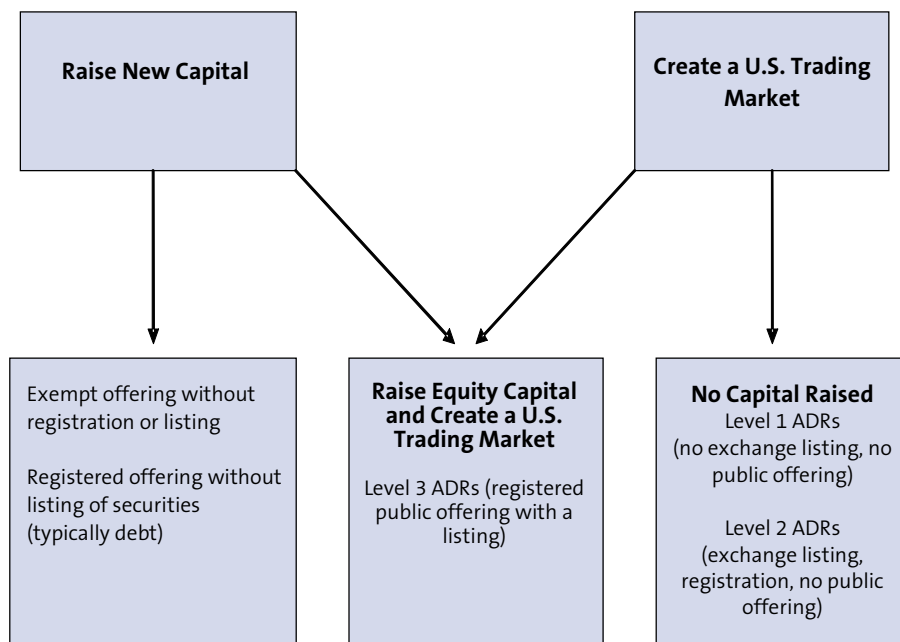
The Financial Industry Regulatory Authority (“FINRA”) is a self-regulatory organization formed through a merger of the enforcement branches of the NYSE and the National Association of Securities Dealers, or NASD. Its primary purpose is to protect investors and maintain the integrity of the marketplace through regulation of the activities of broker dealers. There are specific FINRA rules that apply to the conduct of underwriters and dealers in connection with registered public offerings of securities.

ACCESSING THE U.S. CAPITAL MARKETS

There are a number of ways a foreign private issuer can access the U.S. capital markets. A foreign private issuer may wish to raise fresh capital by offering new debt or equity securities in the U.S. markets through a registered public offering, or it may choose to privately place its new securities through transactions that are exempt from registration. A public offering is accessible to a wider base of investors and allows the securities to trade on a national securities exchange, but is subject to more extensive and complex regulations. A private offering is subject to less regulation and can usually be completed faster and less expensively, but it does not allow retail participation and there is a more limited trading market.

Without raising new capital, a non-U.S. company may wish to broaden its investor base by listing its

existing shares on a U.S. national securities exchange. This is often accomplished through the establishment of an American Depositary Receipt (“ADR”) program. Listing existing securities on a national securities exchange involves registering under the Exchange Act and requires much of the same disclosures, and entails similar consequences, as a registered public offering of new securities. Another alternative for companies whose equity securities are publicly traded in other jurisdictions is to create a so-called “Level 1” ADR program for their existing shares without listing on a U.S. national securities exchange. The establishment of a Level 1 ADR program can be accomplished without much regulatory complexity and has become even simpler under recent SEC rules.



SECURITIES ISSUED IN ACQUISITIONS

Foreign companies considering acquisitions of U.S. companies or of non-U.S. companies with significant U.S. shareholders also have to consider the application of the U.S. securities laws to the extent the acquiring company is using securities as part of the purchase price. An offer of sale of shares or other securities of the acquiring company in an acquisition context to the shareholders of the target company is an offering that must either be registered with the SEC or rely on an exemption from registration, much like in a capital-raising transaction. There are special registration forms for registered “exchange offers,” but the general disclosure requirements for the acquirer entity are substantially similar to those used in registration statements for a primary offering of securities for cash. Some exchange offers can be done as private offerings or with the benefit of a safe-harbor exemption from registration depending on the extent and nature of the U.S. resident ownership of the target company’s securities. There are sometimes challenges to obtaining appropriate disclosure about the target company to the extent the target company’s management does not support the acquisition proposal.

There are a variety of substantive and procedural issues that a non-U.S. company must consider when accessing the U.S. capital markets through any of these methods. Each method has distinct advantages and disadvantages. Evaluating whether an offering of new securities in the United States should be registered or conducted as a private offering is one of the most fundamental questions. Determining whether a listing on a national securities exchange is appropriate for outstanding equity securities or whether the establishment of a non-listed ADR program is adequate is equally important.

Although this guide principally focuses on equity offerings, the requirements for debt offerings are

similar. Historically, there has been less need to list debt securities on a national securities exchange since debt trading generally occurs over the counter among financial intermediaries and large institutional investors. In addition, the U.S. market for debt securities of foreign companies is largely institutional and thus the advantage of registration is not as meaningful as in the case of equity securities, except for well-known seasoned issuers that are eligible for a “fast-track” registration process known as automatic shelf registration. Some special considerations applicable to offerings of debt securities are discussed towards the end of this guide.

REVERSE MERGERS

Some private companies located in foreign countries have accessed the U.S. capital markets by merging with an existing U.S. public company. In these transactions, commonly referred to as “reverse mergers,” an existing public “shell company” - a public reporting company with few or no operations - acquires a private operating company. Typically, the shareholders of the private company exchange their shares for a large majority of the shares of the public company, thus gaining a controlling interest in the surviving public shell company, and the private company’s management takes over the board of directors and management. The assets and business operations of the post-merger surviving public company are primarily, if not solely, those of the former private company. Reverse mergers are often done to facilitate access to the U.S. capital markets, including the liquidity that comes with having stock quoted on a market or listed on an exchange, and have been perceived to be a quicker and cheaper method of “going public” than an initial public offering. Unlike an initial public offering, a reverse merger does not raise any new capital for the company and shareholders may not receive any cash for their shares. Although reverse mergers are generally structured to avoid the registration requirements under the Securities Act, the SEC does require extensive disclosure about the operating company, either in a proxy statement or a Form 8-K, substantially equivalent to the disclosure required in a registered initial public offering.

Some foreign companies that have accessed the U.S. markets through reverse mergers have been using small auditing firms, some of which may not have the resources to meet their auditing obligations (particularly when all or substantially all of the private company’s operations are in another country) and thus may not be in a position to identify circumstances where these companies may not be complying with the relevant accounting standards. There have been instances of fraud and other abuses involving reverse merger companies and the SEC has issued an investor bulletin and has instituted enforcement proceedings against several reverse merger companies. In addition, the NYSE and NASDAQ have both adopted stricter listing criteria for reverse merger companies seeking to list on their exchanges, which would require a one-year “seasoning” period before a listing would be permitted.

TRANSACTION TEAM

Below is a brief overview of the parties typically involved in the registration and offering process. In underwritten private offerings exempt from SEC registration, the parties are generally the same and have similar responsibilities. If the issuer is only

registering and listing its outstanding equity securities, the issuer generally works only with its local and U.S. counsel and auditors and with the depository bank and its counsel.

Party	Responsibilities
Issuer	The issuer is the core player in a securities offering and its management and employees are a critical part of the team because they provide the underwriters, counsel and other participants with all the necessary information about the company and its business. In an equity offering where there are selling shareholders, the sellers are often involved in many of the key decisions regarding the offering.
Underwriter	The underwriting process and the marketing of the securities are the main responsibilities of the investment bankers. They provide expertise in organizing the roadshow and pricing the securities and will conduct a “due diligence” investigation to verify the accuracy and completeness of the company’s disclosure.
Issuer’s Counsel	A foreign private issuer will often have local counsel assist with local securities law issues and U.S. counsel to advise it on U.S. securities law matters. U.S. counsel to the issuer will be primarily responsible for drafting the registration statement and prospectus, or offering memorandum, and both counsel will deliver legal opinions to the underwriters.
Underwriters’ Counsel	Counsel for the underwriters assist the underwriters in fulfilling their due diligence obligations. Underwriters’ U.S. counsel also drafts the underwriting agreement and the indenture (in a debt offering) while underwriters’ local counsel will assist in conducting local law due diligence and assist in any local underwriting issues, and both counsel will deliver legal opinions to the underwriters.
Accounting Firm	Registered public accountants will audit the foreign private issuer’s financial statements, conduct a limited review of statements for any interim periods and deliver a “comfort letter” to the underwriters. In SEC-registered offerings, the accountants must be registered with the U.S. Public Company Accounting Oversight Board (the “PCAOB”) and must consent to each filing with the SEC. If more than one auditing firm is involved, obtaining the requisite consents and “comfort letters” can be more challenging.
Trustee	In connection with debt offerings, a trustee typically acts on behalf of bondholders as a fiduciary. A trustee would also retain separate U.S., as well as local, counsel to represent it, although sometimes the underwriters’ counsel can perform this role as well with the consent of all concerned parties.
Depository Bank	In connection with equity offerings where ADRs are established, a U.S. bank acts as depository bank and typically retains its own U.S. counsel to prepare the deposit agreement and, if the offering is registered, to file a Form F-6 registration statement for the ADRs with the SEC.
Other Experts	Whether other experts are needed to support disclosure or provide other expert opinions will depend upon the nature of the company’s business and the type of offering. Oil and gas companies typically have reports on reserves and certain real estate offerings may have independent property appraisals.

REGISTERED PUBLIC OFFERINGS

A registered public offering involves the offering and sale of a company’s securities to the public, through the filing of a registration statement with the SEC. The SEC needs to declare the registration statement effective before sales can be made. For companies undertaking an initial public offering, or IPO, in the United States, the process generally revolves around three distinct periods:

- the period prior to filing with the SEC, or “the pre-filing period”;
- the period between filing and the “effective date” of the registration statement, or “the waiting period”; and
- the period after the registration statement is declared effective by the SEC, or “the effective period.”

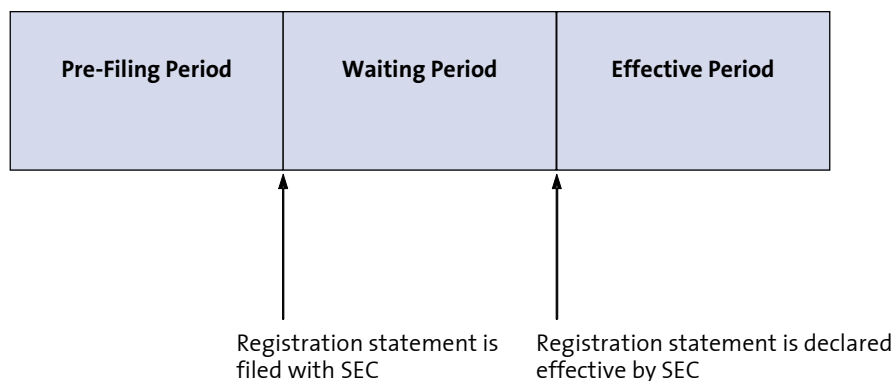
There are specific requirements and restrictions imposed by law and SEC regulations with respect to activities conducted during each period. Some

requirements vary depending on the category of issuer, but the discussion in this guide focuses primarily on first-time registrants.

The Pre-Filing Period

The pre-filing period generally begins when the company decides to undertake a public offering and hires investment bankers to manage the underwriting of the securities. The period of time between when an issuer decides to make a public offering and when it publicly files a registration statement with the SEC is also known as the “quiet period.” During this time, the underwriters and their counsel conduct a due diligence review of the company, a process that generally involves multiple meetings and interviews with management as well as a thorough review of the company’s legal documents, business plans and projections. The due diligence process serves several purposes, including providing an understanding of the company’s business, assets and financial results as well as its contractual rights and commitments, and identifying risk factors related to the issuer and the

Registered Public Offerings Timeline



PRE-FILING PERIOD

Begins when the company decides to undertake a public offering

Also known as the “quiet period”

Issuer prohibited from making offers or sales of the securities to be registered

WAITING PERIOD

SEC reviews and comments on the company’s registration statement

Oral offers are permissible

Written offers can be made through a preliminary prospectus
No sales allowed

EFFECTIVE PERIOD

SEC has declared registration statement effective

Both offers and sales can be made to public

offering. For the underwriters, the process serves the additional purpose of establishing the basis for their “due diligence” defense to liability.

While the due diligence process is underway, the company’s counsel, in cooperation with management, prepares a first draft of the registration statement which other offering participants will review and revise. Several meetings typically follow where the offering document is reviewed and discussed by the group and revisions are made. The discussions regarding the content of the registration statement are an integral part of the due diligence process.

During the quiet period, the issuer may not make offers or sales of the securities being registered, subject to certain limited exceptions. The term “offer” is broadly construed by the SEC and care must be taken by all transaction participants to ensure that no activities occur that might be deemed to be an offer of the securities to be registered, so-called “gun jumping,” which could significantly delay or even derail a proposed offering. Publicity constraints are generally discussed and agreed to by all transaction participants at the commencement of the process.

Confidential Submissions

Companies that are already public in their home market may be required to make new and different disclosures with the SEC than what are currently publicly available in such market. A first-time foreign private issuer may submit its registration statement to the SEC for review on a confidential basis as long as it

falls into one of the categories the SEC has established under its new policy. This is a distinct advantage which is not available to U.S. companies and permits foreign private issuers to address any disclosure and accounting issues raised by the SEC before making the information in the registration statement publicly available through filing.

There can be several rounds of confidential submissions and the SEC comment process is similar to that involved with public filings. One concern with the confidential submissions is that the absence of a formal filing means that the marketing period may not begin and no offers can be made. Sometimes publicity concerns or the desire to start offering securities may prompt a public filing to avoid “gun jumping.” Once publicly filed, subsequent amendments to the registration statement must be filed publicly. Auditors’ reports are generally required to be signed even for draft submissions.

Filing with the SEC

The formal registration process begins with the issuer’s filing of a registration statement with the SEC through the SEC’s Electronic Data Gathering and Retrieval (“EDGAR”) system. There is a registration fee payable by the issuer at the time of filing, the amount of which depends on the estimated dollar value of the securities to be offered.

The SEC has recently enacted new rules to mandate the use of the eXtensible Business Reporting Language (“XBRL”) program by SEC filers to publicly file financial

COMMON SEC REGISTRATION FORMS USED BY NON-U.S. COMPANIES

Form 20-F: The basic disclosure document for foreign companies. A foreign private issuer typically uses this form either as an initial registration statement under the Exchange Act (e.g., for a stock exchange listing) or as an annual report under the Exchange Act.

Form F-1: Form F-1 refers to the required disclosures in Form 20-F and is the form used by foreign private issuers when initially accessing the U.S. public markets through a public offering or when they are not eligible for another form.

Form F-3: A short form available for a foreign private issuer that already files reports with the SEC under the Exchange Act and that meets other eligibility criteria. Issuers may incorporate by reference information contained in its filings under the Exchange Act, such as its annual report on Form 20-F as well as specified periodic reports on Form 6-K.

Form F-6: Form F-6 is used to register ADRs issued by a U.S. depository bank against the deposit of the equity securities of a foreign private issuer. ADRs registered on Form F-6 require that the underlying securities either be registered under the Exchange Act or be exempt from registration under Rule 12g3-2(b).

information, subject to a phase-in period. XBRL allows publicly filed financial data to be publicly accessed in an interactive way and involves electronic tags, much like bar codes, that are attached to each piece of financial data. The SEC has provided temporary relief from the XBRL requirements for foreign private issuers who use IFRS until the SEC specifies a classification system for IFRS, which it has not yet done so far. Interactive data will not be required in connection with an IPO.

SEC rules require that certain specified types of information about the company and its business be included in the registration statement. The registration statement is also required to contain risk factors about the company, financial statements and various exhibits such as material contracts, opinions and consents. The issuer's auditors must consent to the use of their audit report in the registration statement and this consent must be filed as an exhibit. The registration statement must be signed by the issuer, at least a majority of the board of directors, its chief executive officer ("CEO"), its chief financial officer, its principal accounting officer and a duly authorized representative in the United States.

The SEC's rules also require that the front and back cover pages of the prospectus, as well as the summary and risk factors sections, be drafted in "plain English." Plain English requires the issuer to use simplified

sentence structure, use non-technical business terms, avoid multiple negatives and use the active voice.

Confidential Treatment of Certain Information

Although the entire registration statement, including exhibits, is publicly accessible once filed, SEC rules allow issuers to request that certain portions of exhibits (typically commercially sensitive information in material contracts) be afforded confidential treatment. This process can be relatively time-consuming and care should be taken to try and identify as early as possible potential confidentiality issues in order to properly assess the risks involved and address the issues in a timely manner. The request is made at the time the material is filed and needs to be supported by convincing arguments to the SEC as to why confidential treatment is appropriate.

The Waiting Period

The "waiting period" refers to the time from the initial filing (not a confidential submission to the SEC for initial review) of the registration statement to the date on which it is declared effective. During this period, oral offers are permitted and written offers can be made through a "free writing prospectus" which needs to be filed electronically with the SEC after its first use, or the preliminary (or "statutory") prospectus contained in the registration statement. Violations of these rules may severely delay the timing of a proposed offering

PRACTICAL CONSIDERATIONS

A first-time foreign private issuer must compile required financial statements as well as substantial amounts of statistical information about its business, markets, strategy and regulatory environment in order to prepare the required disclosures. This process may take several months, depending on the availability of such information, how well it is prepared and the management resources available to focus on obtaining the information. If the company decides to undertake a registered public offering, it should first take necessary steps to reconcile its financial statements with U.S. GAAP or have its financial statements prepared in accordance with IFRS, as promulgated by the IASB, and to ensure that it has governance procedures and mechanisms in place to comply with any applicable requirements of SOX and any listing standards. In addition, many exhibits required to be filed as part of the registration statement may require a translation to English and certain exhibits may require a confidential treatment request. These are all time-consuming exercises and need to be carefully planned in advance.

Management should identify with its advisors the major substantive and procedural compliance issues that are likely to arise early in the decision-making process. In addition to U.S. requirements, a foreign private issuer should also consider the substantive and procedural issues under local law. Often, a U.S. offering will be conducted as part of a global offering which may include a local public offering. Companies that are already public in their home country may need to do a preemptive rights offering to existing shareholders for new equity securities. Local filing and compliance issues need to be carefully considered as part of an integrated global offering process.

and could result in potential “rescission rights” as well as unfavorable disclosures about the company included in the prospectus.

The SEC reviews the company’s registration statement, whether publicly filed or submitted confidentially by a first-time issuer, and will typically respond with initial comments and requests for additional information in approximately 30 days. The company and its auditors and counsel will then revise the registration statement and file an amended registration statement with the SEC, together with a response letter to the SEC’s comments. Depending on the offering, several amendments may need to be filed (or submitted confidentially) in order to address and resolve all of the SEC’s comments. The SEC staff reviews each amendment and issues additional comment letters so long as it still has concerns about the disclosure provided. Issuer correspondence with the SEC relating to publicly filed registration statements becomes publicly available 45 days after the SEC review process is completed. However, an issuer may also request confidential treatment of certain portions of its correspondence with the SEC.

Once significant SEC comments are resolved (and the registration statement is publicly filed, if previously submitted confidentially) and the offering is ready to proceed, the underwriters will “launch” the offering and distribute a preliminary prospectus contained in the registration statement to potential buyers and may orally solicit indications of interest in the securities. The preliminary prospectus is also commonly known as a “red herring” because the cover page contains a legend in red ink noting that the document is not complete and may be changed. Beginning marketing efforts prior to resolving all SEC comments is possible but entails what is referred to as “recirculation risk,” *i.e.*, the risk that an

amended prospectus containing different disclosures will be required to be redistributed to potential investors. The preliminary prospectus includes all required disclosures but does not contain the price of the offered securities and related information. In initial public offerings of equity securities, the SEC requires that there be a price range before marketing efforts begin.

Once the preliminary prospectus is distributed to potential investors, the company and the underwriters begin evaluating investor interest for the offering and typically arrange a marketing trip, known as the “roadshow,” where the company’s senior management and the underwriters will meet with potential investors to explain the company’s business and answer questions related to the offering.

Going Effective

Once the registration statement has been declared “effective” by the SEC, both offers and sales can be made to the public. The declaration of effectiveness is typically timed so that it corresponds with the end of the marketing efforts. The underwriters and the company agree on a final price for the securities to be offered and a final prospectus containing the price of the new securities, the underwriters’ discount and other price-related information (such as use of proceeds and pro forma capitalization) is distributed to investors who are purchasing the securities. The underwriting agreement is typically signed upon or immediately following the pricing of the securities. The underwriters confirm their resales to investors, and the issuer’s securities begin trading the following day, even though the closing and settlement of the transaction typically occurs three business days thereafter. This is referred to as “when-issued” trading.

REGISTRATION STATEMENT REQUIREMENTS

The basic disclosure roadmap for foreign private issuers is Form 20-F, which sets forth required disclosures for registered offerings in the United States, as well as for initial listings and annual reports by foreign private issuers. The form is designed to elicit all material information about the company so that investors can make an informed decision as to whether

or not to make an investment in the company's securities. The SEC also requires that issuers in certain industries, such as financial services, mining and oil and gas, provide additional disclosures specific to that particular industry. Below is an overview of the general categories of required disclosure.

<p><i>Company Information</i></p> <ul style="list-style-type: none"> ⦿ Identity of directors, senior management, key employees and advisors ⦿ Description of the company's business and properties ⦿ Related party transactions ⦿ Material contracts ⦿ Description of share capital and corporate law affecting share ownership 	<p><i>Operating and Financial Review and Prospects</i></p> <ul style="list-style-type: none"> ⦿ Management's discussion and analysis of financial condition and results of operations ("MD&A") <ul style="list-style-type: none"> ○ Known trends and uncertainties ○ Critical accounting policies ○ Results of operations ○ Liquidity and capital resources ○ Off-balance sheet transactions ○ Market risk disclosures ⦿ Financial statements
<p><i>Other Key Information</i></p> <ul style="list-style-type: none"> ⦿ Risk factors ⦿ Capitalization table ⦿ Use of proceeds ⦿ Dividend history and policy ⦿ Dilution table (in the event of material dilution to prospective investors) ⦿ Selected financial data ⦿ Offer statistics, listing and expected timetable ⦿ Exchange controls ⦿ Taxation – material tax consequences to investors ⦿ Plan of distribution 	<p><i>Additional Information</i></p> <ul style="list-style-type: none"> ⦿ Disclosure required of material terms of securities such as: <ul style="list-style-type: none"> ○ Debt securities ○ ADRs ○ Warrants and rights ⦿ Certifications and exhibits ⦿ Solely for annual reports: <ul style="list-style-type: none"> ○ "Code of Ethics" ○ Corporate governance discussion regarding differences between U.S. and home country requirements ○ Defaults, dividend arrearages and delinquencies ○ Material modifications to the rights of securityholders ○ Disclosure controls and procedures ○ Management's report on internal controls

As noted above, certain key documents and agreements are required to be filed as exhibits to the registration statement. These include a list of

subsidiaries, material contracts, instruments defining rights of the securityholders, explanation of calculation

MATERIALITY

When is information considered “material”? A fact is considered material if there is a substantial likelihood that such fact would have been viewed by a reasonable investor as having significantly altered the “total mix” of information made available. In addition, the SEC takes the position that an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item. Aside from specific disclosures required by SEC rules, the materiality standard is key when deciding what information needs to be included in a registration statement or offering document. Whether a fact is material enough to be disclosed and whether the prepared disclosure accurately reflects all the relevant considerations depends to a large extent on judgment. Issuers and underwriters rely heavily on their counsel when making these decisions.

of earnings per share and, in debt offerings, a ratio of earnings to fixed charges.

Every contract which is material to the registrant and is to be performed in whole or in part at or after the filing of the registration statement or report or was entered into not more than two years before the date of such filing must be filed as a material contract under Form 20-F. Common examples of material contracts include underwriting agreements, asset purchase agreements, long-term debt agreements, employment agreements for executive officers, financial services agreements, joint venture agreements, lease agreements, license agreements, pension plans, profit sharing plans, stock option agreements, stock purchase agreements and termination agreements.

Each registration statement must include, or incorporate by reference, a section called “Operating and Financial Review and Prospects,” which is also referred to as the MD&A. The purpose of the MD&A is to provide readers with the information necessary to understand the company’s financial condition and results of operations. The MD&A is intended to satisfy three principal objectives:

- ⦿ provide a narrative explanation of a company’s financial statements that enables investors to see the company “through the eyes of management”;
- ⦿ enhance the overall financial disclosure and provide the context within which financial information should be analyzed; and
- ⦿ provide information about the quality of, and potential variability of, a company’s earnings and cash flow, including known trends and uncertainties, so that investors can ascertain

whether past performance is indicative of future performance.

The MD&A also is required to provide an overview of a company’s aggregate contractual obligations in tabular format. This table must disclose, as of the end of the latest fiscal year, long-term debt obligations, capital lease obligations, operating lease obligations, purchase obligations and other long-term debt liabilities reflected on the company’s balance sheet. A company must also disclose all off-balance sheet arrangements that have, or are reasonably likely to have, a current or future material effect on its financial condition, results of operations or liquidity. An off-balance sheet arrangement includes any transaction, agreement or contractual arrangement to which any entity unconsolidated with the company is a party, under which the company has certain obligations or interests.

Financial Statement Requirements

The financial statement requirements for a foreign private issuer’s registration statement are set forth in Form 20-F and in Regulation S-X. Foreign private issuers are generally required to present audited statements of income, changes in shareholders’ equity and cash flows for each of the three most recently completed fiscal years and audited statements of financial position for each of the two most recently completed fiscal years (or since the date of incorporation, if such time periods are not available). An accommodation in Form 20-F permits a foreign private issuer in its first year of reporting under IFRS (as promulgated by the IASB) to file two years rather than three years of statements of income, changes in shareholders’ equity and cash flows. This is also true for the case when the primary statements are expressed in U.S. GAAP. The most recent yearly audited

financial statements may be no more than 15 months old at the time of the offering (if the registration statement relates to an offering that is the company's IPO, the most recent audited financial statements may be no more than 12 months old).

If the registration statement becomes effective more than nine months after the end of the latest fiscal year, unaudited interim financial statements of a more recent date (with the prior year's comparative period) must also be provided. Marketing and liability concerns often dictate more conservative approaches and the inclusion of more recently available information than is otherwise required under the rules. Furthermore, local law requirements may also mandate the disclosure of more recent information than would otherwise be technically required under U.S. rules, particularly for those companies that are already public in their home country.

Financial statements of foreign private issuers may be prepared in accordance with local GAAP, rather than U.S. GAAP, provided that certain net income, principal balance sheet items, and other selected financial data are "reconciled" to U.S. GAAP. Reconciliation shows how financial statements prepared in accordance with another body of accounting principles would look like if they had been prepared in accordance with U.S. GAAP and Regulation S-X. Reconciliation entails both disclosure of the material variations between local GAAP and U.S. GAAP and a numerical quantification of those variations. Items that frequently require discussion and quantification as a result of the reconciliation requirements include the different

methods of accounting for business combinations, stock compensation, restructuring charges, impairments and deferred taxes. The reconciliation process normally takes time and effort and the need to do this work should be factored into the timing and cost considerations for a registered offering.

In an attempt to make SEC registration easier and more attractive for non-U.S. issuers, the SEC permits first-time registrants to reconcile differences between U.S. GAAP and home country GAAP in connection with the required financial data for the two most recently ended fiscal years and any subsequent interim periods required to be included in the registration statement. Foreign private issuers preparing their financial statements in accordance with IFRS (as adopted by the IASB) no longer need to reconcile their financial statements to U.S. GAAP. These new SEC rules, combined with the requirements in many jurisdictions for public companies to adopt IFRS, will likely reduce the number of issuers needing to undertake a U.S. GAAP reconciliation in connection with a U.S. registration.

Special Financial Disclosure Issues

If a company operates in more than one line of business or in more than one geographic market, it may be subject to segment reporting requirements. This requires detailed reporting of financial information, including profit or loss, revenues and assets, for each segment or geographic market. In many cases, the necessity of presenting segment or geographic market information will dictate that the business description as well as the MD&A be divided along these lines. This

CHOICE OF AUDITOR

Companies undertaking a registered public offering in the United States must use an auditing firm registered with the PCAOB for the audit of its financial statements. While many foreign auditing firms have registered with the PCAOB, the foreign issuer should ensure that its independent auditor is registered if it is contemplating a public offering or listing in the United States. In addition, even in exempt offerings, companies that have historically used local auditors that are not internationally recognized should consider whether it would be advisable to choose a more recognized independent auditor to audit some or all of its historical financial statements. From a marketing perspective, investors may be influenced by an issuer's choice of auditors and underwriters sometimes encourage issuers to retain one of the internationally recognized firms to audit, at a minimum, the last fiscal year presented in the financial statements. Since the choice of auditors also affects the level of comfort that underwriters receive on the financial statements, an issuer should consult its underwriters early on in the process to determine whether it should consider retaining a new or additional auditor. Doing so will increase costs and generally involve timing considerations.

DETERMINING FINANCIAL INFORMATION REQUIREMENTS

When an issuer is contemplating making, or has made, significant acquisitions of one or more businesses, it is prudent to raise the issue of the required financial disclosures early in the process. This can be done with the company's auditors and U. S. counsel even before underwriters are appointed. Where local offerings are also contemplated, there may be additional local law requirements. The financial disclosures are often the most complex, take the most time to prepare, and attract a good deal of the SEC staff's attention during their review of the registration statement.

accounting issue should be addressed early on in the process because it can affect timing as well as the presentation of business information.

Information regarding significant business acquisitions must also be disclosed. Whether financial statements for recent and probable acquisitions must be included in the filing depends upon the "significance" of the acquisition, as measured by three criteria: (1) the amount of the issuer's investment in the acquired business compared to the issuer's total assets; (2) the total assets of the acquired business compared to the issuer's total assets; and (3) the pre-tax income from continuing operations of the acquired business compared to the issuer's pre-tax income from continuing operations. The number of years of audited financial statements and interim financial information that is required to be presented depends on the level of significance of the acquisition. The company must submit audited financial statements for a significant acquisition of a business either that was completed more than 75 days before the offering or in certain cases where the acquisition is of the greatest significance. Also, as soon as an acquisition becomes "probable," the duty to present separate financial statements exists. Further, where a material acquisition has occurred or is probable, pro forma financial information must be included in the registration statement for the most recent fiscal year and the most

recent interim period. The necessary financial statements must comply with the requirements of Form 20-F, which may in certain circumstances require further U.S. GAAP reconciliation.

Non-GAAP Financial Measures

The SEC's Regulation G applies to any public disclosures by reporting companies of material information that includes a "non-GAAP financial measure" and also includes rules governing the presentation of non-GAAP financial measures in public filings. A non-GAAP financial measure is defined as any numerical measure of a company's historical or future financial performance, position or cash flow that either includes amounts that are excluded, or excludes amounts that are included, in the most directly comparable measure calculated and presented in GAAP in the company's financial statements. For purposes of these rules, GAAP generally means U.S. GAAP. However, in the case of a foreign private issuer whose primary financial statements are prepared in local GAAP, GAAP means the local GAAP unless the measure in question is derived from U.S. GAAP. Disclosure of a non-GAAP financial measure must include a presentation of the most directly comparable GAAP financial measure and a quantitative reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure. Also, certain types of non-GAAP financial measures are prohibited entirely.

PARALLEL DISCLOSURE

When securities offerings are conducted in both the United States and the home country of the issuer, disclosure requirements in such country related to the content of offering materials used in the local offering need to be considered. It is always prudent to ensure that investors in all "tranches" of a global offering receive substantially similar information, unless otherwise immaterial. Thus, there are often disclosures that appear in a U.S. registration statement which are not technically required but which are rendered necessary to ensure that investors in all offerings receive consistent information. Conversely, U.S. requirements can influence the content of local offering materials. Translations of information and disclosures can also raise substantive as well as timing concerns and should be considered carefully.

CONSEQUENCES OF REGISTRATION

Once a foreign private issuer undertakes a registered public offering or otherwise registers its securities under the Exchange Act, it becomes a “reporting issuer” under the Exchange Act and becomes subject to a variety of laws and regulations requiring ongoing compliance. These include periodic reporting obligations, compliance with the requirements of SOX and the FCPA, and adherence to the continuing listing standards of the relevant exchange on which its securities are listed. The issuer also becomes subject to liability for its disclosure under the federal securities laws and exposes itself to potential private lawsuits as well as SEC enforcement actions for deficiencies in such disclosure. Also, there are reporting obligations imposed on certain shareholders regarding changes in beneficial ownership of equity securities of reporting companies.

Periodic Reporting Obligations

Annual Reports on Form 20-F

Under current rules, a reporting foreign private issuer must file an annual report with the SEC on Form 20-F within six months after the end of the fiscal year covered by the report. The SEC recently adopted amendments which will accelerate the annual report filing deadline for foreign private issuers from six months to four months following the end of each fiscal year. This amendment will take effect on an issuer’s first fiscal year ending on or after December 15, 2011. This shortened period has caused many reporting foreign issuers to voice concern about their ability to prepare in a timely manner the additional audited financial and other disclosures that are required in Form 20-F but that are typically not required under their local rules.

Periodic Reports on Form 6-K

The SEC does not require foreign private issuers to file quarterly or other interim reports, but such issuers are required to furnish the SEC with reports on Form 6-K containing any material information that the issuer: (1) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized; (2) files or is required to file with a national securities exchange on which the foreign private issuer’s securities are traded and which was made public by that exchange; or (3) distributes or is required to distribute to its securityholders. Form 6-K reports must be furnished electronically to the SEC promptly after such information is first made public, but they are not considered “filed” for purposes of the liability provisions of the securities laws. Some examples of significant developments for which a report on Form 6-K must be prepared are:

- interim reports on financial condition and results of operations;
- changes in management or control;
- material acquisitions or dispositions of assets;
- changes in company’s certifying accountants;
- material legal proceedings;
- bankruptcy or receivership;
- defaults upon senior securities;
- material increases or decreases in the outstanding amount of securities or indebtedness; and
- any other information which the issuer deems material to securityholders.

SELECTIVE DISCLOSURE

The SEC’s Regulation FD requires that whenever an issuer intentionally discloses material nonpublic information, it must do so through general public disclosure and that whenever an issuer learns that it has made an unintentional disclosure of material nonpublic information, it must promptly make disclosure of such information to the public. Companies use press releases and preannounced, publicly accessible webcasts and conference calls to communicate information to research analysts and investors. Although Regulation FD, by its terms, does not apply to foreign private issuers, it is always good practice to refrain from selectively disclosing material nonpublic information to avoid potential liability. The laws of many non-U.S. jurisdictions also have equivalent rules designed to address this concern. A foreign private issuer can use Form 6-K to make public information that it needs to disseminate and this submission is often accompanied by or contains a press release.

Sarbanes-Oxley

The Sarbanes-Oxley Act applies to any company that:

- has securities registered under the Exchange Act;
- is required to file reports with the SEC under the Exchange Act; or
- has publicly filed a registration statement under the Securities Act which has not become effective and has not been withdrawn.

Once a foreign private issuer files a registration statement under the Securities Act or becomes subject to Exchange Act reporting requirements, it becomes subject to the requirements of SOX (see Appendix A). However, there are certain phase-in rules which give first-time registrants additional time to meet specified SOX requirements and the listing rules that national securities exchanges have adopted pursuant to SOX. For example, there is a one-year transition period for compliance with the requirement of producing management reports on internal control. In addition, there are certain phase-in allowances provided by the exchanges for newly listed companies. For example, the NYSE and NASDAQ rules provide that a company listing in connection with an IPO has 12 months from the date of listing to comply with the requirement that a majority of the board of directors be independent. Furthermore, the issuer's compensation, nominating and audit committees must have at least one independent director at the time of listing, a majority of independent directors within 90 days, and be fully independent within one year of listing. Whether a director is considered independent requires a review of various facts and relationships and should be considered early on in the process.

Foreign Corrupt Practices Act

Reporting companies are also subject to the FCPA, which prohibits questionable payments (typically bribery) to foreign government officials. The FCPA applies to the conduct of the company and its officers, directors, employees, agents, stockholders or others acting on behalf of the company. The FCPA essentially recognizes that corporate accounting and control deficiencies may encourage improper practices, and thus, the FCPA sets standards in order to discourage such behavior, including imposing criminal liability upon persons who knowingly circumvent or knowingly fail to implement a system of internal accounting controls (this is sometimes referred to as a "books and

records violation"). Recently, the SEC and the U.S. Department of Justice have increased the number of enforcement actions under the FCPA, including actions against foreign private issuers.

Beneficial Ownership Reports

Any person who becomes (through purchase or otherwise) the beneficial owner of more than 5% of a class of equity securities registered under the Exchange Act is required by Section 13(d) of the Exchange Act and related SEC rules to file with the SEC a statement on Schedule 13D. This obligation is on the holder, not the issuer of the securities, and the filing must be made electronically within 10 days of the event giving rise to the obligation. Schedule 13D contains disclosures regarding the holdings of the reporting person, the source of funds for the acquisition, any plans of the reporting person regarding the issuer of the shares and any understandings with others with respect to the securities of the issuer. If any material change occurs in the facts, an amendment must be filed promptly with the SEC, including any material increase or decrease in the percentage of the class of securities beneficially owned. A shorter form Schedule 13G is available, in lieu of Schedule 13D, for investors that meet certain requirements.

Liability

A foreign private issuer that undertakes a registered public offering or registers its securities in the United States exposes itself to a risk of liability under the U.S. securities laws. This risk is generally perceived to be more significant in the United States than in most other jurisdictions, both because of the legal liability regime itself and because of the nature of the U.S. judicial process and the predisposition of private litigants and their lawyers to sue for damages. U.S. courts have interpreted certain provisions of the federal securities laws to grant private rights of action to investors claiming harm due to violations of those provisions by those involved in the offering process. Furthermore, "class action" lawsuits in the United States permit a large group of investors to collectively file a lawsuit against the issuer and others with procedural advantages that make this type of litigation very appealing in securities fraud actions. The litigation risk is often cited as a significant deterrent to foreign companies entering the U.S. market.

In addition to private litigation, the SEC may itself bring civil actions against issuers and other persons for registration violations as well as for disclosure

deficiencies. In addition, the U.S. Department of Justice and states' attorneys general are empowered to prosecute persons for violations of securities laws at the federal and state levels, respectively.

The principal liability provisions of the U.S. federal securities laws are described briefly below.

Section 11 of the Securities Act

An issuer, its directors and officers, experts and underwriters involved in a registered securities offering are subject to liability under Section 11 of the Securities Act if any part of the registration statement, at the time of its effectiveness:

- ⦿ contained an untrue statement of a material fact;
- ⦿ omitted to state a material fact required to be stated in the registration statement; or
- ⦿ omitted to state a material fact necessary to make the statements in the registration statement not misleading.

Any person acquiring a security under a registration statement containing inaccurate or misleading statements or omissions that are material can sue:

- ⦿ every person who signed the registration statement;
- ⦿ every person who was a director of the issuer at the time of the filing of that part of the registration

statement, even if the person did not sign the registration statement;

- ⦿ every expert who, with his consent, has been named in the registration statement as having prepared or certified any portion of the registration statement; and
- ⦿ every underwriter.

Persons other than the issuer can assert a defense to liability if they can establish the "due diligence defense" described in the box below.

Section 11 is a strict liability standard and does not require fraudulent intent or that any misstatement or omission was relied upon in connection with a purchase. Damages under Section 11 are generally limited to the difference between the amount the investor paid and the value of the security at the time the suit is brought (or when sold).

Section 12(a)(2) of the Securities Act

Section 12(a)(2) has broader coverage than Section 11, which focuses only on the registration statement. Under Section 12(a)(2) of the Securities Act, a material untrue statement, or a misleading omission, *written or oral*, in connection with an offer or sale of a security can subject the seller to liability. For the purposes of Section 12(a)(2), liability is determined as of the "time of sale," which is the time the investor agrees to

THE DUE DILIGENCE DEFENSE

Sections 11 and 12(a)(2) of the Securities Act provide persons other than the issuer with a defense to liability, although the standard to establish the defense under Section 12(a)(2) differs slightly from the Section 11 standard. Underwriters may avoid liability if they can successfully assert the so-called "due diligence defense." Section 11 provides that underwriters can avoid liability for any part of the registration statement not purporting to be made on the authority of any expert if such person had, after "reasonable investigation," reasonable grounds to believe, and did believe, at the time such part of the registration statement became effective under the Securities Act, that the registration statement contained no material misstatements or omissions. Section 12(a)(2) provides that a defendant shall not be liable under that section "if he did not know, and in the exercise of reasonable care, could not have known, of such untruth or omission."

In order to establish a record of "reasonable investigation" and "reasonable care," underwriters customarily conduct an in-depth due diligence investigation of the issuer. To provide third-party support for their diligence efforts, underwriters request the issuer's independent auditors to provide a "comfort letter" on financial and accounting information and engage U.S. law firms to conduct a comprehensive legal due diligence investigation of the issuer in connection with the preparation of offering documents and to render negative assurance letters on disclosure. Other third-party experts may also render reports that strengthen the due diligence defense in appropriate circumstances. These third-party supporting documents are a key factor in securities offerings, in particular because the need for them has cost and often timing implications.

purchase the securities being offered, not at the settlement date.

Similar to Section 11, the standard for Section 12(a)(2) is strict liability and there is no requirement to prove that the misstatement or omission by the seller was intentional. Although the purchaser is not required to prove reliance on the misstatement or omission, the purchaser must demonstrate that it did not have knowledge of the misstatement or omission at the time of the purchase.

Damages are limited to recovery of the amount paid for the security. However, the defendant will not be liable to the extent such defendant can prove that any portion of the depreciation in the value of the security results from causes other than the misstatement or omission (e.g., a market downturn).

U.S. courts have concluded that Section 12(a)(2) does not apply to private placements. However, in private placements, underwriters typically still perform a due diligence investigation and request third-party support from auditors and counsel in order to avoid any potential liability under other provisions of the federal laws, including claims under Section 10(b) of the Exchange Act, as well as possible state law claims.

Section 15 of the Securities Act

Section 15 of the Securities Act extends the liabilities referred to in Section 11 and Section 12(a)(2) to controlling parties of the persons or entities that are principally liable under such sections. Such persons are jointly and severally liable with and to the same extent as the issuer, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the issuer is alleged to exist. Controlling persons of foreign private issuers should consider this issue when

analyzing the options for the issuer to access the U.S. market.

Section 10(b) of the Exchange Act

Section 10(b) of the Exchange Act, together with SEC Rule 10b-5, are general anti-fraud provisions that impose liability for material misstatements or omissions and other fraudulent or manipulative practices in connection with *any* purchase or sale of a security. Unlike Section 11 and Section 12(a)(2) under the Securities Act, a Rule 10b-5 claim requires a showing of “scienter” (i.e., an intent to defraud) that is often difficult to establish. Rule 10b-5 is a broad anti-fraud provision that covers oral and written statements (whether or not relating to a registration statement or prospectus) and applies to:

- public offerings of securities;
- private placements (unregistered transactions); and
- secondary market trading.

U.S. courts and the SEC take the position that liability under Section 10(b) and SEC Rule 10b-5 extends to activity that occurs outside the United States but that has an effect on U.S. markets. There are many recent examples of enforcement activities against foreign companies and residents for violations of these provisions.

Section 18 of the Exchange Act

Section 18 of the Exchange Act imposes liability for false and misleading statements made in any application, report or document “filed” under the Exchange Act. Courts have interpreted Section 18 to encompass a private right of action for enforcement and it does not require intent by the issuer. Good faith, however, by the issuer may be a valid defense.

DEREGISTRATION

Prior to 2007, foreign private issuers that became subject to SEC reporting obligations were subject to a regulatory trap that effectively prevented them from permanently leaving the SEC reporting system (and therefore from permanently terminating the burdens of compliance with U.S. reporting company requirements). However, in June of 2007, in recognition of the difficulties encountered by many companies desiring to deregister, the SEC adopted Exchange Act Rule 12h-6, which now makes it easier for foreign private issuers to terminate their reporting obligations.

Rule 12h-6 sets forth several requirements that foreign private issuers must meet in order to deregister

their equity securities. The main condition has two alternatives, each with a quantitative benchmark. In order to deregister, one of two alternative tests must be met, and three additional conditions must be satisfied.

While the SEC's goal in adopting Rule 12h-6 was not to encourage foreign private issuers to withdraw from the U.S. capital markets, the rule provides a clearer, consistent and easier-to-apply standard by which foreign registrants can terminate their obligations to comply with U.S. reporting rules. This, in turn, affords foreign registrants more comfort in entering the U.S. markets if a later withdrawal is desired.

First Alternative

5% Average Daily Trading
Volume Test

Average daily trading volume (ADTV) of relevant class of securities during most recent 12-month period in the United States has been 5% or less of the ADTV of those same securities on a worldwide basis.

Second Alternative

The 300 Holder Test

Less than 300 record holders on a worldwide basis or less than 300 U.S. resident holders, 120 days before filing for deregistration. The determination of who is a holder "of record" is often complex and requires careful analysis with counsel.

and

Minimum 12-month Exchange Act reporting history and at least one Exchange Act annual report filed.

Securities not sold through a registered public offering under the Securities Act in the 12 months prior to deregistration.

Relevant class of securities is listed on an exchange in the issuer's primary market (non-U.S. market where at least 55% of the trading volume occurs) for at least 12 months prior to deregistration.

LISTING ON A NATIONAL SECURITIES EXCHANGE

A foreign private issuer can list its securities on a U.S. national securities exchange either in connection with a registered public offering of securities or by listing its outstanding securities (without a public offering). In either case, the issuer needs to register the class of securities under the Exchange Act and a listing application must be submitted to the exchange. In the case of a new listing made as part of a registered offering under the Securities Act, the Exchange Act registration is accomplished by filing a simplified registration form, Form 8-A, with the SEC that becomes effective in most instances upon the effectiveness of the concurrent Securities Act registration statement. In the case of listing its existing securities, the foreign private issuer is required to register the class of securities under the Exchange Act on Form 20-F with all the disclosures required by such Form, including the financial statement requirements discussed previously.

The exchange will review and analyze the company's listing qualifications during the review process to ensure compliance with its eligibility requirements (see Appendix B). Although the exchanges have in the past been somewhat flexible in their approach to eligibility criteria for foreign companies, the exchanges have become more rigorous in their review in the wake of SEC concerns as to stricter adherence to listing standards.

Original listing fees and continued listing fees vary depending on a number of factors, including the type of listing and the number of shares outstanding. A foreign private issuer who meets the quantitative requirements for initial listing on a national securities exchange must also meet additional criteria and comply with certain governance standards on an ongoing basis in order to maintain its listing eligibility.

Principal National Securities Exchanges

The two principal national securities exchanges in the United States are the NYSE and the NASDAQ. The NYSE is part of NYSE Euronext and recently agreed to a combination with Deutsche Boerse. The NYSE also owns the American Stock Exchange. The NASDAQ is part of the NASDAQ OMX Group (which also owns and operates exchanges and integrates exchange technology worldwide). The NASDAQ operates purely on an electronic trading floor, while the NYSE still retains a physical trading floor for some of its

operations. The NASDAQ has three listing tiers, each with progressively stringent initial listing standards:

- the NASDAQ Capital Market;
- the NASDAQ Global Market; and
- the NASDAQ Global Select Market.

Despite different initial quantitative listing standards, the three NASDAQ listing tiers also have some overlapping requirements, such as the requirement that the issuer comply with NASDAQ's corporate governance requirements.

Quantitative Listing Requirements

The NYSE has listing requirements designed specifically for foreign private issuers, in addition to the regular listing requirements for U.S. companies with which foreign private issuers can choose to comply with. While NASDAQ does not have specific listing requirements for foreign private issuers, all securities listed on NASDAQ (except securities which are book-entry only) must be eligible for a "direct registration program" operated by a registered clearing agency and are required to participate in an electronic link with a clearing agency registered under the Securities Act to facilitate the electronic transfer of securities held pursuant to such program. A foreign private issuer is subject to this requirement unless it is prohibited from complying by law or regulation in its home country. In such case, a foreign private issuer may follow its home country practice in lieu of this requirement by submitting to NASDAQ a written statement from an independent counsel in such company's home country certifying that the company's practices are not prohibited by the home country's laws and certifying that a law or regulation in the home country prohibits compliance with the direct registration rules.

Appendix B contains a summary of the quantitative listing requirements for foreign private issuers for the NYSE, as well as financial, qualitative and liquidity requirements under the three NASDAQ listing tiers.

Continued Listing Requirements

NYSE

In order to maintain its listing on the NYSE, a company must comply with the standards under which it was originally listed. In addition, the NYSE will consider a company below compliance if it fails to meet any of the following distribution requirements:

- less than 400 total stockholders;
- less than 1,200 total stockholders and 100,000 shares of average daily trading volume for the most recent 12 months; or
- less than 600,000 publicly held shares.

Depending upon the financial standard under which the company was listed, other financial criteria must be met to continue listing. Please see Appendix C for a closer examination of these requirements.

NASDAQ

Each of the three listing tiers on the NASDAQ has distinct continued listing requirements, including minimum bid price and market value thresholds. These are outlined in detail on Appendix D.

Delisting for Failure to Meet Continued Listing Criteria

Failure by a listed issuer to meet the continued listing criteria of either the NYSE or NASDAQ can result in delisting. The rules for delisting depend on the exchange where the issuer is listed and on the particular requirement that is not met. Generally, if an issuer fails to meet the minimum bid price or market capitalization criteria for a certain period of time, the exchange provides a delisting notice to the issuer informing it of the failure to meet the continued listing requirement, and providing a time period for the issuer to cure the violation. The NYSE also requires the issuer to provide a remediation plan of action in the event it fails to meet the market capitalization criteria.

If either the NYSE or NASDAQ notifies a listed company that the company does not satisfy a continued listing requirement of the exchange, the company is required to publicly disclose such notice (Form 8-K if a U.S. issuer, or a Form 6-K if a foreign private issuer). The exchanges have been flexible when issuers' failure to meet these criteria are due to systemic problems, such as the market turbulence following the September 11, 2001 terrorist attacks and the 2008 economic crisis that severely affected share prices and market capitalizations. In some cases, the exchanges have enacted temporary interim rules that grant relief from certain of the requirements.

Corporate Governance Standards

An issuer meeting the requirements for listing its shares on the NYSE or NASDAQ will also have to comply with the separate reporting requirements and corporate

governance obligations of that exchange, including those set forth below.

NYSE

Companies listed on the NYSE must comply with certain standards regarding corporate governance as codified in the NYSE's Listed Company Manual. Generally, foreign private issuers are permitted to follow home country practice instead of the provisions of the NYSE Listed Company Manual. However, they must make their U.S. investors aware of the significant ways in which their corporate governance practices differ from those required of U.S. companies under NYSE listing standards, although they are not required to present a detailed, item-by-item analysis of these differences. A foreign private issuer may publish such differences either on its internet website and/or in its annual report. Notwithstanding this general accommodation, foreign private issuers must comply with certain requirements, including those summarized below:

- The company must maintain an audit committee comprised of independent board members;
- The company's CEO must promptly notify the NYSE when an executive officer becomes aware of any material non-compliance with applicable provisions of the NYSE rules; and
- The company's CEO must certify to the NYSE, annually and each time a change occurs to the company's board or a committee, that the company is in compliance with the NYSE's corporate governance rules.

NASDAQ

Upon listing on the NASDAQ, each company must complete a *Corporate Governance Certification Form*, which certifies the company's compliance with NASDAQ's requirements relating to the audit committees, director nominating process, determination of officer compensation, board composition, executive sessions, quorum and code of conduct. Foreign private issuers may follow their home country governance practices in lieu of certain NASDAQ corporate governance requirements and the requirement to distribute annual and interim reports, provided the company discloses each requirement that it does not follow and the alternative home country practice it does follow in its annual reports filed with the SEC. Alternatively, a foreign private issuer that is not required to file its annual report with the Commission

on Form 20-F may make this disclosure only on its website.

A foreign private issuer may take advantage of the above exemptions under certain conditions. Such exemptions include: (i) prompt notification to NASDAQ in the event of non-compliance with the corporate

governance rules, (ii) the maintenance of an audit committee whose members are independent (as set forth in SOX) and (iii) submitting to NASDAQ a written statement from an independent counsel in such company's home country certifying that the company's practices are not prohibited by the home country's laws.

COMPANIES WITH DUAL CLASSES OF STOCK

Controlling shareholders of non-U.S. companies are often concerned about the potential for future dilution of voting control through subsequent equity offerings. Despite the existence in many jurisdictions of mandatory preferential rights to subscribe to a capital increase, some foreign companies either have established or desire to establish a dual class share structure where multiple voting rights are afforded to a certain class of securities, typically those owned by the controlling shareholders. In general terms, both the NYSE and NASDAQ will allow a company, including a foreign private issuer, to list its equity securities with such a structure provided that the structure is in place at the time of the initial listing. The NYSE, for example, will accept any action or issuance relating to the voting rights structure of a non-U.S. company that is in compliance with the NYSE's requirements for U.S. companies or that is not prohibited by the company's home country law.

UNREGISTERED OFFERINGS

An offering of securities not involving a public offering, known as a private placement, is exempt from registration under the Securities Act if certain conditions are met. A foreign private issuer contemplating an offering of securities in the United States may prefer to undertake a private placement rather than the more time consuming and expensive public offering process. This is particularly true where the issuer's home market offers sufficient depth and liquidity to create a primary trading market for its securities.

Private Placements

Securities may be offered by an issuer under the Section 4(2) private placement exemption of the Securities Act only to "persons who are able to fend for themselves" and thus are not in need of the disclosures designed to protect them. The eligibility of offerees is evaluated based on certain financial requirements designed to ensure that such persons are sophisticated enough to understand the investment risks. The requirements for a valid exemption under Section 4(2) were first developed by transactional lawyers, and the SEC then enacted a series of rules known as Regulation D that provides a safe harbor for certain offerings made under the Section 4(2) private placement exemption. "Traditional" private placements, whether relying on Section 4(2) or the Regulation D safe harbor, are generally made directly by issuers to investors through the services of a placement agent and are not underwritten on a firm commitment basis.

Companies using the private placement exemption do not need to register the securities with the SEC; however, if the Regulation D safe harbor is used, such companies must file a "Form D" with the SEC after they first sell their securities. Form D is a brief notice that includes the names and addresses of the company's executive officers and stock promoters, but contains little other information about the company.

Regardless of whether the safe harbor of Regulation D is used as the basis for the exemption, it does provide certain guidance on issues that are relevant even when the safe harbor is not used and contains a definition of "accredited investor," the investor eligibility threshold required for private placements. Although traditional private placements are made only to accredited investors, Regulation D allows up to 35 non-accredited investors to participate

in an offering, provided that these non-accredited investors be delivered an information memorandum that substantially complies with the information required in a registered public offering. For this reason, the Regulation D safe harbor is seldom used by foreign private issuers whose securities tend to interest a more institutional investor base where other exemptions are available, such as a Section 4(2) offering followed by Rule 144A resales, as discussed below.

Although there is no need for SEC registration in a properly structured private offering, there are other restrictions which apply. In particular, resales of the securities are subject to transfer restrictions and there cannot be any general solicitation or advertising in connection with the offering, thus significantly curtailing publicity. Violations of these rules subjects the issuer to the risk of an SEC enforcement action, and purchasers of securities in an offering that should have been registered have rescission rights for one year after the violation occurred. There are also rules relating to whether two or more separate offerings are required to be "integrated" into a single offering, thus potentially rendering some exemptions unavailable. The integration rules can create complexity when more than one offering is contemplated or when separate offerings are made within a short time of each other.

The Section 4(2) and Regulation D exemptions from registration are limited to offerings by an issuer. Subsequent resales of securities by initial purchasers and other parties must be made pursuant to another exemption. This is the primary reason why the SEC created Rule 144A.

Rule 144A Offerings

In 1990, the SEC adopted Rule 144A to increase the liquidity of privately placed securities by allowing eligible institutional investors greater freedom in reselling these securities. Rule 144A provides a safe harbor from the registration requirements of the Securities Act for *resales* of unregistered securities to qualified institutional buyers ("QIBs"). Because issuers themselves cannot use the Rule 144A resale exemption, a "Rule 144A offering" commonly refers to an initial sale of securities to underwriters (often called "initial purchasers" in this context) by the issuer under the Section 4(2) exemption discussed above, followed by resales by the initial purchasers to QIBs under the Rule 144A resale exemption.

A QIB is defined generally as an institution, acting for its own account or for the account of other QIBs, that in the aggregate owns and invests on a discretionary basis at least \$100 million (\$10 million in the case of registered dealers) in securities of unaffiliated companies. Certain financial institutions must satisfy additional criteria in order to qualify.

A resale under Rule 144A must meet four basic criteria in order to qualify for the exemption:

- ⦿ the securities must be offered and sold only to QIBs;
- ⦿ when issued, the securities may not be of the same class as securities listed on a U.S. securities exchange or quoted in a U.S. automated interdealer quotation system;
- ⦿ both the seller and the prospective purchaser must be able to obtain certain information about the issuer if such information is not publicly available; and
- ⦿ the seller must take reasonable steps to ensure that the prospective purchaser knows that the seller may rely on Rule 144A.

Thus, foreign private issuers whose shares are currently listed on a U.S. national securities exchange cannot conduct a Rule 144A offering of the same class of shares because those shares are fungible with the listed securities. However, they could offer debt securities in a Rule 144A offering even though their equity securities are listed. Special rules apply to

convertible securities and warrants.

Today, the overwhelming majority of exempt offerings in the United States by foreign private issuers are undertaken in reliance on Rule 144A.

Regulation S Offerings

Under Regulation S of the Securities Act, unregistered offers and sales may be made if the sales are made in “offshore transactions” and there are no “directed selling efforts” in the United States.

An offshore transaction is defined as an offer not made to a person in the U.S. and either:

- at the time the buy order is originated, the buyer is outside the United States, or the seller reasonably believe that the buyer is outside the United States; *or*
- the trade is made in, on or through a physical trading floor of an established foreign exchange located outside the U.S.

A directed selling effort in the United States is broadly defined as an activity undertaken for the purpose of, or reasonably expected to have the effect of, conditioning the U.S. market for securities offered in reliance on Regulation S. This would include, for example, placing an advertisement in a publication with general circulation in the U.S., conducting seminars in the United States and mailing offering materials into the United States.

“RESTRICTED” AND “CONTROL” SECURITIES

Securities purchased in a private placement, including those purchased from underwriters in a Rule 144A offering, are considered “restricted securities” under the U.S. securities laws and are subject to resale restrictions. Resales must comply with the provisions of Rule 144A or another available exemption, such as the offshore resale exemption in Regulation S, or the public resale exemption found in Rule 144. Restrictions on resales and the applicable settlement procedures are described in disclosure documents and underwriting agreements.

“Control securities” are securities held by an affiliate of the issuing company. An “affiliate” is generally defined as a person, such as an executive officer, director or large shareholder, in a relationship of control or common control with the issuer. Control securities are also subject to restrictions on resale and may only be resold pursuant to an exemption from the registration requirements of the Securities Act, including Rule 144.

Rule 144 of the Securities Act allows public resale of restricted and control securities without SEC registration if certain conditions are met. These include the length of time the security has been held since being acquired from the issuer or an affiliate, the adequacy of public information about the issuer, the requirement that notice be filed with the SEC, that the trade is handled as an ordinary brokerage transaction and certain quantitative limits based on trading volume.

In addition to the offshore transaction requirement and the prohibition on directed selling efforts, Regulation S requires the issuer and underwriters and other selling participants to comply with certain resale and other offering restrictions, depending on the category of issuer involved and the type of security being offered. As with private placements in the United States, a violation of these rules could subject the issuer to SEC enforcement as well as to liabilities to purchasers.

Concurrent Offerings

Companies often use the Regulation S offering exemption in conjunction with a Rule 144A offering. These exemptions can be used together so that offers and sales outside the United States are made in reliance on Regulation S and offers and sales within the United States are made in reliance on Rule 144A. The resale restrictions applicable to these two exemptions are different, however, so it is customary for securities issued in reliance on each of these exemptions to be represented by separate global securities with distinct trading numbers and transfer restrictions.

Private Offering Process

The offering and distribution process in an underwritten exempt offering resembles that of a public offering, although the disclosure and procedural requirements for these offerings are not set forth in specific SEC regulations. The company generally

prepares an offering circular containing much of the same information that is required in a statutory prospectus for a registered public offering.

Similar to a public offering, the underwriters and their counsel will conduct a due diligence review of the company and a preliminary offering circular will be distributed to prospective investors. After the offering is priced, the pricing terms are delivered to purchasers of the securities.

While Regulation S and Rule 144A offerings are exempt from registration, they are still subject to the U.S. federal anti-fraud rules and blue sky laws. It is common for issuers, underwriters and other parties to a private placement to closely mirror the due diligence process for registered offerings when undertaking a private placement of securities, and underwriters typically require the same comfort letters and lawyers' negative assurance letters that are standard in registered offerings.

Generally, Rule 144A and Regulation S offerings are fully underwritten. A purchase agreement will typically be drafted by the lead manager, or underwriter, for the portion of the offering being placed outside the foreign issuer's home country, and such agreement governs the contractual relationship between the underwriters and the issuer for this portion of the offering. In dollar-denominated debt offerings, there is rarely any local offering.

ALTERNATIVE TRADING PLATFORMS

Over-the-counter ("OTC") trading allows for the trading of securities between two parties via a dealer network as opposed to on a centralized exchange. Debt securities generally do not trade on a formal exchange. OTC equity securities can be quoted on the Pink Sheets Electronic Quotation Service or, if the company is SEC reporting, on the OTC Bulletin Board. Foreign private issuers that have "Level 1" ADR programs have their securities traded on the Pink Sheets Electronic Quotation Service. Issuers whose securities trade on the OTC Bulletin Board are required to file Exchange Act reports with the SEC, but there are no listing requirements such as those applicable for a NYSE or NASDAQ listing.

In September 2009, NASDAQ and nine leading U.S. investment banks formed The PORTAL Alliance, an open, industry-wide platform to facilitate OTC trading of Rule 144A equity securities. The platform is open to all QIBs based on pre-certification and includes access to functionality for trade negotiation, investor qualification, shareholder tracking, transaction settlement and dissemination of issuer information and historical trade data. This new trading platform has not yet developed as a viable alternative to a national securities exchange listing.

There are also a few platforms such as Second Market and SharesPost that have been established to facilitate trading of "restricted" securities of companies that are not yet reporting companies. For the most part, these platforms have not succeeded in attracting any foreign private issuers and have mostly catered to large, well-known private companies.

THE UNDERWRITING PROCESS

The process of underwriting and distributing securities in both registered and Rule 144A offerings is similar and is generally done on a “firm commitment” basis. In contrast, “traditional” private placements such as Regulation D offerings are often done on a “best efforts” basis with a placement agent as opposed to an underwriter, although many of the placement agency agreement provisions are similar to those found in underwriting agreements.

Underwriting Agreements

Underwriting agreements govern the relationship among the underwriters, the issuer and the selling stockholders, if any. Most underwriters have their own form of underwriting agreement (although they tend to be substantially similar) and underwriters’ counsel takes primary responsibility for drafting the document based on the form of the lead underwriter and relevant precedents.

Besides the basic obligations of the underwriters to purchase, and the issuer’s (and selling stockholders’, if any) obligation to sell the securities, typical provisions include representations and warranties, indemnities, covenants relating to the offering and furnishing of additional information, reimbursement of expenses, closing conditions and termination rights of the underwriters. Closing conditions include both the delivery of a “comfort letter” by the issuer’s auditors addressed to the underwriters relating to financial information in the prospectus or offering document and the delivery of legal opinions by counsel to the issuer and counsel to the underwriters.

The underwriting agreement is not executed until after the roadshow and effectiveness of the registration statement. However, negotiation of the terms of the agreement should be concluded prior to effectiveness and, ideally, even before the marketing effort begins in order to avoid last minute issues. Between the time the agreement is signed and the closing of the offering, the underwriters are obligated to purchase the securities, subject to certain relatively standard termination rights related to material adverse events affecting the company or the market.

In registered offerings, the form of underwriting agreement must be filed with the SEC as an exhibit to the registration statement (usually filed as part of an amendment).

Also, the underwriting arrangements for registered offerings by first-time issuers must be reviewed and approved by FINRA prior to effectiveness of the registration statement and the terms must comply with guidelines and limitations contained in FINRA’s rules. The level of underwriter compensation must be fair and equitable and the relationships between directors, officers and certain securityholders with any FINRA members must be reviewed to determine whether there are any conflicts of interest. A questionnaire is typically sent to these persons well in advance of the commencement of the offering in order to determine whether there are any issues that require disclosure or resolution.

Over-Allotment Options

In offerings of equity securities, including convertible debt securities, underwriters typically request an over-allotment (or so-called “green shoe”) option from the issuer to buy up to 15% of the number of securities initially sold in the offering at the offering price, usually for a period of up to 30 days after the initial closing. This option allows the underwriters to over-allot the securities and create after-market demand for the securities, thereby supporting the price. If the option is exercised, a second closing occurs at that time. Sometimes this option is granted by one or more selling stockholders and not the issuer.

Lock-Up Arrangements

In equity offerings, it is also customary for the underwriters to restrict the issuer from issuing additional securities of the same class (or securities convertible into such securities), and to require the issuer’s directors, officers and major stockholders to agree to “lock-up” the securities they continue to own for a certain period of time after the offering. This period is typically 180 days for initial public offerings and 90 days for “follow-on” offerings by reporting issuers. The idea is to foster an orderly trading market and to avoid a large number of securities coming into the market after the offering, thereby depressing the price. These issues should be raised early on in the process because they could raise business problems, and it is sometimes difficult to obtain all the required agreements, particularly if there is a large group.

Global Offerings

In global offerings where only a portion of the securities are offered in the United States, there is often a separate underwriting agreement among the issuer and the underwriters of the local offering. In such a case, the arrangements between the separate underwriting syndicates (including the exercise of any over-allotment options) are handled through an

intersyndicate agreement. Where the issuer is also conducting a simultaneous public offering in its home country, there may be structural issues (such as preemptive rights and different underwriting practices) that raise compatibility issues with U.S. requirements and practices. These issues should be raised early on in the process as they often involve significant timing and procedural concerns.

PUBLIC VERSUS PRIVATE OFFERINGS: PROS AND CONS

A company contemplating whether and to what extent to access the U.S. capital markets should carefully consider the consequences of a public offering and a private offering and consult with legal, accounting and investment banking advisors before making a decision on which kind of offering to conduct. Undertaking a registered public offering and a listing, or merely listing existing equity securities on a national securities exchange, have similar consequences in terms of ongoing compliance costs and reporting obligations and can entail a significant increase in liability exposure, particularly where new securities are offered. On the other hand, the U.S. public markets offer advantages over the private institutional market which sometimes outweigh the associated costs and perceived liability risks. Determining this “tipping point” is often difficult and careful analysis and planning is key.

Transaction and Compliance Costs

When a company undertakes a public offering of securities or a listing on an exchange, the transaction costs are significantly higher than in an unregistered offering without a listing. In new offerings registered with the SEC, companies will need to pay listing exchange fees and filing fees to the SEC and FINRA. Legal and accounting costs tend to be lower in private transactions where there is no SEC review, a more flexible disclosure regime and less need to conform to the rigorous corporate governance standards of SOX and the national securities exchanges.

In addition to the initial fees associated with offering and listing securities, a public company will incur ongoing costs related to compliance and periodic reporting. Compliance with these obligations, including obligations under SOX, such as assessments of internal controls and auditors’ attestations, take significant management time and resources and can be expensive. Although these costs have gone down since the inception of the SOX requirements, they are factors to consider when contemplating public status.

Litigation Risk

As noted previously, there is a risk of exposure to liability in connection with purchases and sales of securities under the U.S. securities laws; generally the risks are higher than is customary under the laws of most other countries. While the SEC itself may bring charges against a company for alleged violations of the

U.S. securities laws, a greater and more likely risk is that of shareholder claims. Derivative suits and class action lawsuits may be brought by shareholders against the company. Even if these claims are based on weak or meritless grounds, there still may be a considerable cost to defending against them.

The exposure to liability is significantly higher in connection with registered offerings than private offerings. Foreign companies often list potential exposure to liability as one of the primary reasons why they have chosen not to register and list their securities in the United States.

Trading and Liquidity

Unlike a private placement, securities sold in a registered public offering may be resold without restriction. Therefore, the market for publicly offered securities is generally much deeper and more liquid than for privately placed securities. In addition, securities sold in a public offering may be listed on a U.S. national securities exchange, which provides investors with a greater ability to trade such securities than is possible for privately placed securities, which may be offered only to limited investors whose ability to resell such securities is restricted. Although some of the private trading platforms such as PORTALSM have attempted to provide more liquidity to the private institutional market, there can be little doubt that a full national securities exchange listing provides the maximum amount of liquidity and trading freedom for a company’s securities.

Acquisition Currency

Once a company’s equity securities are registered and listed on a national securities exchange, the company can more readily use them as currency to acquire equity positions in other companies. Target companies and their shareholders are more likely to accept a reporting issuer’s securities as compensation because of the enhanced liquidity, and often market value, of the issuer’s securities afforded by a national securities exchange listing.

Market Exposure and Analyst Coverage

Securities analysts will track a public company’s performance and will be more likely to undertake coverage of a company once it is public. Analyst coverage of companies whose securities have been privately placed is not as extensive, although these

companies are often included in industry-wide reports covering numerous companies, particularly if they are reporting companies in their home country.

Benefits of an Integrated Disclosure System

The SEC has developed an integrated disclosure system under which qualified issuers can use information filed in their periodic reports as the basis for the disclosure in prospectuses in subsequent public offerings of securities. Information contained in such periodic reports may be incorporated by reference into a prospectus. After a certain period, reporting companies satisfying certain criteria, whose securities are listed, can file so-called “shelf” registration statements for periodic offerings of securities, thus providing more flexibility in terms of market timing. This offering procedure is unavailable for companies whose securities are not registered with the SEC.

Easier to Deregister Under New Rules

Before the SEC’s 2007 rule amendments, deregistration was problematic for many foreign companies. Under Rule 12h-6 of the Exchange Act, it is much easier to deregister, thus reducing the fear of

becoming a reporting issuer and being trapped in both the SEC’s registration regime and adherence to SOX.

Testing the Waters

A domestic U.S. company that issues equity securities through a Rule 144A offering cannot conduct a subsequent registered exchange offer of such securities for the purpose of listing them on a national securities exchange in the United States. Current SEC policy requires U.S. companies to use a resale shelf registration statement for such purpose where the exchanging investors are listed as underwriters, thereby increasing their exposure to liability.

Foreign private issuers can rely on an exception to this position under a series of SEC “no-action” letters. They can conduct a registered exchange offer for such securities in connection with the national securities exchange listing. This makes it possible for foreign private issuers to “test the waters” through a Rule 144A offering and then, if desirable, to conduct a registered exchange offer and national securities exchange listing at a later date.

	Registered public offering and a listing	Listing existing equity securities	Private placement
Cost	Highest costs in terms of fees, management time and firm resources	High costs in terms of fees, management time and firm resources	Typically faster transaction with less cost
Liability	Highest potential legal liability	Potential legal liability	Least amount of potential liability
Rules	Offering must be registered under Securities Act Registration of security under Exchange Act Compliance with exchange rules Compliance with SOX	Registration of security under Exchange Act Compliance with exchange rules Compliance with SOX	Not subject to either registration of the offering under the Securities Act or registration of that class of security under the Exchange Act
Resale	Securities can be resold without restriction	Securities can be resold without restriction	Resale of securities is restricted
Liquidity	Enhanced liquidity; shares can be used as currency to acquire other companies	Enhanced liquidity; shares can be used as currency to acquire other companies	Limited liquidity due to restrictions on offerees and resales
Analysts	Likely to have analyst coverage	Likely to have analyst coverage	May have analyst coverage, depending on size of company

AMERICAN DEPOSITARY RECEIPTS

American Depositary Receipts (“ADRs”) are negotiable receipts issued by a U.S. depository bank. These receipts are evidence of ownership of shares of a non-U.S. company held in custody, either directly or indirectly, by the issuing bank. This mechanism allows a foreign private issuer’s equity securities to be traded in the U.S. capital markets.

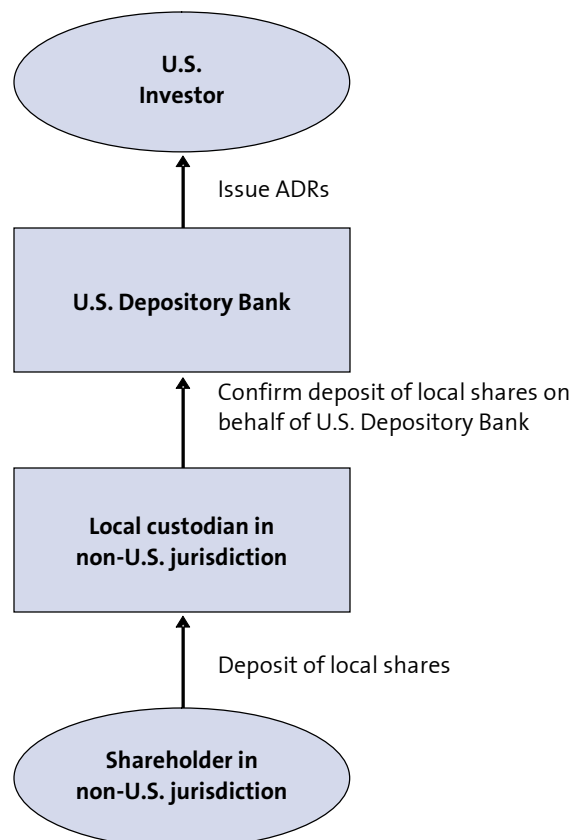
ADRs can represent one or more shares, or a fraction of a share. They are separate securities from the underlying shares in which they represent an interest and, in the case of registered ADRs, require a separate registration statement by the issuing bank. ADRs are generally bought and sold in U.S. dollars and can be listed on the NYSE, quoted on the NASDAQ or traded “over-the-counter.” “GDRs,” or global depository shares, refer to a similar mechanism prevailing in overseas trading markets.

Foreign private issuers often find significant benefits from having their securities traded in the form of ADRs. The receipts offer the following advantages:

- they are issued in a registered form, which generally is more familiar to U.S. investors, and shares of companies from many countries are not eligible for direct listing on an exchange because there is no satisfactory settlement system that can accommodate cross-market transfers;
- trading and settlement occurs in the manner customary for securities in the United States, enhancing liquidity;
- dividends are paid in U.S. dollars; and
- they are considered U.S. securities and are eligible portfolio investments for certain institutional investors that may not be able to own foreign securities directly or that may have limitations on the amount of such securities they can own.

ADR facilities can be sponsored or unsponsored. A sponsored ADR is one established in cooperation with the foreign private issuer; an unsponsored ADR is established by the depository bank without the issuer’s involvement. Unsponsored ADRs are typically established by a U.S.

ADR Creation Process



broker dealer that owns shares of a foreign private issuer and is interested in developing a trading market for those shares in the United States. Although cooperation is not necessary from the issuer, a letter of non-objection from the issuer is customary. Unsponsored programs are less desirable because the issuer has no control over the deposit agreement terms, including fees charged to holders, and corporate governance issues sometimes arise, such as the pass-through of voting and other shareholder rights. Regardless of the issuer’s involvement, the issuer must be eligible for the exemption under Rule 12g3-2(b), discussed below, in order for the broker dealer to establish the ADR. As discussed later, 2008 SEC rule modifications that make this exemption apply automatically have made unsponsored programs easier to implement.

To form a sponsored ADR, the foreign issuer and the depository bank (the issuer of the depository receipts that is usually a commercial bank) enter into a deposit agreement setting forth the terms on which the ADRs will be issued, the rights of ADR holders and the duties of each party. Sponsored facilities have been generally

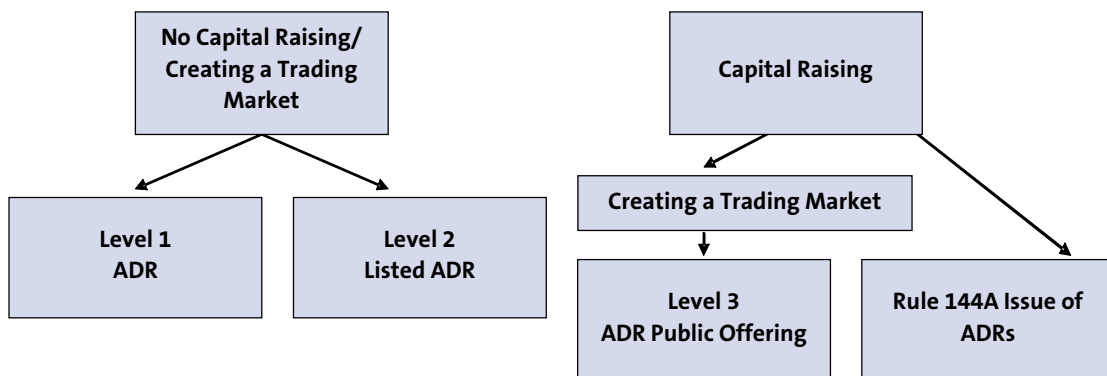
regrouped into three different categories:

Level 1

A Level 1 ADR is the simplest and requires the least amount of disclosure. However, as it is traded over-the-counter (“OTC”), it also has the least visibility and liquidity in the U.S. markets. The purpose of a Level 1 ADR facility is not to raise new capital (which is not allowed), but to enable trading of an issuer’s existing equity securities in the United States through the ADRs. This can serve to broaden shareholder base and enhance trading liquidity. Many foreign issuers that are public in their home countries and have sufficient public float have established these types of ADR programs as a plan to access the U.S. capital markets gradually.

In order to create a Level 1 ADR, the depository bank must file a short C-form registration statement with the SEC on Form F-6 describing the ADR facility. This type of ADR is not allowed to be listed on a U.S. national securities exchange and the issuer does not need to register the underlying securities with the SEC under

Types of ADR Programs



Advantages

Minimal registration requirements
Exempt from periodic reporting under Exchange Act Rule 12g3-2(b)

Not subject to compliance with SOX

Disadvantage

Shares not listed, only traded over-the-counter in the U.S.

Advantage

ADRs are listed on a U.S. exchange

Disadvantages

Registration of securities under the Exchange Act
Compliance with SOX

Advantages

Public offering of new shares
ADRs are listed on a U.S. exchange

Disadvantages

Registration of securities under the Exchange Act
Initial offering using Form F-1
Compliance with SOX

Advantages

Exemption from registration requirements of the Securities Act
Not subject to periodic reporting requirements under the Exchange Act

Disadvantages

Shares are not listed
Shares are restricted
Capital is raised, but no public trading market is created

the Exchange Act as long as it establishes the exemption under Rule 12g3-2(b). Trading in Level 1 ADRs occurs through the OTC market.

Level 2

A Level 2 ADR does not involve the raising of new capital but the ADRs are listed on a U.S. national securities exchange. This requires registration of the issuer's underlying securities under the Exchange Act by filing a registration statement with the SEC on Form 20-F as well as the short-form registration on Form F-6. Although a Level 2 ADR program can generate interest in the company's shares and provide substantial liquidity, it does subject the issuer to the disclosure and reporting requirements of the Exchange Act, as well as compliance with SOX. Foreign private

issuers should therefore carefully consider the consequences of this type of program.

Level 3

A Level 3 ADR facility refers to the establishment of a sponsored ADR program in connection with the issuance of new shares to raise capital. The ADRs are listed and traded on a U.S. national securities exchange. This is similar to an initial public offering of a U.S. company and full registration with the SEC is required. Form F-1 and Form 8-A must be filed for the initial public offering and the Form F-6 is filed for the ADRs. Similar to a Level 2 ADR, it subjects the issuer to the disclosure and reporting requirements of the Exchange Act as well as compliance with SOX.

ADRs vs. ORDINARY SHARES

In the last several years, institutional investors in the United States have become increasingly comfortable with purchasing and holding foreign equity securities directly in the form of ordinary shares within the local clearing and settlement system of the issuer's home country rather than indirectly through ADRs. In many equity offerings by foreign private issuers, where a local public offering is accompanied by a Rule 144A offering in the United States, the U.S. portion of the offering is sold in the form of ordinary shares and, if ADRs are in fact offered and created, some investors choose to purchase and hold the ordinary shares directly, particularly in cases where the local equity market is reasonably well developed and liquid. Increasing familiarity with the more developed local markets, local currency stability, the additional costs of depositing and withdrawing securities from the ADR program and the relaxing of certain restrictions on the direct ownership of foreign securities by certain U.S. funds are some of the factors that have contributed to this recent trend.

THE RULE 12g3-2 EXEMPTIONS

Under Section 12(g) of the Exchange Act, an issuer whose total assets exceed \$10 million must register under the Exchange Act if a class of securities has 500 or more record holders. To reduce the burden on foreign private issuers, the SEC adopted Rule 12g3-2, allowing them to avail themselves of two exemptions from the registration and reporting provisions of the Exchange Act.

The first exemption, Rule 12g3-2(a), exempts foreign private issuers whose equity securities are held by less than 300 U.S. residents even if it has more than 500 record holders worldwide.

The second exemption, Rule 12g3-2(b), amended in 2008, exempts foreign private issuers if a large percentage of the trading volume of a class of its securities is outside the United States. However, the exemption is not available if the issuer's securities are listed on a U.S. national securities exchange, if the issuer has made or is making a public offering of securities in the United States or if the issuer already has reporting obligations under the Exchange Act.

To benefit from the exemption under Rule 12g3-2(b), an issuer must:

- maintain a listing of the subject class of securities on one or more exchanges in its primary market and 55% of the trading volume of such class of securities must take place in either a single or no more than an aggregate of two foreign

jurisdictions, where the trading volume in at least one of the two jurisdictions must still be greater than the trading volume for that same class of securities in the United States;

- not be required to file or furnish Exchange Act reports; and
- publish, on its website or through another electronic delivery system generally available to the public, English translations of information it (i) has made public or has been required to make public in its home country; (ii) has filed or been required to file with the principal securities exchange on which its securities are traded and which is made public and (iii) has distributed or been required to distribute to securityholders, since the first day of its most recently completed fiscal year.

This exemption becomes effective for the issuer automatically without having to apply or notify the SEC. It remains in effect on an ongoing basis, as long as the issuer: (i) maintains its foreign private issuer status; (ii) publishes electronically the required non-U.S. disclosure documents; (iii) meets the foreign listing/primary trading market condition; and (iv) does not incur Exchange Act reporting obligations. An issuer will have to reevaluate its relative U.S. and foreign trading volumes on an annual basis.

INCREASE IN UNSPONSORED ADRs AS A RESULT OF THE RULE 12g3-2(b) AMENDMENTS

The 2008 SEC amendments to Rule 12g3-2(b), granting an automatic registration exemption to foreign private issuers who meet certain requirements, have resulted in the increase of unsponsored Level 1 ADR programs based on the securities of foreign companies whose existing home country reporting practices satisfy the new requirements of Rule 12g3-2(b). Depository banks may now establish unsponsored ADRs for this expanded group of foreign private issuers based upon their reasonable good faith belief that such issuers comply with Rule 12g3-2(b).

Foreign private issuers should therefore monitor F-6 registration statement filings with the SEC if they are concerned about these unsponsored programs. The SEC has stated that a sponsored program cannot co-exist with an unsponsored program, so an issuer can prevent unsponsored programs if it preemptively establishes a sponsored program, assuming it satisfies the Rule 12g3-2(b) requirements.

TRANSACTIONS WITH EXISTING U.S. HOLDERS

Aside from voluntarily seeking to access the U.S. capital markets, a foreign private issuer whose securities are already held by U.S. investors may need to consider certain U.S. securities law issues when deciding how to structure a transaction with its existing holders. In addition, a foreign company seeking to undertake a business combination with a U.S. company through the issuance of securities will need to consider the securities law implications of the transactions with the U.S. company's shareholders. Transactions such as rights offerings and exchange offers involving the issuance of new securities implicate many of the same issues discussed previously with respect to registered and unregistered offerings. Other transactions such as cash tender offers or equity or debt securities repurchase programs do not, but may involve other securities laws.

Rights Offerings

A rights offering is one where existing holders of an issuer's equity securities are granted the preferential right to purchase additional securities. Although rights offerings have historically not been common for U.S. companies, many non-U.S. jurisdictions have mandatory preferential subscription rights for shareholders. Rights offerings of new securities can either be registered with the SEC or offered on an exempt basis. If all existing U.S. holders are accredited investors, a "private" rights offering could be contemplated. Otherwise, the offering may require SEC registration unless U.S. holders can be excluded from the offering under local law. Also, the new SEC cross-border rules allow for certain limited exemptions from registration if certain conditions are met:

- ⦿ the number of U.S. holders must represent less than 10% of the class solicited;
- ⦿ there must be equal terms for both U.S. and non-U.S. holders; and
- ⦿ certain requirements regarding the informational document must be met, including English translations of documents disseminated to non-U.S. holders and a legend regarding non-U.S. nature of the transaction and the issuer's disclosure practices.

In a registered rights offering, certain procedural rules of the securities exchanges must also be taken into account.

Exchange Offers

An exchange offer involves an offer of a new security to existing holders in exchange for their existing securities. These offerings can be registered or unregistered (if there is an exemption available). One customary exemption is provided by Section 3(a)(9) of the Securities Act, which allows these offers to be exempt from registration if:

- ⦿ no fee is payable to anyone to solicit the exchange;
- ⦿ the issuer of the two securities is the same; and
- ⦿ the offer is made only to existing holders.

The new SEC cross-border rules also include similar exemptive relief for exchange offers (which are considered tender offers as well) based on the number of U.S. holders.

Tender Offers

Tender offers are not defined under the U.S. securities laws but are generally widespread offers to purchase securities of a company. The rules vary depending on whether or not the securities are equity or debt securities. Tender offers for listed equity securities (including convertible debt) are subject to a more complex set of rules and regulatory filings, while the rules governing tender offers for debt securities are relatively light and consist largely of procedural rules and there are no SEC filing requirements. However, in the case of listed equity securities, the level of regulation depends principally on the proportion of U.S. ownership of the subject class of securities.

Consent Solicitations

Companies with outstanding debt securities may encounter the need to seek consents from the holders of the debt securities to amendments or waivers of provisions of the governing indenture. Consent solicitations by themselves do not generally involve the purchase or sale of a security and thus the U.S. securities laws would not be a concern. However, there are circumstances when the changes to the terms of the underlying debt are so substantial that the SEC would consider the transaction to be in essence the offering of a new security. In this case, the analysis needs to consider the implications of the new "offering" under the U.S. securities laws. Consent solicitations are often undertaken as part of an exchange offer or tender offer and there are often disclosure and procedural issues

that need to be carefully analyzed in order to ensure compliance with applicable rules.

Repurchase Programs

Companies often undertake programs to repurchase from time to time their own securities in the open market or in privately negotiated transactions for cash. These repurchases can usually be structured to avoid the application of the tender offer rules, but should be reviewed carefully with counsel to ensure that they comply with all legal requirements.

“Going Private” Transactions

Acquisitions by a foreign private issuer or its affiliates of its equity securities that are listed on a securities exchange in the United States may also

involve the application of special rules for “going private” transactions. “Going private” transactions are defined somewhat broadly to include any transaction where the purpose or reasonable outcome may be that the issuer of a class of registered equity securities would be eligible to terminate or suspend reporting obligations to the SEC with respect to such class, or that such a class could be delisted from a national securities exchange or not authorized to be quoted in an inter-dealer quotation system of a registered national securities association. More onerous disclosure and filing requirements are triggered by a “going private” transaction, including the need for extensive disclosures on the background of the transaction as well as sources of funding, prior agreements and determinations of fairness.

SOME CONSIDERATIONS RELATING TO DEBT SECURITIES

Debt securities, unlike equity securities, are created by contract and are not defined by statutory law. As such, the rights and obligations of the parties are determined principally by the contractual terms of the debt security (such as interest rate, maturity dates, covenants and events of default) that are included in the agreement governing the debt. Contract terms governing debt securities are generally included in a document called an indenture (in English law agreements, a trust deed), although, in certain private offerings other contractual forms, such as fiscal agency agreements and note purchase agreements, are sometimes used. The indenture is entered into between the issuer and an indenture trustee (usually a bank) who acts in a fiduciary capacity for the holders of the debt securities.

An offering of debt securities raises certain issues that are different than those that arise in equity offerings. A few of these issues are discussed here.

Indenture Qualification

The Trust Indenture Act requires that indentures be used for registered public offerings of debt securities, including convertible debt, and that the indenture meet several substantive and procedural requirements. The issuer must file a Form T-3 with the SEC, which is an application for the qualification of the indenture pursuant to the Trust Indenture Act. In unregistered debt offerings, although the Trust Indenture Act qualifications and the Form T-3 filing are generally not required, market practice is to use indentures which substantially comply with the Trust Indenture Act provisions.

Negotiating the Indenture

Because debt securities are governed principally by contract law, significant attention must be given to the terms of the securities which are negotiated between the issuer and the underwriter. Although the underwriters advise the issuer on how to maintain operating flexibility and on what is “marketable,” they also have an interest in maintaining credibility with potential purchasers. Terms that are significant include restrictive covenants, events of default, redemption provisions, tax gross-up clauses, and change of control terms. The necessity, as well as the language, of many of these provisions depends to a large extent on whether or not the issuer is considered “investment grade” by the rating agencies. Investment grade

companies have very few restrictive covenants while companies below investment grade are generally required to comply with a number of restrictive provisions. Some indentures allow for certain restrictions to “fall away” if the issuer’s ratings increase to investment grade.

Registration Rights

In the past, many unregistered debt offerings, including those of foreign private issuers, contained a commitment by the issuer to register the securities offered with the SEC for resale after the offering or to conduct a registered exchange offer where registered securities would be exchanged for the unregistered securities. This permitted investors to rely on the fact that the “restricted” securities would be eventually freely tradable and thus give the issuer the benefit of a lower interest rate, eliminating any discount attributable to the restricted nature of the securities. If the subsequent registration did not occur, however, the interest rate on the securities typically “stepped up” to a higher rate as a penalty.

Because a subsequent registration resulted in the need for issuers to comply with SOX and become a reporting company, many foreign issuers decided to forego any benefit of the subsequent SEC registration. Debt offerings by foreign private issuers with registration rights have largely disappeared, except for those companies that are already reporting companies in the United States. With the shortened holding period under Rule 144 for securities issued in unregistered offerings, the need for registration rights, even for U.S. issuers, has been significantly reduced. However, companies which are already reporting companies under the Exchange Act may still benefit from the use of registration rights in unregistered offerings.

Special Disclosure Issues

Special risk factors are often included in disclosure documents for debt offerings to address the particular concerns related to the enforcement of remedies, subordination and similar issues that are not present in equity offerings. Also, investors tend to be less concerned about net income and earnings per share and focus more on earnings before interest, taxes, depreciation and amortization (EBITDA). In a registered debt offering, the issuer must also disclose the ratio of earnings to fixed charges. Offering documents for debt

offerings contain a section describing in detail the terms of the indenture.

Guarantor Financial Statements

Under U.S. securities laws, the guaranty of a security is considered a separate security “issued” by the guarantor and Regulation S-X requires a guarantor to submit the same financial information in a registration statement as the underlying issuer of the securities. There are various exceptions that permit issuers to disclose financial information of guarantors in a summary format subject to certain conditions. Some of the exceptions eliminate the separate guarantor reporting requirements entirely. Where less than all of the subsidiaries of a holding company issuer are guarantors, there are also disclosure issues related to the separation of financial information for the guarantor and non-guarantor subsidiaries. Care should be taken to identify early on in the planning stages of a debt offering the types of guaranties that are required and the financial statement requirements for the guarantors. Although private offerings do not require adherence to the technical disclosure rules of Regulation S-X, market practice as well as the need for adequate disclosure often dictate substantial compliance with these provisions.

Secured Offerings

Regulation S-X also requires separate financial statements for a pledgor if the collateral pledged by it for the offering constitutes a “substantial portion” of the collateral. Similar to the treatment with respect to guaranties, pledgor financial statements must contain the same information as that required of the issuer of the securities.

Ratings

Debt offerings often involve ratings from one or more rating agencies although ratings are not technically required to do a registered offering. Obtaining the necessary ratings is sometimes a burdensome process that requires the attention of both company management and the underwriters. Some investors may also have investment limits for offerings by issuers with less than a specified ratings level.

Tax Issues

Original issue discount (“OID”) is considered a form of taxable interest under U.S. tax rules. If a foreign private issuer issues a debt instrument for a lower price than its redemption price at maturity, part of the discount (the amount that it increases in value each tax year towards maturity) must be reported to the IRS each year by the investor as interest income. This forces investors to pay tax on income they have not yet received and is not an attractive feature. Some *de minimus* amounts of discounts are allowed without triggering these rules.

Many jurisdictions require that interest payments to non-residents be paid net of withholding taxes. Investors typically require the issuer to “gross up” interest payments in order to compensate them for this withholding tax. Foreign private issuers should be aware of this issue and include a provision in the indenture allowing them to redeem the bonds at par if the withholding tax rate is increased to a level that makes the gross up provision onerous.

Foreign Stock Exchange Listings

Many institutional investors in Europe and elsewhere are restricted from purchasing and holding securities that are not listed on a recognized stock exchange. Thus, depending on the source of investor demand for a particular offering, the underwriters will often recommend to an issuer that it undertake to list the offered debt securities on a foreign stock exchange (often the Euro MTF Market of the Luxembourg Stock Exchange or the Irish Stock Exchange) in order to make the securities eligible for purchase by any investors subject to such restrictions. The listing application is typically the issuer’s responsibility and needs to be factored into the timing considerations for the offering. Although many offerings are completed with an undertaking by the issuer to list the securities once issued, rather than making the listing a condition to the closing, the issue should be raised early in the process with the underwriters.

APPENDIX A

SOX: THE BASICS

Although SOX does not distinguish between domestic and foreign issuers, the SEC and the national securities exchanges have made some accommodations for foreign private issuers in their implementing rules. SOX does not apply to foreign private issuers that are not “issuers” under the Exchange Act, for example, non-reporting companies offering securities in transactions exempt from registration under the Securities Act or companies establishing a “Level 1” ADR facility.

SOX established the Public Company Accounting Oversight Board, or PCAOB, which oversees, regulates and disciplines accounting firms serving as auditors of public companies. The PCAOB’s rules are subject to SEC approval.

SOX introduced major changes in corporate governance that cover a broad range of issues affecting public companies. Some of the principal ones are noted below.

Internal Controls over Financial Reporting

Under SOX, an issuer is required to maintain adequate internal controls over financial reporting, with the participation of the company’s chief executive officer (“CEO”) and chief financial officer (“CFO”). In the issuer’s annual report on Form 20-F, not only must the independent auditor report on management’s assessment of the internal controls over financial reporting, but the issuer’s CEO and CFO are required to certify that they (i) are responsible for establishing and maintaining the issuer’s disclosure controls and procedures and internal controls over financial reporting; (ii) have evaluated the effectiveness of those controls and procedures; (iii) have disclosed in the report any change in the issuer’s internal controls over financial reporting that has materially affected, or is reasonably likely to materially affect, the issuer’s internal controls over financial reporting; (iv) have disclosed to the issuer’s auditors and the issuer’s audit committee all significant deficiencies and material weaknesses in the design or operation of the issuer’s internal controls over financial reporting; and (v) have disclosed any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer’s internal controls over financial reporting.

A foreign private issuer must evaluate internal controls, and provide management’s internal controls assessment report and an auditor’s attestation report in its annual report on Form 20-F. Foreign private issuers that become reporting issuers in the United States for the first time, whether through an IPO, a registered exchange offering or a listing on a national securities exchange, only have to provide a management internal controls assessment report and an auditor’s attestation in the second annual report they file with the SEC.

CEO/CFO Certifications

SOX also requires an issuer’s CEO and CFO to certify each time the issuer files an Exchange Act report (including, in the case of foreign private issuers, the annual report on Form 20-F) that they have read the report and that, to their knowledge (i) the financial statements fairly present the issuer’s financial condition and results of operations; and (ii) the report does not contain any material misstatements or omissions.

In addition, SOX requires the company’s CEO and CFO to certify each periodic report containing financial statements filed by the company, that such report complies with the requirements of Section 13(a) or 15(d) of the Exchange Act, and that the information it contains fairly presents, in all material respects, the financial condition and results of operations of the company. These certifications are sanctioned by criminal liability if the certifying party knowingly or willfully makes false certifications.

Audit Committees

SOX granted audit committees more responsibility and authority and raised membership requirements and committee composition to include more independent directors. The national securities exchanges subsequently enacted listing standards embodying many of these principles. Each member of the audit committee must be unaffiliated with the company and its subsidiaries and may not accept any compensation, directly or indirectly, from

the company or any of its subsidiaries. However, an audit committee member may serve as a member of the board of directors or as a member of a board committee.

Under Exchange Act Rule 10A-3, foreign private issuers are entitled to certain exemptions from the independence requirements. A foreign private issuer relying on exemptions needs to disclose in its annual report its reliance on the exemptions and an assessment of whether this reliance will materially adversely affect the audit committee's ability to act independently and to satisfy any of the other requirements. Such exemptions include the following:

- **Employee representations:** Non-management employees can serve on a foreign private issuer's audit committee if the employee is elected or appointed to the board or audit committee pursuant to local law, the company's constituent documents or home country legal or listing requirements.
- **Transitional period:** Foreign private issuers undertaking in an IPO are entitled to certain exemptions during a transitional period following their public offering.
- **Controlling shareholders:** One representative of a controlling shareholder can sit on the audit committee so long as the "no compensation" prong of the independence requirements is satisfied.
- **Two-tiered boards:** The supervisory or non-management board under this exemption could create an audit committee or function as such.
- **Board of auditors:** Companies with a board of auditors established pursuant to home country legal requirements are exempt from the requirement to have an independent audit committee and to oversee the work of outside auditors.
- **Shareholder election of outside auditors:** In jurisdictions mandating shareholder election of outside auditors, such election is allowed so long as the audit committee does not make any recommendation.

All action by a company's auditors, whether auditing or non-auditing, must be pre-approved by the company's audit committee. A foreign private issuer relying upon a board of auditors must require the board of auditors to perform the same overview.

The Controlled Company Exemption

Companies of which more than 50% of the voting power is held by an individual, group or other company, are known as "Controlled Companies." Both NASDAQ and the NYSE have created exemptions for controlled companies from compliance with certain SOX-based requirements relating to having a majority of independent directors, an independent compensation committee and independent nominating committees and director nominees.

Auditor Independence

SOX strengthens auditor independence and sets forth requirements for additional disclosures to investors about the services provided to companies by the independent accountant. To this end, SOX sets forth several requirements for auditor independence, including mandatory rotation by certain partners on the audit engagement team after no more than five or seven consecutive years, reports by the auditor on certain matters to the company's audit committee and the disclosure of certain information to investors related to audit and non-audit services provided by, and fees paid to, the auditor.

In addition, SOX prohibits officers and directors (and persons acting on their behalf) from coercing, manipulating, misleading or fraudulently influencing the auditor of the issuer's financial statements if such person knows or should know that such action would render the financial statements misleading.

Audit Committee Financial Expert

SOX requires that each public company's annual report contain a statement as to whether it has at least one "audit committee financial expert" serving on its audit committee and, if so, whether the expert is independent of management. An audit committee financial expert is someone who (i) has an understanding of generally accepted accounting principles and their applications; (ii) has experience analyzing financial statements; (iii) understands internal controls over financial reporting; and (iv) understands audit committee functions. In order to qualify, the

audit committee financial expert must have gained these qualifications through education and experience in certain positions (i.e., principal financial officer, public accountant, auditor) or other relevant experience. A company that does not have an audit committee financial expert must disclose this fact and explain why it does not.

Loans to Executives and Directors

SOX generally makes it unlawful for companies directly or indirectly to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any executive officer or director.

Code of Ethics

Under SOX, an issuer must design specific provisions, compliance procedures and disciplinary measures to deter wrongdoing and promote honest and ethical conduct. In accordance with this rule, the SEC amended Form 20-F to include Item 1613, which requires a foreign private issuer to disclose whether it has a code of ethics that applies to its principal executive officers, principal financial officers and principal accounting officers and, if not, the reasons why it has not done so.

Attorney Conduct

SOX required the SEC to issue rules prescribing standards of attorney conduct before the SEC when representing issuers. It also directed the SEC to mandate that an attorney “appearing and practicing” before the SEC report to the CEO or the Chief Legal Officer (“CLO”) of the company evidence of a material violation of securities law or breach of fiduciary duties by the company or any of its agents. The CLO must then open an inquiry into the matter and take all reasonable steps to cause the company to adopt an appropriate response.

The phrase “appearing and practicing” may cover any lawyer who transacts business with the SEC, represents an issuer in SEC proceedings, provides advice on the U.S. securities laws regarding any document the attorney “has notice” will be submitted to the SEC, or advises an issuer whether information must be included in or filed with any SEC document.

An outside local counsel (non-appearing foreign attorney) is exempt from such rules if that person is admitted to practice law outside the United States and does not hold himself or herself out as practicing U.S. law and who either (a) conducts activities that would constitute appearing and practicing before the SEC only incidentally to the practice of law in a jurisdiction outside the United States, or (b) is appearing and practicing before the SEC only in consultation with counsel admitted to practice law in the United States.

**APPENDIX B
QUANTITATIVE LISTING REQUIREMENTS**

NYSE LISTING REQUIREMENTS FOR FOREIGN PRIVATE ISSUERS

Distribution	Non-U.S. Companies
Shareholders	5,000 round lot shareholders worldwide
Publicly Held Shares	2.5 million worldwide
Aggregate Market Value of Publicly Held Shares	\$100 million worldwide

Shares held by directors, officers, or their immediate families and other concentrated holdings of 10 percent or more are excluded in calculating the number of publicly held shares.

If a company either has a significant concentration of stock, or if changing market forces have adversely impacted the public market value of a company which otherwise would qualify for listing on the Exchange such that its public market value is no more than 10 percent below \$100,000,000, the Exchange will generally consider \$100,000,000 in stockholders' equity as an alternate measure of size and, therefore, as an alternative basis to list the company.

In addition, a foreign private issuer must have a closing price or, if listing in connection with an IPO, an IPO price per share of at least \$4 at the time of listing.

A foreign private issuer must also meet *one* of the following financial standards:

1. Earnings Test	<p>(1) Pre-tax earnings from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees, adjusted for certain items, must total at least \$100,000,000 in the aggregate for the last three fiscal years with a minimum of \$25,000,000 in each of the most recent two fiscal years.</p> <p>(2) Additional adjustments available for foreign currency devaluation. Non-operating adjustments when associated with translation adjustments representing a significant devaluation of a country's currency (e.g., the currency of a company's country of domicile devalues by more than 10 percent against the U.S. dollar within a six-month period). Adjustments may not include those associated with normal currency gains or losses.</p> <p>(3) Reconciliation to U.S. GAAP of the third year back would only be required if the Exchange determines that reconciliation is necessary to demonstrate that the aggregate \$100,000,000 threshold is satisfied.</p>
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<p>2. Valuation/Revenue Test</p>	<p>Companies listing under this standard may satisfy either (a) the Valuation/Revenue with Cash Flow Test or (b) the Pure Valuation/Revenue Test.</p> <p>(a) <u>Valuation/Revenue with Cash Flow Test</u></p> <p>(1) at least \$500,000,000 in global market capitalization,</p> <p>(2) at least \$100,000,000 in revenues during the most recent 12 month period, and</p> <p>(3) at least \$100,000,000 aggregate cash flows for the last three fiscal years, where each of the two most recent years is reported at a minimum of \$25,000,000, on an adjusted basis.</p> <p>A Company must demonstrate cash flow based on the operating activity section of its cash flow statement. Cash flow represents net income adjusted to (a) reconcile such amounts to cash provided by operating activities, and (b) exclude changes in operating assets and liabilities. With respect to reconciling amounts pursuant to this paragraph, all such amounts are limited to the amount included in the company's income statement.</p> <p>In the case of companies listing in connection with an IPO, the company's underwriter (or, in the case of a spin-off, the parent company's investment banker or other financial advisor) must provide a written representation that demonstrates the company's ability to meet the \$500,000,000 global market capitalization requirement based upon the completion of the offering (or distribution).</p> <p>Reconciliation to U.S. GAAP of the third fiscal year back would only be required if the Exchange determines that reconciliation is necessary to demonstrate that the \$100,000,000 aggregate cash flow threshold is satisfied.</p> <p>(b) <u>Pure Valuation/Revenue Test</u></p> <p>(1) at least \$750,000,000 in global market capitalization, and</p> <p>(2) at least \$75,000,000 in revenues during the most recent fiscal year.</p> <p>In the case of companies listing in connection with an IPO, the company's underwriter (or, in the case of a spin-off, the parent company's investment banker or other financial advisor) must provide a written representation that demonstrates the company's ability to meet the \$750,000,000 global market capitalization requirement upon completion of the offering (or distribution). For all other companies, market capitalization valuation will be determined over a six-month average.</p>
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<p>3. Affiliated Company Test</p>	<p>(1) at least \$500,000,000 in global market capitalization;</p> <p>(2) at least 12 months of operating history (although a company is not required to have been a separate corporate entity for such period);</p> <p>(3) the company's parent or affiliated company is a listed company in good standing (as evidenced by written representation from the company or its financial advisor excluding that portion of the balance sheet attributable to the new entity); and</p> <p>(4) the company's parent or affiliated company retains control of the entity or is under common control with the entity.</p> <p>In the case of companies listing in connection with an IPO, the company's underwriter (or, in the case of a spin-off, the parent company's investment banker or other financial advisor) must provide a written representation that demonstrates the company's ability to meet the \$500,000,000 global market capitalization requirement upon completion of the offering (or distribution).</p> <p>"Control" for purposes of the Affiliated Company Test will mean having the ability to exercise significant influence over the operating and financial policies of the listing company, and will be presumed to exist where the parent or affiliated company holds 20% or more of the listing company's voting stock directly or indirectly. Other indicia that may be taken into account when determining whether control exists include board representation, participation in policy making processes, material intercompany transactions, interchange of managerial personnel, and technological dependency. The Affiliated Company Test is taken from and intended to be consistent with generally accepted accounting principles regarding use of the equity method of accounting for an investment in common stock.</p>
<p>Securities Exchange Act of 1934</p>	<p>Aside from qualifying under Exchange standards, all corporate securities must be registered under the Securities Exchange Act of 1934 under Section 12(b) before admission to dealings on the Exchange.</p>
<p>Sponsorship by an Exchange Member Firm</p>	<p>Because of the widespread use of bearer shares outside the United States, some non-U.S. companies might have difficulty in demonstrating that they have the required number of shareholders on a worldwide basis. In such cases, sponsorship by an Exchange member firm as to the liquidity and depth of the market for the company's shares may substitute for documentation concerning the number of shareholders. Nevertheless, the Exchange staff must be satisfied that a broad and independent market exists. For companies listing with minimal U.S. distribution, the primary non-U.S. market must provide the liquidity against which U.S. arbitrage transactions can be effected.</p>

NASDAQ LISTING REQUIREMENTS FOR FOREIGN PRIVATE ISSUERS

Once a foreign private issuer has determined the appropriate NASDAQ tier for listing, it must meet all of the criteria under at least one of the three financial standards. Listing on the NASDAQ Global Select Market also requires adherence to applicable liquidity requirements. The standards are described in the tables below.

NASDAQ Capital Market Initial Listing Requirements¹

Requirements	Equity Standard Listing Rules 5505(a) and 5505(b)(1)	Market Value of Listed Securities Standard Listing Rules 5505(a) and 5505(b)(2) ²	Net Income Standard Listing Rules 5505(a) and 5505(b)(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 ³	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
Bid price	\$4	\$4	\$4
Publicly held shares ⁴	1 million	1 million	1 million
Shareholders (round lot holders) ⁵	300	300	300
Market makers ⁶	3	3	3
Corporate governance ⁷	Yes	Yes	Yes

- 1 Companies must meet the bid price, publicly held shares, round lot holders, and market makers requirements as set forth in Rule 5505(a) and at least one of the Standards in Rule 5505(b).
- 2 Seasoned companies (those companies already listed or quoted on another marketplace) qualifying only under the Market Value of Listed Securities Standard must meet the market value of listed securities and the bid price requirements for 90 consecutive trading days prior to applying for listing.
- 3 The term “listed securities” is defined as “securities listed on NASDAQ or another national securities exchange.”
- 4 Publicly held shares is defined as total shares outstanding, less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10% of the total shares outstanding of the company. In the case of ADRs, at least 400,000 shall be issued.
- 5 Round lot holders are shareholders of 100 shares or more. The number of beneficial holders is considered in addition to holders of record.
- 6 An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.
- 7 In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series.

NASDAQ Global Market Initial Listing Requirements¹

Requirements	Income Standard Listing Rules 5405(a) and 5405(b)(1)	Equity Standard Listing Rules 5405(a) and 5405(b)(2)	Market Value Standard Listing Rules 5405(a) and 5405(b)(3) ²	Total Assets/Total Revenue Standard Listing Rules 5405(a) and 5405(b)(4)
Income from continuing operations before income taxes (in latest fiscal year or in two of last three fiscal years)	\$1 million	N/A	N/A	N/A
Stockholders' equity	\$15 million	\$30 million	N/A	N/A
Market value of listed securities ³	N/A	N/A	\$75 million	N/A
Total assets and Total revenue (in latest fiscal year or in two of last three fiscal years)	N/A	N/A	N/A	\$75 million and \$75 million
Publicly held shares ⁴	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 ²	\$4
Shareholders (round lot holders) ⁵	400	400	400	400
Market makers ⁶	3	3	4	4
Operating history	N/A	2 years	N/A	N/A
Corporate governance ⁷	Yes	Yes	Yes	Yes

- 1 Companies must meet the bid price, publicly held shares, and round lot holders requirements as set forth in Rule 5405(a) and at least one of the Standards in Rule 5405(b).
- 2 Seasoned companies (those companies already listed or quoted on another marketplace) qualifying only under the Market Value Standard must meet the market value of listed securities and the bid price requirements for 90 consecutive trading days prior to applying for listing.
- 3 The term “listed securities” is defined as “securities listed on NASDAQ or another national securities exchange.”
- 4 Publicly held shares is defined as total shares outstanding, less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10% of the total shares outstanding of the company.
- 5 Round lot holders are shareholders of 100 shares or more. The number of beneficial holders is considered in addition to holders of record.
- 6 An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.
- 7 In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series.

NASDAQ Global Select Market Initial Listing Requirements¹

Requirements	Standard 1 Listing Rules 5315(e) and 5315(f)(3)(A)	Standard 2 Listing Rules 5315(e) and 5315(f)(3)(B)	Standard 3 Listing Rules 5315(e) and 5315(f)(3)(C)	Standard 4 Listing Rules 5315(e) and 5315(f)(3)(D)
Pre-tax earnings ² (income from continuing operations before income taxes)	Aggregate in prior three fiscal years > \$11 million and Each of the two most recent fiscal years > \$2.2 million and Each of the prior three fiscal years > \$0	N/A	N/A	N/A
Cash flows ³	N/A	Aggregate in prior three fiscal years > \$27.5 million and Each of the prior three fiscal years > \$0	N/A	N/A
Market capitalization ⁴	N/A	Average > \$550 million over prior 12 months	Average > \$850 million over prior 12 months	\$160 million
Revenue	N/A	Previous fiscal year > \$110 million	Previous fiscal year > \$90 million	N/A
Total assets	N/A	N/A	N/A	\$80 million in the most recently completed fiscal year
Stockholders' equity	N/A	N/A	N/A	\$55 million
Bid price ⁵	\$4	\$4	\$4	\$4

Market makers ⁶	3 or 4	3 or 4	3 or 4	3 or 4
Corporate governance ⁷	Yes	Yes	Yes	Yes

- 1 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 Rule 5315(f)(3). If the common stock of a company is included in The NASDAQ Global Select Market, any other security of that same company, such as other classes of common or preferred stock, which 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.
- 2 In calculating income from continuing operations before income taxes for purposes of Rule 5315(f)(3)(A), NASDAQ will rely on a company's annual financial information as filed with the Securities and Exchange Commission (SEC) in the company's most recent periodic report and/or registration statement. If a company 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 sub period in the company's publicly reported financial statements.
- 3 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 company's most recent periodic report and/or registration statement, excluding changes in working capital or in operating assets and liabilities. A period of less than three months shall not be considered a fiscal year, even if reported as a stub period in the company's publicly reported financial statements.
- 4 In the case of a company listing in connection with its initial public offering, compliance with the market capitalization requirements of Rules 5315(f)(3)(B) and 5315(f)(3)(C) will be based on the company's market capitalization at the time of listing.
- 5 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.
- 6 A company that also satisfies the requirements of Rule 5405(b)(1) or 5405(b)(2) is required to have three market makers. Otherwise, the company is required to have four market makers. An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.
- 7 In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series.

NASDAQ Global Select Market Initial Listing Requirements¹

New Company Listings				
Requirements	Initial Public Offerings and Spin-Off Companies	Seasoned Companies: Currently Trading Common Stock or Equivalents	Affiliated Companies ¹	Listing Rules
Round lot shareholders or Total shareholders or Total shareholders and Average monthly trading volume over past twelve months ²	450 or 2,200	450 or 2,200 or 550 and 1.1 million	450 or 2,200 or 550 and 1.1 million	5315(f)(1)
Publicly held shares ³	1,250,000	1,250,000	1,250,000	5315(e)(2)
Market value of publicly held shares or Market value of publicly held shares and Stockholders' equity	\$45 million	\$110 million or \$100 million and \$110 million	\$45 million	5315(f)(2)

- 1 Companies affiliated with another company listed on The NASDAQ Global Select Market. For purposes of Rule 5315, a company 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 company. 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 intercompany transactions, interchange of managerial personnel, or technological dependency.
- 2 Round lot and total shareholders include both beneficial holders and holders of record.
- 3 Publicly held shares is defined as total shares outstanding, less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10% of the total shares outstanding of the company.

APPENDIX C
NYSE CONTINUED LISTING STANDARDS

“Earnings Test”	“Valuation/Revenue with Cash Flow Test”	“Pure Valuation/Revenue Test”	Affiliated Company Test
Company below compliance if:	Company below compliance if:	Company below compliance if:	Company below compliance if:
average global market capitalization over a consecutive 30 trading-day period is less than \$50,000,000; and	average global market capitalization over a consecutive 30 trading-day period is less than \$250,000,000 and, at the same time, total revenues are less than \$20,000,000 over the last 12 months; or	average global market capitalization over a consecutive 30 trading-day period is less than \$375,000,000 and, at the same time, total revenues are less than \$15,000,000 over the last 12 months (unless the company qualifies as an original listing under one of the other original listing standards); or	the listed company’s parent/affiliated company ceases to control the listed company, or the listed company’s parent/affiliated company itself falls below the continued listing standards applicable to the parent/affiliated company; and
at the same time, total stockholders’ equity is less than \$50,000,000.	average global market capitalization over a consecutive 30 trading-day period is less than \$75,000,000.	average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.	average global market capitalization over a consecutive 30 trading-day period is less than \$75,000,000 and, at the same time, total stockholders’ equity is less than \$75,000,000.
<p>The NYSE will promptly initiate suspension and delisting procedures with respect to a company that is listed under any financial standard if a company is determined to have average global market capitalization over a consecutive 30 trading-day period of less than \$15,000,000, regardless of the original standard under which it was listed.</p>			

APPENDIX D
NASDAQ CONTINUED LISTING STANDARDS

NASDAQ Capital Market Continued Listing Requirements

Companies must meet the bid price, publicly held shares, market value of publicly held shares, public holders, and market makers requirements as set forth in Rule 5550(a) and at least one of the Standards in Rule 5550(b).

Requirements	Equity Standard Listing Rules 5550(a) and 5550(b)(1)	Market Value of Listed Securities Standard Listing Rules 5550(a) and 5550(b)(2)	Net Income Standard Listing Rules 5550(a) and 5550(b)(3)
Stockholders' equity	\$2.5 million	N/A	N/A
Market value of listed securities ¹	N/A	\$35 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	\$500,000
Publicly held shares ²	500,000	500,000	500,000
Market value of publicly held securities	\$1 million	\$1 million	\$1 million
Bid price	\$1	\$1	\$1
Public holders ³	300	300	300
Market makers ⁴	2	2	2
Corporate governance ⁵	Yes	Yes	Yes

NASDAQ Global Market Continued Listing Requirements

Companies must meet the bid price and total shareholders requirements as set forth in Rule 5450(a) and at least one of the Standards in Rule 5450(b).

Requirements	Equity Standard Listing Rules 5450(a) and 5450(b)(1)	Market Value Standard Listing Rules 5450(a) and 5450(b)(2)	Total Assets/Total Revenue Standard Listing Rules 5450(a) and 5450(b)(3)
Stockholders' equity	\$10 million	N/A	N/A
Market value of listed securities ¹	N/A	\$50 million	N/A
Total assets and Total revenue (in latest fiscal year or in two of last three fiscal years)	N/A	N/A	\$50 million and \$50 million
Publicly held shares ²	750,000	1.1 million	1.1 million
Market value of publicly held shares	\$5 million	\$15 million	\$15 million
Bid price	\$1	\$1	\$1
Total shareholders ³	400	400	400
Market makers ⁴	2	4	4
Corporate governance ⁵	Yes	Yes	Yes

- 1 The term "listed securities" is defined to mean "securities listed on NASDAQ or another national securities exchange."
- 2 Publicly held shares is defined as total shares outstanding less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10% of the total shares outstanding.
- 3 Public holders of a security include both beneficial holders and holders of record, but does not include any holder who is directly or indirectly an executive officer, director, or the beneficial holder of more than 10% of the total shares outstanding.
- 4 An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.
- 5 In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series.



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