

## Guide to Public ADR Offerings in the United States

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## I. Introduction

Shares of foreign corporations may be issued and traded in the United States in three different forms: (i) as a direct listing of ordinary shares,<sup>1</sup> (ii) as shares issued by the foreign corporation specifically for the U.S. market in a form adapted to the needs of U.S. investors (*e.g.*, “Shares of New York Registry” issued by Royal Philips Electronics and ArcelorMittal) or (iii) through American Depositary Receipts, also known as “ADRs.” ADRs are by far the most prevalent form through which foreign corporations list and offer to the public equity securities in the United States.<sup>2</sup>

The ADR, similar in form to a standard U.S. registered stock certificate, is a substitute trading certificate evidencing the American Depositary Shares (“ADSs”) that represent the underlying shares of the foreign corporation.<sup>3</sup> ADSs are typically issued by a commercial bank with a U.S. depositary business (the “depository”), which holds the underlying foreign shares directly or through a foreign correspondent (the “custodian”). The underlying shares remain at the office of the foreign bank acting as custodian. Each ADR evidences one or more ADSs, with each ADS representing a number or a fraction of underlying shares. Typically, an ADR is issued in global book-entry form. If the U.S. dollar equivalent of the underlying shares would be unusually low or high by U.S. market standards, the ratio of ADRs to underlying shares can be adjusted to establish an ADR price in dollars that is consistent with U.S. market practice.

This memorandum describes the U.S. legal requirements and the principal procedures involved in the public offering in the United States of shares of a “foreign private issuer”<sup>4</sup> represented by ADRs issued under a sponsored<sup>5</sup> ADR program registered with the U.S. Securities and Exchange Commission (the “SEC”).

<sup>1</sup> Historically, direct listings of ordinary shares of foreign private issuers have primarily been of Canadian and Israeli issuers and issuers based in certain Caribbean and Micronesian countries. The New York Stock Exchange (the “NYSE”) has also established a “Global Share” program to facilitate the listing of ordinary shares of foreign private issuers. The Global Shares that are listed directly on the NYSE are fungible with those listed in the issuers’ home countries. Difficulties in transfers of shares between U.S. and non-U.S. clearing systems and in the payment of dividends denominated in currencies other than the U.S. dollar, however, have prevented issuers in many jurisdictions from taking advantage of this program, and as of the date of this memorandum, only two issuers (Deutsche Bank and UBS) currently have Global Shares listed on the NYSE.

<sup>2</sup> U.S. institutional investors often hold and trade shares of foreign companies in the form of shares listed on foreign exchanges following an offering of those shares to large institutional investors in the United States in reliance on the exemption in Rule 144A under the Securities Act of 1933 (the “1933 Act”).

<sup>3</sup> In a technical sense, “an ADR is the physical certificate that evidences [an] ADS . . . and an ADS is the security that represents an ownership interest in deposited securities . . . .” SEC Release No. 33-6894 (May 23, 1991). However, market practice has tended to refer to the underlying security as an “ADR” whether or not the security is in certificated or book-entry form, and in this memorandum, we will generally follow that practice.

<sup>4</sup> A corporation incorporated or organized under the laws of a foreign country is a “foreign private issuer” as defined in Rule 405 under the 1933 Act and Rule 3b-4 under the Securities Exchange Act of 1934 (the “1934 Act”), unless (A) more than 50 percent of the corporation’s outstanding voting securities are directly or indirectly held of record by residents of the United States, and (B)(i) the majority of its executive officers or directors are U.S. citizens or residents, (ii) more than 50 percent of its assets are located in the United States or (iii) its business is administered principally in the United States. If a foreign corporation ceases to qualify as a

## II. Nature and Purpose of ADRs

The ADR mechanism was developed to overcome certain practical problems confronting residents of the United States who invest in foreign securities. Some of these problems arose because, historically, foreign securities sometimes were available only in bearer form, making it difficult for U.S. shareholders to receive dividends and for the issuer to demonstrate it had sufficient U.S. shareholders to qualify for listing in the United States. Since ADRs are registered in the name of the holders, dividends may be distributed to them, and the number of ADR holders may be determined by reference to the ADR register.

Other practical advantages of ADRs for U.S. investors in foreign securities include the following:

- Whereas a holder of foreign registered securities may be required to follow inconvenient transfer procedures, ADRs may be transferred through book-entry procedures in the same manner as domestic shares. In addition, in certain countries, investors are required to register with the securities regulator or central bank prior to investing in a local company; ADRs permit the custodian to be the registrant instead.
- ADRs also eliminate the need for the U.S. investor to convert dividends paid in a foreign currency into dollars. Dividends on the underlying shares are collected by the custodian, converted into dollars and transmitted by the depositary to the ADR holders.
- The depositary often also assists ADR holders with filings that are necessary for a reduction in foreign withholding tax available under a U.S. tax treaty (as discussed in Part IV.B below).
- Use of ADRs may also assist in compliance with any exchange controls, restrictions on foreign investment or reporting requirements that may apply to

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“foreign private issuer,” it will become subject to the provisions of the U.S. securities laws applicable to a domestic corporation. *See* Rule 405 under the 1933 Act and Rule 3b-4(c) under the 1934 Act.

For purposes of this definition, a corporation should calculate its U.S. ownership by taking account of beneficial ownership reports provided to it or publicly filed (in the United States or other jurisdictions) and by “looking through” the record ownership of those brokers, dealers, banks and nominees located in the United States, in the issuer’s home jurisdiction or in the primary trading market for the issuer’s securities to determine the residency of their customers. If the issuer is unable to obtain this information after reasonable inquiry or if the cost of obtaining it is unreasonable, it may assume that the customers are resident in the jurisdiction where the nominee has its principal place of business.

Corporations must test their qualification to be a foreign private issuer annually on the last business day of their second fiscal quarter (rather than on a continuous basis). A corporation that qualifies as a foreign private issuer will immediately become eligible to use the forms and rules for foreign private issuers under the 1933 Act and 1934 Act. An issuer that ceases to qualify as a foreign private issuer must begin using the forms and complying with the rules for domestic issuers on the first day of the fiscal year following the date on which it no longer qualifies as a foreign private issuer. *See* SEC Release Nos. 33-8959; 34-58620 (Sept. 23, 2008).

<sup>5</sup> The term “sponsored” is discussed in Part II.B below.

foreign holders of the issuer's stock, since it generally will be possible for the depositary to comply with the necessary formalities with respect to the underlying shares.

Benefits to issuers include increased access to U.S. investors, which may increase share liquidity and help stabilize the share price for existing shares, as well as facilitate future capital increases. In addition, because each ADR may represent multiple underlying shares, stock exchange listing fees on ADRs are generally lower than on ordinary shares.<sup>6</sup>

The depositary keeps ADR holders informed of important developments concerning the issuer of the underlying securities, such as recapitalization plans, security exchange offers and subscription rights. In most cases, the depositary informs ADR holders of matters submitted for the vote of shareholders. Depositaries will vote the shares they hold in accordance with instructions from ADR holders and may be willing to vote shares for which no instruction is given in accordance with management's direction or in the same proportion that all other outstanding shares are voted.<sup>7</sup>

#### A. Types of ADR Programs

There are three "levels" of programs for publicly traded ADRs: Levels 1 and 2 relate to shares already outstanding, while Level 3 relates to a new offering of shares. Each level involves registration requirements of varying complexity and in some cases, also subjects the issuer to ongoing SEC reporting requirements.<sup>8</sup>

Any issuer wishing to establish an ADR program must comply with the U.S. securities laws. Two principal U.S. federal laws govern the offer and sale of securities in the United States: the 1933 Act regulates the public offering of securities, while the 1934 Act regulates securities markets and requires periodic reporting by issuers of securities publicly traded in the United States. These laws were recently amended by the Jumpstart Our Business Startups Act (the "JOBS Act"), enacted in 2012, which liberalized certain aspects of the 1933 Act and 1934 Act registration and reporting regimes for smaller issuers (including foreign private issuers) that qualify as "Emerging Growth Companies" ("EGCs").

Companies may also opt for a "restricted" ADR program, which provides access to the U.S. markets without SEC registration. Restricted ADR programs enable issuers to raise capital through the private placement of ADRs with large institutional investors in the United States through Rule 144A under the 1933 Act. Companies issuing shares through a restricted ADR program are not subject to 1933 Act registration requirements or to ongoing reporting under the 1934 Act. An issuer may establish both a restricted program and a Level 1 program (as described below), and shares offered and sold outside the United States, pursuant to

<sup>6</sup> See Appendix B for NYSE and NASDAQ exchange listing fees.

<sup>7</sup> See *infra* Note 198 and accompanying text.

<sup>8</sup> According to the SEC, there are 912 foreign issuers with securities registered in the United States as of December 31, 2014, of which 295 are Canadian issuers. See SEC Division of Corporation Finance, "International Registered and Reporting Companies," <http://sec.gov/divisions/corpfin/internatl/companies.shtml>.

Regulation S under the 1933 Act as part of a global offering, may be deposited into a Level 1 program 40 days<sup>9</sup> after the closing of the global offering.

A Level 1 ADR program is the most accessible for foreign issuers and requires that only Form F-6, a highly simplified 1933 Act registration statement, be filed with the SEC. A company wishing to establish a Level 1 ADR program must have securities already traded on a foreign stock exchange and must publish its annual reports in English on its web site in the form provided by the laws of its home country. In the United States, ADRs issued under a Level 1 program are traded only in the over-the-counter (“OTC”) market. A Level 1 ADR program will not be subject to ongoing U.S. reporting requirements so long as the foreign issuer publishes in English on its web site certain periodic information that would allow it to qualify for a Rule 12g3-2(b) exemption under the 1934 Act.<sup>10</sup>

A Level 2 ADR program involves the issuance of U.S. exchange-listed ADRs without raising new capital. In addition to a 1933 Act registration statement on Form F-6, Level 2 ADR programs require the issuer to file a more extensive 1934 Act registration statement on Form 20-F. Issuers registering ADRs under a Level 2 ADR program become subject to the ongoing reporting requirements of the 1934 Act, including annual reports required to be filed on Form 20-F and reports required to be submitted on Form 6-K to the SEC (*see* Part III.E below).

A Level 3 ADR program involves a registered public offering to raise capital in addition to an exchange listing. Level 3 ADR programs require filing of a 1933 Act registration statement on Form F-1, which requires substantially the same issuer information as Form 20-F, as well as detailed information on the offering. Level 3 ADR programs also require filing of the simplified 1933 Act registration statement on Form F-6. Companies that establish Level 3 ADR programs also become subject to the ongoing reporting requirements of the 1934 Act.

## B. Issuer Relationships with Depositaries

The issuance of ADRs may be either “sponsored” or “unsponsored.” In order for a depositary to create an unsponsored ADR facility for an issuer’s shares, the issuer must be

<sup>9</sup> The 40-day period is consistent with the unavailability of the dealer exemption in Section 4(a)(3) of the 1933 Act.

<sup>10</sup> Under Rule 12g3-2(b), a foreign private issuer is automatically exempt from the registration and periodic reporting requirements of the 1934 Act if the issuer (i) is not currently required to file or furnish reports under Section 13(a) or 15(d) of the 1934 Act (*i.e.*, has not publicly offered or listed securities in the United States, including on the OTC Bulletin Board), (ii) has a class of securities listed on one or more exchanges in its primary trading market (*i.e.*, a foreign jurisdiction that, either singly or together with the trading of the securities in a second foreign jurisdiction, constitutes at least 55% of its worldwide trading volume) and (iii) has published on a web site or other electronic information delivery system English translations of the material information it has (a) made public pursuant to the law of its home country, (b) filed with a securities exchange or (c) distributed to its security holders, including, at a minimum, English translations of its annual report (including annual financial statements), interim reports that contain financial statements, press releases and all other communications and documents distributed directly to holders of each class of securities to which the exemption relates. *See* SEC Release No. 34-58465 (Sept. 5, 2008).

either: (i) subject to the periodic reporting requirements under the 1934 Act or (ii) exempt from these reporting requirements pursuant to Rule 12g3-2(b) under the 1934 Act.<sup>11</sup>

“Un-sponsored” ADRs are issued by a depositary for already outstanding foreign shares without an agreement with the issuer of the shares. A depositary can establish an unsponsored ADR program unilaterally based on investor and broker-dealer demand. As a result, the issuer bears no cost or additional reporting obligation in connection with the establishment of an unsponsored ADR program. Multiple unsponsored ADR facilities may exist for the same issuer because an unlimited number of depositaries may issue unsponsored ADRs. Unsponsored ADRs trade in the United States on the OTC market only.

“Sponsored” ADRs are issued by a depositary pursuant to an agreement with the issuer and with its financial support for shares that are already outstanding or for shares issued specifically for an offering of ADRs in the United States. A single depositary establishes the sponsored ADR facility, which cannot be duplicated by other depositaries, unlike unsponsored ADR facilities.<sup>12</sup> Sponsored ADR facilities also provide the issuer the flexibility to list the ADRs on a U.S. stock exchange. A foreign private issuer that chooses to issue its shares in the United States through a sponsored ADR program enters into a deposit agreement (the “deposit agreement”) with the depositary, which governs the creation and maintenance of the deposit facility. The deposit agreement sets forth the rights and obligations of the ADR holders and covers matters such as the issuance of ADRs upon deposit of underlying shares (and the withdrawal of underlying shares upon presentation of ADRs), the treatment of dividends and other distributions, the procedure for voting the underlying shares and the amendment and termination of the deposit agreement. ADR holders wishing to trade the underlying shares (as opposed to the ADRs) may submit their ADRs to the depositary for cancellation and withdrawal of the underlying shares. Similarly, a holder of underlying shares can deposit such shares with the depositary (by delivery to the custodian) against issuance by the depositary of ADRs. Typically, an ADR is issued in global book-entry form, although many deposit agreements allow investors to exchange book-entry ADRs for certificated ADRs. The deposit agreement also specifies the fees of the depositary for the issuance and cancellation of ADRs,<sup>13</sup> which generally are waived for an initial issuance in connection with a public offering, but are paid by investors for the subsequent deposit and withdrawal of the underlying shares.

In addition to the issuance and cancellation fees payable by the investor, the depositary may charge the issuer a fee for administering the program, which will vary depending on the number of accounts the depositary maintains for holders of ADRs and the particular services to be provided (*e.g.*, the number of cash or stock dividends to be distributed or reports to be mailed to ADR holders annually). Issuers are also often required to reimburse the depositary for its out-of-pocket expenses in establishing and administering the ADR facility, including legal

<sup>11</sup> See *supra* Note 10.

<sup>12</sup> The existence of unsponsored ADR facilities may become an obstacle to an issuer’s establishing a sponsored ADR facility, since it is the position of the staff of the SEC that a sponsored ADR facility may not be established unless all unsponsored ADR facilities relating to the same underlying securities are terminated. In such a case, negotiated fees for cancellation of the unsponsored ADRs must be paid to the depositaries of the unsponsored programs; these fees, which can be quite significant, are typically borne by the issuer or by the depositary of the new sponsored facility.

<sup>13</sup> These fees are generally \$5.00 per 100 ADRs, or portion thereof, to be issued or canceled.



fees. Charges for establishing and administering an ADR program are subject to negotiation between the issuer and the depositary.<sup>14</sup>

Some depositaries have offered to reimburse issuers for the issuers' costs of establishing and maintaining an ADR program (ordinarily in an annual fixed amount that is payable to the issuers). The Office of the Chief Counsel of the United States Internal Revenue Service has concluded that payments of the type described above, from the depositary to an issuer, are similar to payments made under franchise arrangements and thus are subject to U.S. withholding tax, unless an income tax treaty provides otherwise, or the issuer is engaged in a trade or business in the United States (in which case the payments would be subject to U.S. net income tax).<sup>15</sup> It may be expected that this guidance will be taken into account in future negotiations between issuers and depositaries regarding any reimbursement arrangements.

Foreign private issuers with a sponsored ADR facility are required to disclose in their annual report on Form 20-F the fees the depositary charges to investors, as well as payments, if any, made by the depositary to the issuer (including payments for expenses of the issuer that are reimbursed by the depositary).<sup>16</sup>

### III. Registration, Disclosure, Reporting Requirements and Civil Liabilities under U.S. Securities Laws

#### A. 1933 Act Registration Requirement and Related Publicity Restrictions

A public offering in the United States of securities, including equity securities in the form of ADRs, ordinarily must be registered with the SEC. The issuer of the securities is required to file with the SEC a 1933 Act registration statement containing a prospectus to be made available to prospective investors. In the registration statement, the issuer must disclose information concerning itself and the securities to be offered, in compliance with detailed SEC regulations. The SEC does not itself judge the merits of any public offering, but it does seek to ensure that investors have the opportunity to base their decisions upon adequate and accurate factual information included in the registration statement and prospectus.

The 1933 Act provides that an "offer" of securities may not be made until the related registration statement has been filed with the SEC and the appropriate filing fees paid,<sup>17</sup>

<sup>14</sup> In 2006, the NYSE amended its rules to eliminate restrictions on ADR depositary dividend and servicing fees. See SEC Release No. 34-53978 (June 13, 2006). Nonetheless, the ability of a depositary to charge these fees to ADR holders is governed by the terms of the relevant deposit agreement, which may not allow the depositary to charge these fees.

<sup>15</sup> See Office of Chief Counsel, Internal Revenue Service, "Memorandum No. AM2010-006," (Dec. 17, 2010), <http://www.irs.gov/pub/irs-utl/am2010006.pdf>.

<sup>16</sup> See SEC Release Nos. 33-8959; 34-58620 (Sept. 23, 2008).

<sup>17</sup> Effective October 1, 2015, the filing fee for a registration statement (whether on Form F-1 or Form F-3) is equal to 0.01007% (\$100.70 per \$1 million of securities) of the maximum aggregate offering price of the securities being registered or, with respect to ADRs (registered on Form F-6) representing underlying shares, the maximum aggregate charges to be imposed in connection with the issuance of the related ADRs (generally \$5.00 per 100 ADRs, as indicated above, with a minimum registration fee of \$100). See SEC Fee Rate Advisory #1 for Fiscal Year 2016 (Aug. 27, 2015) and Rule 457 under the 1933 Act.

unless the offering is made pursuant to an exemption from the registration requirements of the 1933 Act. Actions taken in advance of a public offering that have the effect of arousing public interest in the issuer or its securities, including posting information on the issuer's web site, may constitute an offer of securities in violation of the 1933 Act. Pre-filing publicity that constitutes an offer, even if inadvertent, is known as "gun-jumping" and may result in delays to the offering to allow for a "cooling-off period" to reduce the risk that investors may rely on information not included in the prospectus.<sup>18</sup>

There are several relevant safe harbors that allow communications that would otherwise constitute impermissible "offers" under the 1933 Act:

- Pursuant to Rule 135 under the 1933 Act an issuer may, prior to filing a registration statement, publicly disclose that it intends to make a public offering of securities if certain conditions are met, principally that: (i) the Rule 135 notice may contain only the name of the issuer and the title, amount and basic terms of the securities proposed to be offered, the anticipated time of the offering and a brief statement of the manner and purpose of the offering, and (ii) the notice may not identify the prospective underwriters for the offering.
- A foreign issuer also may rely on Rule 135e under the 1933 Act to hold offshore press conferences or issue press releases offshore without such publicity resulting in a violation of the 1933 Act.<sup>19</sup> Caution should be exercised, however, regarding the content of offshore press conferences and press materials as the SEC staff may require that issuers include in their registration statements and prospectuses substantive disclosures made in offshore conferences and press materials, including projections.
- Rule 163A under the 1933 Act provides a safe harbor for communications made by or on behalf of an issuer more than 30 days prior to the filing of the registration statement if the communication does not reference a securities offering and the issuer takes "reasonable steps" to ensure that the communication is not redistributed or republished during the 30-day period prior to the filing.
- Rules 168 and 169 under the 1933 Act provide a safe harbor for ongoing communications at any time during the offering process of: (i) regularly

<sup>18</sup> For example, the U.S. initial public offering prospectuses of Google, Salesforce.com and Groupon each contained extensive risk factor disclosure concerning potential gun jumping violations in connection with the offering, resulting in delays to those offerings. Google's disclosure also mentioned that it could be subject to rescission claims from shareholders if the company was held in violation of the 1933 Act.

<sup>19</sup> Rule 135e establishes a safe harbor for foreign issuers under which members of the U.S. press may have access to offshore press conferences and press materials released offshore as long as: (i) the press activity is conducted offshore; (ii) at least part of the offering is conducted outside the United States; (iii) access to the offshore press activities is also provided to members of the foreign press; and (iv) any written press-related materials contain a cautionary legend and do not contain any form of purchase order or coupon that may be returned to express interest in the offering.

released “factual business information”<sup>20</sup> by or on behalf of any issuer and (ii) regularly released “forward-looking information”<sup>21</sup> by or on behalf of any “reporting issuer.”<sup>22</sup> To qualify for these safe harbors, the issuer must have previously released the same type of information in the ordinary course of business, and the timing, manner and form in which the information is disclosed must be consistent with past practice.

Publicity regarding the issuer or the offering is also restricted during the period between the filing of the registration statement and its effectiveness, although the issuer may make oral offers during this period, and written offers subject to certain conditions. The term “oral” is not defined in the 1933 Act or the SEC’s rules, but the term “written” is defined very broadly in Section 2(a)(9) of the 1933 Act to include, among other modes of communication, “graphic communication,” which in turn is defined in Rule 405 under the 1933 Act. Essentially, any communication other than an in-person or telephonic communication (not in any way preserved for retransmission) will be treated as a written communication.

Under the 1933 Act, written offers can only be made using the preliminary prospectus in the registration statement, and under SEC rules in the case of a non-reporting issuer, only when the maximum number of shares and a price range for the issuer’s initial public offering are included on the front cover of the preliminary prospectus.<sup>23</sup> The SEC has provided exceptions for certain types of written communications, which are discussed below, and more generally with respect to certain types of issuers, as discussed in Part III.B below.

In addition to Rule 135e, discussed above, Rule 134 permits a written communication limited to specified items of information principally regarding the terms of an offering, including the names of the prospective underwriters.

Eligible issuers may also, under certain conditions, use “free writing prospectuses” during the period between filing and effectiveness of the registration statement in

<sup>20</sup> “Factual business information” typically is limited to information about the issuer, its business, financial condition, products, services, or advertisement of such products or services, provided the information is not presented in such a manner as to constitute an offer of the issuer’s securities. Factual business information generally does not include predictions, projections, forecasts or opinions with respect to valuation of a security. *See* SEC Division of Corporation Finance, “Compliance and Disclosure Interpretations: Securities Act Rules, Question 256.25,” <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm> (last updated Aug. 6, 2015).

<sup>21</sup> “Forward-looking information” is limited to: (i) projections of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items, (ii) statements about management’s plans and objectives for future operations, products or services, (iii) statements about future economic performance and (iv) assumptions underlying or relating to any of the foregoing information. *See* 168(b)(2) under the 1933 Act.

<sup>22</sup> For purposes of these rules, a “reporting issuer” includes a foreign private issuer that (i) meets the registrant requirements of Form F-3 other than the reporting history provisions, (ii) meets the public float requirements of Form F-3 and (iii) either has had its equity securities traded on a “designated offshore securities market” for at least 12 months or has a worldwide market value of common equity held by non-affiliates of at least \$700 million. A list of designated offshore securities markets can be found in Appendix C.

<sup>23</sup> *See* Item 501(b)(3) of Regulation S-K.

reliance on the non-exclusive safe harbor provided by Rule 164 under the 1933 Act.<sup>24</sup> A free writing prospectus is generally defined as any written communication representing an offer to sell, or a solicitation of an offer to buy, securities that are (or, in limited cases, will be) the subject of a registration statement, but that does not otherwise satisfy the statutory prospectus requirements of the 1933 Act. Rule 433 under the 1933 Act contains certain eligibility, legend, record retention and SEC filing requirements in connection with the use of free writing prospectuses, and provides guidelines for the treatment of certain communications under the free writing prospectus rules, such as media publications, electronic roadshows, information posted on web sites and term sheets.<sup>25</sup> Except for issuers that are “well-known seasoned issuers” (referred to as “WKSIs”) (*see* Part III.B below) or “seasoned issuers” (*i.e.*, issuers that are eligible to use Form S-3 or F-3 for a primary offering), a free writing prospectus must be accompanied or preceded by the preliminary prospectus.

Sales of publicly offered securities of any issuer may not be made until the SEC has declared the related registration statement “effective,” generally (at least in the case of initial public offerings) after review to ensure compliance with applicable disclosure requirements.

## B. Exceptions from Publicity Restrictions for Certain Issuers

### 1. Well-Known Seasoned Issuers

Rule 163 under the 1933 Act allows WKSIs to make offers before filing a registration statement, including written offers by means of a free writing prospectus. WKSI is generally companies that meet the registrant requirements of Form S-3 or F-3, including having timely filed their SEC reports during the past year, *and* either (i) have a worldwide market value of voting and non-voting common equity held by non-affiliates of at least \$700 million or (ii) for purposes of registering debt securities only, have issued at least \$1 billion aggregate amount of registered debt securities in primary offerings for cash in the preceding three years. Under certain circumstances, a majority-owned subsidiary of a WKSI may also qualify as a WKSI.

### 2. Emerging Growth Companies

The JOBS Act eased certain restrictions on publicity and offerings of securities for any issuer that qualifies as an EGC. An issuer qualifies as an EGC if: (i) it had annual gross revenues of less than \$1 billion during its most recent fiscal year;<sup>26</sup> (ii) it has not issued more

<sup>24</sup> SEC Release Nos. 33-8591; 34-52056 (July 19, 2005).

<sup>25</sup> The SEC published Compliance and Disclosure Interpretations providing guidelines for the treatment of social media communications under free writing prospectus rules. *See* SEC Division of Corporation Finance, “Compliance and Disclosure Interpretations: Securities Act Rules, Questions 110.01, 164.02, 232.16,” <https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm> (last updated Aug. 6, 2015).

<sup>26</sup> “Total annual gross revenues” is the total revenue presented on the company’s income statement under U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (“IFRS”) (if used as the basis of reporting by a foreign private issuer) and, if applicable, translated to U.S. dollars using the exchange rate as of the last day of the most recently completed fiscal year. SEC Division of Corporation Finance, “Jumpstart Our Business Startups Act Frequently Asked Questions” (last updated Dec. 21, 2015), <http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm> (“JOBS Act FAQ”).

than \$1 billion in non-convertible debt during the previous three-year period and (iii) its initial registered public offering of stock occurred on or after December 9, 2011.<sup>27</sup> Foreign private issuers may elect to be treated as EGCs and must elect EGC treatment if they wish to take advantage of any benefit offered to EGCs under the JOBS Act.

An EGC issuer is permitted to gauge investor interest in a securities offering—“test the waters”—through oral or written communications to “qualified institutional buyers,” as defined in Rule 144A under the 1933 Act, or institutions that are “accredited investors,” as defined in Regulation D under the 1933 Act, before or after the filing of a registration statement. These types of marketing communications are already common outside the United States, and as a result of the JOBS Act are, for EGCs, no longer subject to restrictions on pre-filing publicity under the 1933 Act or to the requirement that post-filing written communications conform to the requirements of a preliminary prospectus or free writing prospectus. For underwriters (when authorized by the issuer to do so), “testing the waters” may include soliciting non-binding indications of customer interest, but may not include the solicitation of binding customer orders, which may not occur until a registration statement is effective (and, in the case of an offering by an issuer that is not an SEC reporting company, until at least 48 hours have elapsed between distribution of the preliminary prospectus and sending a confirmation of sale).<sup>28</sup>

### C. 1933 Act Registration Procedures

The offer and sale of new equity securities in the United States in the form of ADRs technically involve the registration of two securities, *i.e.*, the underlying shares and the ADRs. The ADRs are registered by filing a highly simplified 1933 Act registration statement on Form F-6, which requires certain information concerning the depositary arrangement and consists principally of the deposit agreement and a sample ADR certificate.<sup>29</sup> However, a more

<sup>27</sup> Section 2(a)(19) of the 1933 Act. Once qualified, an issuer will remain an EGC until the earliest of: (i) the last day of the fiscal year five years after its initial public offering; (ii) the last day of the fiscal year in which annual gross revenues exceed \$1 billion; (iii) the date on which it has issued more than \$1 billion in non-convertible debt during the previous three-year period or (iv) the date on which it is determined to be a “large accelerated filer,” defined as having a public float of at least \$700 million and having been a 1934 Act reporting company for at least 12 months. *Id.* The Fixing America’s Surface Transportation Act (the “FAST Act”), enacted in 2015, provides three additional accommodations to EGCs related to the SEC registration process: (i) it amends the 1933 Act to reduce the number of days required between an EGC’s first public filing of its IPO registration statement and the commencement of its road show from 21 to 15 days; (ii) it establishes a grace period for an issuer that loses EGC status after its initial filing or confidential submission but before completing its IPO, which allows such issuer to be treated as an EGC until the earlier of the consummation of its IPO and one year after it ceases to be an EGC and (iii) it permits an EGC filing or confidentially submitting an IPO registration statement to omit historical financial information otherwise required by Regulation S-X, provided that it reasonably believes such information is not required at the time of the offering and amends the registration statement to include all then-required financial information prior to the distribution of the preliminary prospectus. Pub. L. No. 114-94, 129 Stat. 1312 (2015). *See also* this Firm’s memorandum entitled “FAST Act Amendments to the U.S. Securities Laws,” dated Dec. 16, 2015.

<sup>28</sup> *See* Rule 15c2-8(b) under the 1934 Act; SEC Division of Trading and Markets, “Jumpstart Our Business Startups Act Frequently Asked Questions About Analysts and Underwriters” (Aug. 22, 2012), <http://www.sec.gov/divisions/marketreg/tmjjobsact-researchanalystsfaq.htm>.

<sup>29</sup> Form F-6 is also used to register “unsponsored” ADRs. In these cases, the depositary must state that (i) it is relying on the issuer’s Rule 12g3-2b exemption from 1934 Act registration or (ii) the issuer is subject to the 1934 Act periodic reporting requirements, has complied with these requirements and that the reports are available for public inspection and copying. *See* SEC Release No. 34-58465 (Sept. 5, 2008).

elaborate registration statement must be filed concerning the underlying shares, containing information regarding the business and operating and financial history of the issuer and a description of the securities being offered.

Most of the time and effort in registering an offering of ADRs is devoted to preparing the registration statement concerning the underlying shares of the foreign company. It is generally filed on one of two SEC forms, Forms F-1 or F-3, which contain detailed instructions as to the information to be included. The prospectus included in the registration statement is the main selling document permitted to be used in soliciting the interest of investors for the new securities and, except in the case of a WKSI or a seasoned issuer, must accompany or precede any permitted free writing prospectus. Depending in large part upon whether the issuer has previously offered securities in the United States and the nature of the particular offering, a considerable amount of time and planning may be required for preparation of the prospectus. The issuer is primarily responsible for the preparation of its registration statement, with the assistance of its counsel and independent accountants. It is usually advisable for the issuer, the issuer's counsel and accountants and the underwriters and underwriters' counsel to meet as early as possible to discuss scheduling and assignments.

An issuer that has not previously made a public offering of securities in the United States or listed its securities on a national securities exchange<sup>30</sup> will file on Form F-1, which requires extensive information concerning both the issuer and the securities to be offered. Preparation of a registration statement for issuers that have previously made a U.S. public offering, or whose securities are already listed on a national securities exchange, may be significantly expedited through either the incorporation by reference into the registration statement of certain information previously filed in SEC reports or the use of a "short-form" registration statement, Form F-3. Qualification for the use of this short form depends upon the nature of the issuer and the length of time that it has been filing periodic reports under the 1934 Act, as well as on the type of security being offered.

A foreign private issuer that has been subject to the periodic reporting requirements of the 1934 Act for at least 12 months, has timely filed all required reports in the last 12 months and has filed at least one annual report on Form 20-F may register equity securities on Form F-3 if its voting and non-voting common stock held by non-affiliates has an aggregate worldwide market value ("float") equivalent to at least \$75 million and if it has not defaulted on certain payments. A foreign private issuer with a public float less than \$75 million may also use Form F-3 if (a) it is not a shell company and has not been a shell company for at least 12 calendar months, (b) it has a class of common equity securities listed on a national securities exchange and (c) the aggregate of the proposed sale and all sales for the period of 12 calendar months prior to the proposed sale does not exceed one third of its public float. An issuer using Form F-3 simply incorporates by reference in the prospectus its most recent annual report on Form 20-F and any other reports filed with the SEC thereafter and prior to the

<sup>30</sup> A foreign private issuer whose securities are listed on a national securities exchange is generally required to register with the SEC under the 1934 Act (*see* Part III.D below) and to file annual reports on Form 20-F.

termination of the offering (*see* Part III.C below), with the result that the registration statement often may be prepared relatively quickly and easily.<sup>31</sup>

Issuers must file their 1933 Act (and 1934 Act) registration statements electronically through the SEC's Electronic Data Gathering Analysis and Retrieval ("EDGAR") system. Once a registration statement has been filed, the staff of the SEC may elect to review it and may give comments to the issuer and its counsel, indicating changes the staff will require before declaring the registration statement effective. The SEC comments and responses from the issuer are made public on the SEC web site after the SEC staff has completed its review of the registration statement.<sup>32</sup>

An offering of securities may commence upon the filing of the registration statement, but sales may be made only after the declaration of effectiveness by the SEC. During the period between the filing of the registration statement and its effective date, copies of the preliminary prospectus may be circulated to prospective purchasers and to sales personnel of securities dealers involved in the offering.<sup>33</sup> The preliminary prospectus typically omits information as to pricing and final underwriting arrangements but is otherwise essentially complete. However, if the issuer is not an SEC reporting company, Item 501(b)(3) of Regulation S-K requires the first preliminary prospectus "circulated," or distributed to the market, to include a bona fide estimate of the price range and maximum size of the offering.<sup>34</sup> The final

<sup>31</sup> Issuers eligible to use Form F-3 may also qualify to file a "shelf" registration statement, which is used to register securities to be offered and sold on an immediate, continuous or delayed basis (including "at the market offerings") during the three-year period following effectiveness of the shelf registration statement. Once a shelf registration statement has been declared effective, individual offerings of the registered securities may generally be made immediately, without further SEC review. Shelf registration statements may be used to register debt or equity securities or both (a registration statement covering both is often called a universal shelf registration statement). In addition, WKSIs may make use of an automatic shelf registration process under which shelf registration statements and post-effective amendments filed by WKSIs will become effective immediately upon filing without SEC staff review, will be deemed filed on the proper form and for which filing fees can be paid at the time of each offering ("pay-as-you-go"). A shelf registration statement (whether automatically registered, in the case of WKSIs, or otherwise) expires after three years; therefore, in order to maintain its shelf registration, an issuer must file a new shelf registration statement prior to the end of the three-year period.

<sup>32</sup> SEC comment and issuer response letters related to registration statements filed under the 1933 Act, 1934 Act and the Trust Indenture Act of 1939 are publicly available at <http://www.sec.gov>. *See* SEC Division of Corporation Finance, "SEC Staff to Publicly Release Comment Letters and Responses," SEC Press Release No. 2004-89 (June 24, 2004); "SEC Staff to Begin Publicly Releasing Comment Letters and Responses," SEC Press Release No. 2005-72 (May 9, 2005). The SEC has indicated that it may release correspondence as early as 20 days following completion of a filing review, a decrease from the previous minimum of 45 days after completion of review. *See* SEC Division of Corporation Finance, "SEC Staff to Release Filing Review Correspondence Earlier," (Dec. 1, 2011), [www.sec.gov/divisions/corpfin/cfannouncements/edgarcorrespondence.htm](http://www.sec.gov/divisions/corpfin/cfannouncements/edgarcorrespondence.htm).

<sup>33</sup> Pursuant to Rule 164, any free writing prospectus used by an issuer other than a WKSI or a seasoned issuer must be accompanied or preceded by the preliminary prospectus. *See supra* Note 24.

<sup>34</sup> According to SEC staff guidance, the estimated price range generally cannot be wider than \$2.00 (if the maximum price is \$10 or less) or 20% of the maximum price (if the maximum price is greater than \$10). With respect to foreign registrants that are listed in their home country prior to filing, the SEC staff has often permitted such registrants to provide share price information for the home market as of a recent date in lieu of the price range information referred to above.

prospectus containing all information required by the 1933 Act must, however, be filed with the SEC prior to delivery of the securities purchased.<sup>35</sup>

While the period of SEC review of a registration statement may vary widely, and the SEC may elect not to review the registration statement at all, it is ordinarily prudent to allow 30 days for receipt of the first set of SEC comments, and the time required for resolution of those comments will depend materially on their number and difficulty. In the case of issuers filing on Form F-3, the likelihood that the SEC will elect not to review the registration statement is significantly greater because the SEC will already have had an opportunity to review most of the information in the registration statement. In such cases, the SEC may be willing to declare the registration statement effective as early as 48 hours after filing. Particular timing requirements, such as those that may arise in coordinating a global offering, should be raised in advance with the SEC staff, which has demonstrated a willingness to accommodate such requirements.

Registration statements filed for review are generally publicly available through the EDGAR system unless they meet the criteria for confidential review<sup>36</sup> by the SEC. A foreign private issuer is permitted to submit for confidential review a draft registration statement for its initial public offering in the United States if it is:

- Listed, or is concurrently listing, its securities on a non-U.S. securities exchange;
- Being privatized by a foreign government; or
- Able to demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.<sup>37</sup>

The SEC has indicated that a foreign private issuer falling within the letter of the exceptions described above may still be required by the SEC to publicly file its registration statement in certain circumstances, such as where there is “publicity about a proposed offering or

<sup>35</sup> The issuer will also satisfy the filing requirement if it has made a good faith and reasonable effort to file the final prospectus in a timely manner under the 1933 Act and makes such filing as soon as practicable thereafter.

<sup>36</sup> Eligible foreign private issuers and EGCs may submit a draft registration statement and amendments for confidential review through the SEC’s EDGAR system where the filings remain confidential until the first public filing. *See* SEC Division of Corporation Finance, “Draft Registration Statement to Be Submitted and Filed on EDGAR,” (Sep. 26, 2012), <https://www.sec.gov/divisions/corpfin/cfannouncements/drsfilingprocedures.htm>.

<sup>37</sup> This is the SEC’s confidential submission policy for foreign private issuers, which is separate from the confidential registration statement review procedures available to EGCs. *See* SEC Division of Corporation Finance, “Non-Public Submissions from Foreign Private Issuers,” (Dec. 8, 2011, updated May 30, 2012), <https://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>. Both foreign and U.S. companies may continue to use the SEC confidential treatment procedure under Rule 83 of the SEC’s Rules of Practice for portions of their written responses to staff comments on filings other than registration statements. The SEC has indicated that it will challenge what it views to be overly broad requests. *See* SEC Staff to Publicly Release Comment Letters and Responses, SEC Press Release No. 2004-89 (June 24, 2004); SEC Staff to Begin Publicly Releasing Comment Letters and Responses, SEC Press Release No. 2005-72 (May 9, 2005).



listing.”<sup>38</sup> In addition, such draft submissions are no longer permitted to remain confidential—at the time of public filing, a foreign private issuer must publicly file all previously submitted draft registration statements, SEC comment letters and issuer response letters.<sup>39</sup> The timing and the scope of the SEC’s review of confidential submissions are generally the same as those for publicly-filed registration statements.

The confidential submission process described above is separate from the confidential registration statement review procedures available to EGCs, including foreign private issuers that qualify and elect to be treated as EGCs, under the JOBS Act. EGCs may confidentially submit draft registration statements in connection with an initial public offering of their common stock (including common stock represented by ADRs).<sup>40</sup> As is the case for confidential submissions by foreign private issuers, all draft registration statements submitted by EGCs will become publicly available and all SEC comment letters and issuer response letters will be posted on the SEC’s web site at the time of the first public filing of the registration statement. For an EGC, including a foreign private issuer seeking treatment as an EGC, this public filing must take place at least 15 days prior to the first road show in connection with the offering.<sup>41</sup> Note that if a foreign private issuer that qualifies as an EGC wishes to take advantage of any benefit available to EGCs, including reduced Sarbanes-Oxley compliance obligations and more liberal pre-filing publicity regimes, it must follow the EGC confidential review process (and publicly file its confidential submissions and all amendments thereto at least 15 days prior to the first road show) even if it also qualifies for confidential review under the SEC’s general guidelines for confidential submissions by foreign private issuers.

#### D. Disclosure Requirements

The disclosure requirements for foreign private issuers under the 1933 Act and 1934 Act are based upon SEC Form 20-F. Although the primary use of Form 20-F is for the 1934 Act annual reports, the information about the issuer required to be provided in a registration statement is substantially similar to that required by an annual report on Form 20-F.<sup>42</sup> This section focuses on issues that may be of particular interest to foreign private issuers that are registering securities in the United States for the first time.

<sup>38</sup> Shell companies, blank check companies and issuers with no or substantially no business operations will be ineligible for confidential treatment of their submissions. It is unclear how this might affect submissions by finance companies or guarantors of debt securities that have no business operations. See SEC Division of Corporation Finance, “Non-Public Submissions from Foreign Private Issuers,” (Dec. 8, 2011, updated May 30, 2012), <https://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>.

<sup>39</sup> See *id.*

<sup>40</sup> Approximately 87% of the EGCs that have filed IPO registration statements since the enactment of the JOBS Act have taken advantage of the confidential review accommodation. Ernst & Young, “The JOBS Act: 2015 mid-year update,” (Sept. 2015), [http://www.ey.com/publication/vwluassetsdld/jobsact\\_2015midyear\\_cc0419\\_16september2015/\\$file/jobsact\\_2015midyear\\_cc0419\\_16september2015.pdf](http://www.ey.com/publication/vwluassetsdld/jobsact_2015midyear_cc0419_16september2015/$file/jobsact_2015midyear_cc0419_16september2015.pdf).

<sup>41</sup> See *supra* Note 27; SEC Division of Corporation Finance, “JOBS Act FAQ,” *supra* Note 26; SEC Division of Corporation Finance, Draft Registration Statement Required to be Submitted and Filed Using EDGAR Beginning October 15, 2012, SEC Announcement (Oct. 11, 2012).

<sup>42</sup> The disclosure requirements of Form 20-F are similar to those applicable to annual reports on Form 10-K filed by domestic corporations, subject to certain exceptions, and are outlined in Appendix A.

## 1. Risk Factors

Form 20-F and Form F-1 require that each registration statement and subsequent annual report include a section headed “Risk Factors,” which should discuss the most significant factors that make the offering speculative or risky. The discussion should be specific and tailored to the risks that the issuer and its management consider important in respect of the issuer’s business, results of operations, financial condition and prospects, including macroeconomic factors, competition, regulatory matters and material contingencies. An effort should be made to order them in accordance with their importance. Issuers should not present generic risks that could apply to any issuer or any offering.

## 2. Management’s Discussion and Analysis of Operating and Financial Results

As part of the registration statement and ongoing annual reporting, issuers must provide a discussion of liquidity, capital resources, results of operations and other information necessary for an understanding of the changes in, and material factors affecting, their financial statements (commonly referred to as “MD&A”). The SEC has stated that MD&A disclosure should:

- “[P]rovide a narrative explanation of a company’s financial statements that enables investors to see the company through the eyes of management.” As such, MD&A disclosure should identify and discuss key performance drivers, with a focus on the materiality of each in the context of the company’s overall performance;
- “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 so that investors can ascertain the likelihood that past performance is indicative of future performance.”<sup>43</sup>

Although the SEC does not require projections in MD&A, it does require disclosure of known trends that are reasonably likely (*i.e.*, more than remote but not necessarily more likely than not) to materially affect future results.

MD&A disclosure has received increasing scrutiny in recent years, and the SEC has issued a number of interpretive releases regarding MD&A requirements, including guidance on disclosure related to climate change, liquidity and capital resources, cybersecurity and European sovereign debt exposure.<sup>44</sup> While issuers that are public companies in their home

<sup>43</sup> SEC Release No. 33-8350 (Dec. 19, 2003).

<sup>44</sup> See, e.g., SEC Release Nos. 33-6835 (May 18, 1989), 33-8056 (Jan. 22, 2002) and 33-8350 (Dec. 19, 2003) (general MD&A guidance); SEC Release No. 33-9106 (climate change); SEC Release No. 33-9144 (liquidity and capital resources); CF Disclosure Guidance: Topic No. 2: Cybersecurity (Oct. 13, 2011); CF Disclosure Guidance: Topic No. 4: European Sovereign Debt Exposures (Jan. 6, 2012).

countries may already be required to provide MD&A in their ongoing reporting, SEC review may be more detailed than that of home-country regulators.

### 3. Compensation

The SEC requires domestic companies to disclose detailed information on the company's compensation for its named executive officers and directors in a Compensation Discussion and Analysis ("CD&A") section of the company's annual report on Form 10-K (which generally is incorporated by reference to the company's proxy statement). Foreign private issuers, however, are not required to include a CD&A in their annual report on Form 20-F and may provide information concerning the compensation of directors and officers on an aggregate basis unless the issuer has otherwise made such data public with respect to individual directors and officers.<sup>45</sup> Detail should be provided regarding any compensation provided in the form of stock options. Foreign private issuers must disclose the details of any director or executive officer contracts that provide for benefits upon termination of employment, but are not subject to the substantive requirement applicable to domestic companies related to shareholder approval of executive compensation ("say on pay") or to the requirement that issuers disclose the ratio of median employee pay to CEO compensation.

### 4. Non-GAAP Financial Measures

In connection with the disclosure of financial information, Item 10(e) of Regulation S-K imposes conditions on using non-GAAP financial measures, which are financial measures that include (or exclude) amounts that are excluded (or included) in the most directly comparable measure calculated in accordance with the generally accepted accounting principles ("GAAP") under which the issuer's financial statements are prepared.<sup>46</sup> In particular, an issuer may not: (i) exclude charges requiring cash settlement from non-GAAP liquidity measures (except earnings before interest and taxes ("EBIT") and earnings before interest, taxes, depreciation and amortization ("EBITDA")); (ii) adjust non-GAAP measures for so-called "non-recurring" items if a similar charge or gain occurred within the previous two years or is likely to recur within two years; (iii) present non-GAAP financial measures in the registrant's GAAP financial statements or notes; or (iv) use descriptors for non-GAAP measures that are confusingly similar to those used for GAAP financial measures.

A non-GAAP financial measure that would otherwise be prohibited may be permitted in a filing by a foreign private issuer, provided that the non-GAAP financial measure: (i) relates to the GAAP used in the issuer's primary financial statements included in its filings with the SEC; (ii) is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and (iii) is included in the annual report prepared by the issuer for use in its home jurisdiction or for distribution to its security holders.<sup>47</sup> The SEC has clarified that a measure is "expressly permitted" if either: (i) the

<sup>45</sup> See SEC Release Nos. 33-8732A; 34-54302A (Aug. 29, 2006).

<sup>46</sup> In the case of a foreign private issuer whose primary financial statements are prepared in accordance with non-U.S. GAAP (including IFRS), GAAP refers to such non-U.S. GAAP (other than with respect to any U.S. GAAP-derived measures provided by that issuer). See SEC Releases Nos. 33-8176; 34-47226 (Jan. 22, 2003).

<sup>47</sup> Item 10(e) of Regulation S-K.

particular measure is clearly and specifically identified as an acceptable measure by the GAAP standard setter or (ii) the issuer's primary security regulator in its home jurisdiction has explicitly accepted the measure by publishing its view that the measure is permitted or has provided a letter to the issuer indicating acceptance of the measure.<sup>48</sup>

Regulation G also imposes conditions on the use of non-GAAP financial measures in public disclosures by issuers subject to 1934 Act reporting requirements that are similar to, though less burdensome than, the conditions contained in Item 10(e) of Regulation S-K.<sup>49</sup> Many foreign private issuers have a practice of publishing advertisements highlighting their financial results in their home-country press and in major U.S. financial newspapers. Because an advertisement in the U.S. press or in the U.S. edition of a foreign newspaper may be viewed as targeting persons located in the United States, foreign private issuers that wish to publish advertisements in the U.S. press or the U.S. edition of a foreign newspaper should ensure that any non-GAAP financial measures included in the advertisement comply with Regulation G.

Measures of EBIT and EBITDA, while permitted under Regulation G, are subject to specific requirements. The SEC defines "earnings" for these measures as net income under GAAP and provides that items other than interest and taxes (for EBIT) or interest, taxes, depreciation and amortization (for EBITDA) may not be included in the calculation. Measures that are calculated differently than those described above must be clearly distinguished from EBIT or EBITDA (for example, "Adjusted EBITDA") and are subject to the conditions generally applicable to non-GAAP financial measures.<sup>50</sup>

All filings under the 1933 Act, other than documents filed by eligible Canadian issuers under the Multijurisdictional Disclosure System ("MJDS"), that include a non-GAAP financial measure must also include:<sup>51</sup>

<sup>48</sup> See SEC Division of Corporation Finance, "Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 106.01," (last updated July 8, 2011), <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>.

<sup>49</sup> These conditions do not apply to foreign private issuers with securities listed outside the United States that disclose, outside the United States, non-GAAP financial measures not derived from U.S. GAAP. This is true even if the information is included in a written communication released inside and outside the United States (so long as the communication is not released earlier inside the United States than abroad and is not targeted at persons located in the United States), is accessible by U.S. journalists, appears on the issuer's web site or is included in a Form 6-K. See Note 2 to Rule 100(c) of Regulation G.

<sup>50</sup> See SEC Division of Corporation Finance, "Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 103.01," (last updated July 8, 2011), <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>.

<sup>51</sup> See Item 10(e) of Regulation S-K. Because a free writing prospectus is not "filed" pursuant to the 1933 Act, it is not subject to the restrictions on non-GAAP financial measures in Item 10(e). See SEC Division of Corporation Finance, "Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 102.08," (last updated July 8, 2011), <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>. However, Regulation G under the 1934 Act, which imposes certain, less burdensome requirements on the use of non-GAAP measures in any public disclosure by a SEC-reporting company, does apply to the use of non-GAAP measures in free writing prospectuses. In addition to being less burdensome than Item 10(e), Regulation G by its terms does not apply to public disclosures by a foreign private issuer if the following conditions are satisfied: (i) the securities of the foreign private issuer are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States; (ii) the non-GAAP financial measure is not derived from or

- a presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- a reconciliation (by schedule or other clearly understandable method), which must be quantitative (subject to an exception for forward-looking information),<sup>52</sup> of the differences between the non-GAAP financial measure disclosed and the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- a statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations;<sup>53</sup> and
- to the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measures that are not disclosed under the preceding bullet point.<sup>54</sup>

## 5. Financial Statements

The principal requirements for the content of Form 20-F financial statements, whether for purposes of a 1933 Act or 1934 Act registration statement or for an annual report, are described in Item 18 of Form 20-F.<sup>55</sup> Item 18 requires all information mandated by SEC

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based on a measure calculated and presented in accordance with generally accepted accounting principles in the United States; and (iii) the disclosure is made by, or on behalf, of the foreign private issuer outside the United States or is included in a written communication that is released by, or on behalf of, the foreign private issuer outside the United States. For a discussion of the use of non-GAAP measures in Form 6-K, see *infra* Note 79.

<sup>52</sup> Regulation S-K provides an exception from the quantitative reconciliation requirement with respect to forward-looking non-GAAP financial measures in situations where a quantitative reconciliation is not available without unreasonable effort. Where this exception applies, the SEC expects the issuer to (i) disclose the fact that the most directly comparable GAAP measure is unavailable; (ii) provide reconciling information that is available without unreasonable effort and (iii) identify information that is unavailable and disclose its probable significance. In addition, an issuer may reconcile a non-GAAP financial measure to a *pro forma* measure prepared and presented in accordance with Article 11 of Regulation S-X in lieu of a GAAP measure, if the *pro forma* measure is the most directly comparable measure. See SEC Division of Corporation Finance, "Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 101.02," (last updated July 8, 2011).

<sup>53</sup> The fact that a non-GAAP financial measure is used by or is useful to analysts cannot be the sole support for presenting the non-GAAP measure. The justification must be substantive, although it can be the reason that causes a measure to be used by or useful to analysts. See SEC Release Nos. 33-8176; 34-47226 (Jan. 22, 2003) at *supra* Note 51. The issuer need not actually use the non-GAAP financial measure in managing its business in order to be able to present it. See SEC Division of Corporation Finance, "Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 102.04," (last updated July 8, 2011)

<sup>54</sup> See SEC Release Nos. 33-8176; 34-47226 (Jan. 22, 2003); SEC Division of Corporation Finance, "Securities Offering Reform Questions and Answers," (Nov. 30, 2005).

<sup>55</sup> Until 2011, foreign private issuers had the option of electing to provide financial statements under Item 17 of Form 20-F, which allows the omission of certain information (including financial information relating to the company's operating segments). However, the SEC phased out Item 17 for most issuers, other than Canadian

regulations, including disclosure of financial information for operating segments with revenues, profits and losses or assets that comprise more than a certain percentage of the consolidated assets or financial results of the company.<sup>56</sup>

Financial statements of a foreign private issuer must either be (1) prepared in accordance with IFRS<sup>57</sup> or U.S. GAAP, or (2) if presented in accordance with other accounting principles used in the issuer's home country, accompanied by an explanation of the principal differences between those accounting principles and U.S. GAAP, together with a numerical reconciliation of the differences in financial results and principal balance sheet items as reported under its accounting practices and those that would have been obtained under U.S. GAAP.<sup>58</sup> This numerical reconciliation is required in both Form 20-F registration statements and annual reports filed under the 1934 Act, except that for first-time registrants the numerical reconciliation of financial results is required only for the two most recent fiscal years and any required interim period.<sup>59</sup>

Subject to the exceptions noted below, financial statements for all foreign private issuers, other than those that qualify and elect to be treated as EGCs, must include audited balance sheets as of the end of each of the three most recent fiscal years and audited statements of income and cash flow for each of the three most recent fiscal years. A balance sheet for the earliest year of the three-year period is not required, however, if that balance sheet is not required by the issuer's home jurisdiction. If a foreign private issuer prepares its primary financial statements in accordance with U.S. GAAP or IFRS, the financial statements for a first-time registrant need only include audited balance sheets and statements of income and cash flows for the two most recent fiscal years.<sup>60</sup> However, IFRS also requires issuers to present an opening statement of financial position as of January 1 for the earliest of the two years included in their financial statements, in addition to the statements of financial position as of the end of each of the two years.

Foreign private issuer may provide audited financial statements as of the end of the three (or, where applicable, two) fiscal years preceding the most recently completed fiscal year if: (i) the audited balance sheet for the most recent fiscal year is not available, and (ii) the

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MJDS filers, for financial years ending on or after December 15, 2011. *See* SEC Release Nos. 33-8989; 34-58620 (Sept. 23, 2008).

<sup>56</sup> *See* Appendix A for more information on the SEC's reporting segment requirements.

<sup>57</sup> If IFRS other than issued by the IASB is used for a registrant's financial statements, the financial statements must be reconciled to U.S. GAAP. *See* SEC Release No. 33-8879 (Dec. 21, 2007).

<sup>58</sup> A foreign private issuer that presents its financial statements in accordance with accounting standards other than U.S. GAAP or IFRS may not reconcile those statements to IFRS; they must be reconciled to U.S. GAAP.

<sup>59</sup> *See* SEC Division of Corporation Finance, Financial Reporting Manual, Section 6410.2 (last updated Aug. 25, 2015).

<sup>60</sup> *See* SEC Release No. 33-7053 (Apr. 19, 1994); SEC Release Nos. 33-8567; 34-51535 (Apr. 12, 2005); SEC Release Nos. 33-8879; 34-57036 (Dec. 21, 2007). Foreign private issuers must also provide selected historical financial data for the five most recent financial years. However, foreign private issuers relying on the first-time IFRS adopter exception need include only the two years of selected financial data and may omit the prior three years of financial data. *See* Center for Audit Quality International Practices Task Force, Highlights (Nov. 24, 2009), at 11, [http://www.theacq.org/docs/ipf-highlights/2009\\_ipf11-24-09jointmeetinghlspostedon6-2-10.pdf?sfvrsn=2](http://www.theacq.org/docs/ipf-highlights/2009_ipf11-24-09jointmeetinghlspostedon6-2-10.pdf?sfvrsn=2).

last audited financial statements included in the registration statement are no older than 15 months at the time the registration statement is declared effective.<sup>61</sup> Furthermore, if the foreign private issuer is making its initial public offering (*i.e.*, before the offering, the foreign private issuer is public in neither the United States nor its home country), the last audited financial statements must be no older than 12 months.<sup>62</sup>

Pursuant to the JOBS Act, an EGC that is conducting an initial public offering need only provide audited financial statements for the two most recently completed fiscal years.<sup>63</sup> However, a foreign private issuer EGC that is dual-listing its securities in the United States and another jurisdiction may elect to provide additional years if so required by the other jurisdiction. Notwithstanding this relaxed requirement, many issuers that qualify as EGCs elect to disclose three full years of audited financial statements.<sup>64</sup>

Unaudited interim financial statements also must be included in the registration statement if the registration statement is declared effective more than nine months after the end of the last audited fiscal year. These financial statements must cover at least the first six months of the current fiscal year and must comply with U.S. GAAP or IFRS, or, if they are presented in accordance with other home-country accounting principles, they must include a reconciliation to U.S. GAAP. In addition, if a foreign private issuer prepares and discloses to its shareholders or otherwise makes public interim financial information relating to revenues and income that is more current than the interim financial statement requirements described in this paragraph, the registrant is required to include the more current interim financial information in its registration statement (but not in an annual report on Form 20-F).<sup>65</sup>

<sup>61</sup> For purposes of the 15-month rule, the last audited financial statements must be annual financial statements (rather than audited interim financial statements). *See* Item 8.A.4 of Form 20-F; SEC, Division of Corporation Finance, “International Disclosure Standards; Correction,” SEC Release No. 34-44406 (June 11, 2001).

<sup>62</sup> The SEC will waive this requirement where the issuer adequately represents that the requirement does not apply to the issuer in any jurisdiction outside the United States and that compliance with this requirement is impracticable or involves undue hardship. The issuer must file these representations as an exhibit to the registration statement and comply with the 15-month rule. *See* Instructions to Item 8.A.4 of Form 20-F.

<sup>63</sup> An EGC may also limit the number of years of selected financial data under Item 301 of Regulation S-K to two years if it is presenting two years of audited financial statements in its IPO registration statement. In addition, while the SEC has not yet amended Form 20-F to reflect all of the scaled down disclosure requirements applicable to EGCs, including with respect to financial statements, it has indicated that foreign private issuers qualifying as EGCs may proceed as if these scaled disclosure requirements have been incorporated therein until the form is amended. *See* SEC Division of Corporation Finance, “JOBS Act FAQ,” *supra* Note 26.

<sup>64</sup> A report by Ernst & Young indicated that 59% of EGCs that conducted an IPO since the enactment of the JOBS Act provided more than two years of audited financial statements. Ernst & Young, “The JOBS Act: 2015 mid-year update” (Sept. 2015), [http://www.ey.com/publication/vwluassetsdld/jobsact\\_2015midyear\\_cc0419\\_16september2015/\\$file/jobsact\\_2015midyear\\_cc0419\\_16september2015.pdf](http://www.ey.com/publication/vwluassetsdld/jobsact_2015midyear_cc0419_16september2015/$file/jobsact_2015midyear_cc0419_16september2015.pdf).

<sup>65</sup> The financial statement requirements described in the text are in Item 8 of Form 20-F. When a foreign private issuer can demonstrate to the SEC staff that it is impractical for the issuer, in light of the reasonable timing demands of its specific offering, to include the interim financial statements required by Item 8 in the initial filing of its registration statement, the staff is prepared to review a filing that contains all the required information other than the interim financial statements and related information. In making its request for such treatment, the issuer must undertake in writing not to distribute its preliminary prospectus until the registration statement has been amended to include the interim financial statements and related information.

A registrant may also be required to include in its registration statement audited financial statements of certain significant acquired businesses (or businesses for which acquisition is probable) and equity investees pursuant to Rules 3-05 and 3-09(a) of Regulation S-X, respectively. Depending on their significance, a registrant may also be required to present *pro forma* financial statements reflecting historical and probable future acquisitions and business combinations pursuant to Article 11 of Regulation S-X.<sup>66</sup>

If securities are registered on Form F-3, information must be provided regarding (i) material changes in the foreign private issuer's affairs that have occurred since the end of the fiscal year covered by the Form 20-F incorporated by reference and (ii) significant business acquisitions, changes in accounting principles, corrections of previous accounting errors and material dispositions of assets outside the normal course of business if not incorporated by reference to other filings under the 1934 Act or set forth in another 1933 Act prospectus. If the financial statements in the Form 20-F are not sufficiently current to comply with the financial statement requirements for registration statements, complying financial statements must be included in the prospectus in the Form F-3.

Special rules applicable to foreign private issuers also govern the currency in which financial statements must be presented and the use of "convenience" translations of foreign currencies into U.S. dollars. Financial statements may be stated in any currency the issuer deems appropriate. Explanatory notes to the financial statements are required if the currency in which the issuer expects to declare dividends is different from the reporting currency or if there are material exchange restrictions affecting the reporting currency or the currency in which dividends are paid. The issuer is required to use the same currency for all periods for which financial information is presented. If the financial statements are stated in a currency that is different from that used in financial statements previously filed with the SEC, the issuer is required to restate its financial statements as if the newly adopted currency had been used since at least the earliest period presented in the filing.

"Convenience" translations of the issuer's home currency to U.S. dollars may be provided for the most recent fiscal year and any subsequent interim period, using for this purpose an exchange rate as of the date of the most recent balance sheet included in the registration statement or, if materially different, as of the most recent practicable date. A five-year history of representative exchange rates and, in conjunction with an equity offering, a five-year history of dividends per share stated in both the foreign currency and U.S. dollars (based on exchange rates in effect on the payment dates) also must be included.

## 6. Auditor Independence

The auditors' report issued by the issuer's foreign auditors should be acceptable to the SEC if the auditors are independent of the issuer, have conducted an examination in accordance with auditing standards and practices generally accepted in the United States and are registered with the Public Company Accounting Oversight Board ("PCAOB").<sup>67</sup> Since some

<sup>66</sup> Foreign registrants that file financial statements in accordance with IFRS are required to calculate the prescribed tests of significance using amounts determined under IFRS but are not required to reconcile their *pro forma* financial information to U.S. GAAP. See SEC Release No. 33-8879 (Mar. 4, 2008).

<sup>67</sup> See SEC Release Nos. 33-7745; 34-41936 (Sept. 28, 1999).



procedures required by U.S. auditing standards, such as observation of physical inventory and other field work, may not be customary in certain countries, advance notice should be given to the issuer's auditors to enable them to comply with these requirements if they do not already do so.

SEC standards concerning the independence of auditors are also more stringent than those of many other countries, and include limits on non-audit relationships between the issuer and the audit firm and audit partners. The independence standards for auditors are contained in Rule 2-01 of Regulation S-X. The general independence standard is that the SEC will not recognize an auditor as independent if the auditor is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the auditor is not, capable of exercising objective and impartial judgment on all issues encompassed within the auditor's engagement.<sup>68</sup> Among other things, the independence standards also:

- prohibit an audit firm, the engagement team or any partner who has provided 10 or more hours of non-audit services to the issuer, or any of their immediate family members, from having certain direct and indirect financial relationships with the issuer and from providing certain non-audit services to the issuer (such as bookkeeping, financial information systems consulting, appraisal, management, human resources or legal services);
- require that the issuer's audit committee supervise the engagement of the auditor to provide audit and non-audit services;
- require that (a) the lead and concurring audit partners of an issuer's audit team rotate every five years and (b) other audit team engagement partners who provide more than 10 hours of audit, review or attest services for the issuer (excluding, among others, certain "specialty" or "national office" partners who do not have significant ongoing interaction with the issuer's management) or serve as the lead audit partner for any subsidiary of the issuer whose assets or revenues constitute 20% or more of the issuer's consolidated assets or revenues rotate every seven years;
- impose a "time out" period of five or two years on audit partners, in each case depending on the partner's respective role in the audit;
- make an issuer's employment of former auditor personnel in certain positions involving a financial reporting oversight role inconsistent with independence of that auditor; and
- prohibit audit partners from receiving compensation from the accounting firm with respect to non-audit services provided to the issuer.<sup>69</sup>

<sup>68</sup> Rule 2-01(b) of Regulation S-X.

<sup>69</sup> PCAOB Auditing Standard No. 16, approved by the SEC in 2012, provides standards directed to auditors on their communications with audit committees, including that the auditor report certain matters, such as the issuer's "critical" accounting policies and practices, to the issuer's audit committee. The PCAOB also has rules

Issuers should confirm their auditor's independence under SEC standards as soon as an offering is being considered to allow for consultation with the staff of the SEC, if necessary.

It is customary for the issuer's auditors to deliver to the underwriters "comfort" letters dated as of the date on which sales commence and as of the closing. The letters serve to document procedures undertaken by the auditors at the request of the underwriters to verify certain financial data in the prospectus and provide assurance as to the absence of material changes to the issuer's financial condition and results of operations since the latest date of the financial data in the prospectus.

To assist foreign issuers in resolving conflicting accounting requirements and other procedural matters involved in the registration process, the SEC has established a special staff section for foreign issuers. This section, the Office of International Corporate Finance, often provides guidance to a foreign issuer, its counsel and its investment banker during the course of a public offering. If necessary, an issuer contemplating a U.S. public offering may schedule a preliminary meeting with the SEC staff in advance of filing the registration statement. The issuer's U.S. counsel ordinarily assists the issuer in scheduling the meeting and often accompanies the issuer to the SEC. An agenda for the conference or, if the issuer is eligible for confidential SEC review, a preliminary draft of the registration statement,<sup>70</sup> should be circulated in advance to the SEC staff.

#### E. 1934 Act Registration and Reporting Requirements; Disclosure Controls

Issuers whose securities are listed on a national securities exchange, such as the NYSE or NASDAQ, must, pursuant to Section 12(b) of the 1934 Act, file a 1934 Act registration statement with the SEC. In addition, under Section 12(g) of the 1934 Act, a company must register a class of equity securities within 120 days after its fiscal year end if, on the last day of its fiscal year: (i) its total assets exceed \$10 million and (ii) the class of equity securities is held of record by 2,000 or more persons or 500 or more persons who are not accredited investors.<sup>71</sup> A

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on auditor independence that focus on tax services provided by audit firms, which impose requirements that are more restrictive than the applicable SEC rules, including a prohibition on contingent fees for tax services. The PCAOB rules provide, among other things, that an audit firm generally is not independent of an audit client if that firm, or an affiliate, provides tax services during the audit or professional engagement period to a person in, or an immediate family member of a person in, a financial reporting oversight role at that audit client. *See* PCAOB Rule 3523. The PCAOB requires auditors to communicate with the issuer's audit committee in writing, prior to accepting an initial engagement and annually thereafter, about any services the audit firm has provided or is providing that might be reasonably thought to bear on the audit firm's independence. *See* PCAOB Rule 3526.

<sup>70</sup> *See supra* Note 38 and accompanying text.

<sup>71</sup> The holders of record threshold was increased by the JOBS Act from 500 or more holders of record for the relevant class of securities. The SEC proposed rule amendments to reflect this increased threshold to Rule 12g-1. The SEC raised the asset threshold for Section 12(g) registration to \$10 million in 1996. *See* SEC Release Nos. 33-9693; 34-73876 (Dec. 17, 2014).

Under Section 15(d) of the 1934 Act, issuers that have made public offerings of securities (debt or equity) registered under the 1933 Act but not listed on any national securities exchange are also subject to the 1934 Act reporting obligations and must periodically file reports with the SEC. Issuers that become reporting companies

1934 Act registration statement on Form 20-F requires extensive disclosures by foreign issuers (*see* Appendix A below), including more detailed information about the issuer and financial disclosures. An issuer preparing a 1933 Act registration statement in connection with a Level 3 ADR program is eligible to prepare a 1934 Act registration statement on Form 8-A, which is highly simplified and incorporates much of the information included in the 1933 Act registration statement.

# 1. 1934 Act Reports: Form 20-F and Form 6-K

The purpose of the 1934 Act disclosure requirements, which are similar to the disclosure requirements under the 1933 Act, is to enable investors trading in the secondary markets to make well-informed investment decisions. Issuers subject to the 1934 Act reporting requirements must: (i) file with the SEC annual reports on Form 20-F, which must include the issuer's annual financial statements and (ii) furnish to the SEC reports on Form 6-K to provide material updates insofar as they are otherwise publicly disclosed by the issuer. Issuers must file or furnish their 1934 Act reports and other documents electronically through the EDGAR system.<sup>72</sup> In addition, issuers are required to submit an English translation or summary of any foreign language document filed as an exhibit to any SEC-filed document.<sup>73</sup> Full translations are required for specified documents, including press releases, annual audited and interim consolidated financial information and other information distributed directly to security holders (other than "glossy" annual reports that are required to be made public but not distributed directly to security holders), organizational documents, instruments affecting the rights of security holders, voting agreements, contracts on which the issuer's business is substantially dependent and related party contracts. These translations do not need to be official translations.<sup>74</sup>

Annual reports on Form 20-F must be filed with the SEC within four months after the close of each fiscal year. The disclosure requirements for a Form 20-F used as an annual report under the 1934 Act are substantially similar to those for registration under the 1933 Act.<sup>75</sup> The SEC is not required to review or approve annual reports on Form 20-F before they are filed; however, the SEC does engage in periodic review of annual reports and may provide comments

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under the 1934 Act, whether by registration under Section 12 or falling within Section 15(d), must follow certain periodic and current reporting requirements under Sections 13(a) and 15(d).

<sup>72</sup> This requirement does not apply to a limited subset of documents, such as "glossy" annual reports and "statutory reports." Statutory reports are reports that an issuer must make public under the laws of its jurisdiction of organization or the rules of any exchange on which its securities are traded, so long as the report or other document is not a press release, is not required to be and has not been distributed to its security holders and, if discussing a material event, has already been the subject of an SEC filing.

<sup>73</sup> *See* Regulation S-T Rule 306 for electronic filings and 1934 Act Rule 12b-12 for 1934 Act paper filings.

<sup>74</sup> *See* SEC Release Nos. 33-8099; 34-45922 (May 15, 2002).

<sup>75</sup> There are certain limited exceptions for the small number of Canadian MJDS filers eligible to use Item 17. *See supra* Note 56. In addition, the financial statement requirements of Rule 3-05 and the *pro forma* requirements of Article 11 of Regulation S-X do not apply to annual reports on Form 20-F; foreign private issuers need only provide the financial statements required by Rule 3-09. *See supra* Note 66; *see also* SEC Release Nos. 33-8900; 34-57409 (Feb. 29, 2008); SEC Release Nos. 34-8959; 34-5866 (Sept. 23, 2008).

intended to improve the quality of disclosure provided and remedy any possible non-compliance with the requirements of Form 20-F.<sup>76</sup>

Form 6-K requires that the issuer promptly provide to the SEC, and to each U.S. stock exchange on which its securities are listed, significant information that (i) must be made public in its country of domicile or incorporation pursuant to the law of that country, (ii) is filed with any foreign stock exchange on which its securities are listed and made public by such exchange or (iii) is distributed to its security holders.<sup>77</sup> Foreign private issuers should consider the list of items required to be reported in Form 8-K (which is applicable only to domestic issuers) in deciding whether particular press releases or home-country filings are significant and which Form 6-K reports should be incorporated into their registration statements.

All information filed on Form 6-K must be in the English language. If the documents included as an exhibit or attachment do not require a full English translation, a summary in English of such documents is sufficient.<sup>78</sup> Copies of the foreign language documents are not required and the documents included in Form 6-K are deemed to be “furnished” and not “filed” for the purpose of Section 18 of the 1934 Act.<sup>79</sup>

## 2. Disclosure Controls and Procedures and Internal Control Over Financial Reporting

All issuers subject to the 1934 Act are required to maintain accurate accounting books and records and internal accounting controls and to design, implement and maintain “disclosure controls and procedures.” Disclosure controls and procedures cover both financial and non-financial information and are defined as controls and other procedures designed to ensure that information required to be disclosed under the 1934 Act is recorded, processed,

<sup>76</sup> Section 408 of the Sarbanes-Oxley Act requires that the SEC review the filings of each reporting company, including foreign issuers, at least once every three years.

<sup>77</sup> Remarks by the SEC’s Director of the Division of Corporation Finance indicate that the SEC may be considering revisions to the Form 6-K disclosure regime in light of the fact that many more issuers are using the United States as their primary, rather than secondary, listing jurisdiction, and therefore fewer foreign private issuers have obligations under home-country law to make information public. See Meredith Cross, “Keynote Address at PLI – Eleventh Annual Institute on Securities Regulation in Europe” (Mar. 8, 2012), <http://www.sec.gov/news/speech/2012/spch030812mc.htm>.

<sup>78</sup> See *supra* Note 74 and accompanying text for a further discussion of the translation requirements applicable to foreign language documents filed with the SEC.

<sup>79</sup> Section 18 of the 1934 Act imposes liability on any person who makes a false or misleading statement in any application report or document “filed” with the SEC pursuant to that Act. See Part III.F below. In addition, since Form 6-K is furnished and not filed with the SEC, the use of non-GAAP financial measures is not subject to Item 10(e) of Regulation S-K, which applies only to filings with the SEC under the 1933 Act and 1934 Act. Regulation G places conditions on the use of non-GAAP financial measure but will not apply to public disclosure of non-GAAP financial measures by a foreign private issuer (including in a Form 6-K) if (i) its securities are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States; (ii) the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with U.S. GAAP and (iii) such disclosure is made outside the United States or is included in the issuer’s written communication released outside the United States. However, as a best practice, foreign private issuers should nevertheless determine whether any non-GAAP financial measures included in press releases or other public disclosure would otherwise fall within the scope of Regulation G, and if they would, include the applicable disclosure and reconciliation.

summarized and reported in a timely and accurate manner.<sup>80</sup> These requirements apply to all 1934 Act reporting obligations, including requirements to furnish reports on Form 6-K (in the case of foreign private issuers). The disclosure controls and procedures maintained by foreign private issuers should be designed to ensure timely submission of Form 6-K reports and to take into account that all information submitted to the SEC is subject to Rule 12b-20 under the 1934 Act. Rule 12b-20 is central to the 1934 Act liability regime and provides that, in addition to the information expressly required to be included in a 1934 Act report, the report must also include such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

In addition to disclosure controls and procedures, issuers subject to the 1934 Act must also maintain internal control over financial reporting. “Internal control over financial reporting” is a process designed by, or under the supervision of, the issuer’s principal executive and principal financial officers to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. Internal control over financial reporting must include policies and procedures allowing the issuer to (i) maintain records that accurately reflect the transactions and dispositions of the assets of the issuer; (ii) record transactions as necessary to permit preparation of financial statements; and (iii) prevent or timely detect unauthorized acquisition, use or disposition of the issuer’s assets that could have a material effect on the financial statements.<sup>81</sup>

#### F. The Sarbanes-Oxley Act

Foreign issuers that register securities under the 1933 Act or with securities listed on a national securities exchange are subject to the requirements of the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”), which was enacted in response to a series of corporate scandals in the United States. The Sarbanes-Oxley Act affects all SEC reporting companies, as well as any company that has publicly filed a 1933 Act registration that has not yet become effective but that has not been withdrawn.<sup>82</sup>

##### 1. CEO and CFO Certifications

Pursuant to Section 302 of the Sarbanes-Oxley Act, in connection with the filing of an annual report on Form 20-F,<sup>83</sup> the chief executive officer (“CEO”) and chief financial officer (“CFO”) of a foreign issuer must certify that:

- he or she has reviewed the report;

<sup>80</sup> Section 13(b)(2) of the 1934 Act; Rules 13a-15 and 15d-15 under the 1934 Act.

<sup>81</sup> Rule 13a-15(a) and (f) under the 1934 Act. See Part III.F below for a further discussion of an issuer’s obligation to maintain effective internal control over financial reporting.

<sup>82</sup> For more information about the Sarbanes-Oxley Act generally, see THE SARBANES-OXLEY ACT OF 2002: ANALYSIS AND PRACTICE (2003), written by partners of this Firm.

<sup>83</sup> Information included in a Form 6-K is not subject to the certification requirements of Section 302.

- based on his or her knowledge, the report contains no material misstatements or statements made misleading by the omission of material facts;
- based on his or her knowledge, the financial statements and other financial information fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of, and for, the periods presented in the report;
- the CEO and CFO are responsible for establishing and maintaining “disclosure controls and procedures” and “internal control over financial reporting” and that they have:
  - designed the disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under their supervision, to ensure that material information about the issuer and its consolidated subsidiaries is made known to them by others within those entities, particularly during the period during which the report is being prepared;
  - designed internal control over financial reporting, or caused it to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - evaluated the effectiveness of the disclosure controls and procedures as of the end of the period covered by the report;
  - presented in the report their conclusions about the effectiveness of the controls and procedures based on that evaluation; and
  - disclosed in the report any change in the issuer’s internal control over financial reporting that occurred during its most recent fiscal quarter (the fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the issuer’s internal control over financial reporting.
- the CEO and CFO, based on their most recent evaluation of internal control over financial reporting, have disclosed to the audit committee and the issuer’s auditors:
  - all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the issuer’s ability to record, process, summarize and report financial information; and

- any fraud (regardless of materiality) involving persons having a significant role in the internal control over financial reporting of the issuer.<sup>84</sup>

Pursuant to Section 906 of the Sarbanes-Oxley Act, in connection with the filing of an annual report on Form 20-F,<sup>85</sup> the CEO and CFO of a foreign private issuer must certify that the report fully complies with the requirements of Section 13(a) or 15(d) of the 1934 Act (as applicable) and that the information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the issuer. False certifications may be subject to criminal penalties.

## 2. Management Evaluation of Internal Control over Financial Reporting

Pursuant to Section 404(a) of the Sarbanes-Oxley Act, the management of each issuer must evaluate, with the participation of its CEO and CFO, the effectiveness, as of the end of each fiscal year, of the issuer's internal control over financial reporting. In addition, each foreign private issuer must include in its annual report on Form 20-F an internal control report containing:

- a statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the issuer;
- a statement identifying the framework used by management to evaluate the effectiveness of this internal control; and
- an assessment by management of the effectiveness of this internal control as of the end of the most recent fiscal year, including a statement as to whether or not internal control over financial reporting is effective.

Further, pursuant to Section 404(b) of the Sarbanes-Oxley Act, "accelerated filers" (issuers that have been 1934 Act reporting companies for at least 12 months and have a public float of between U.S. \$75 million and U.S. \$700 million) and "large accelerated filers" (issuers that have been 1934 Act reporting companies for at least 12 months and have a public float of U.S. \$700 million or more),<sup>86</sup> must include a statement that the auditor of the financial statements included in the annual report has issued an attestation report on internal control over

<sup>84</sup> See Part III.E.2 above.

<sup>85</sup> Form 6-K is event-driven and falls outside the scope of Section 906. See SEC Release Nos. 33-8400; 34-49424 (Mar. 16, 2004). The SEC has adopted rules that require an issuer to furnish the Section 906 certifications as exhibits to its annual report for those required to be filed after June 30, 2003. See SEC Release Nos. 33-8238; 34-47986 (June 5, 2003). The release makes clear the SEC's view that Section 906 certifications should be "furnished," rather than "filed," with the SEC. Accordingly, Section 906 certifications would not be subject to the civil anti-fraud provisions of Section 18 of the 1934 Act, nor would they be automatically incorporated by reference into an issuer's registration statement.

<sup>86</sup> Section 989(g) of the Dodd-Frank Act eliminated the requirement that "non-accelerated" filers include an attestation report in their internal control report beginning with annual reports filed for fiscal years beginning on or after June 15, 2010. See SEC Release Nos. 33-9142; 34-62914 (Sept. 15, 2010).

financial reporting.<sup>87</sup>

Although the rules do not specify the method or procedures management should use to assess internal control over financial reporting or prescribe detailed criteria for the content of the report, the evaluation should be based on a company's primary financial statements but also should take into account controls related to U.S. GAAP reconciliation.<sup>88</sup> The report must include disclosure of any material weakness in internal control over financial reporting identified by management, defined as a "reasonable possibility" that a material misstatement will not be prevented or detected on a timely basis.<sup>89</sup> Management may not conclude that internal control over financial reporting is effective where one or more material weaknesses exist. In addition, the SEC has indicated that management may not qualify its conclusions in its internal control report by saying that internal control over financial reporting is effective subject to certain qualifications or exceptions. While the issuer is not required to disclose changes to internal controls made as a result of preparing for the first management report on internal control over financial reporting, the issuer will be required to identify and disclose any material changes in subsequent periodic reports.

In order to provide time for companies and their auditors to perform comprehensive evaluations of their internal control over financial reporting as a basis for the initial internal control report, the SEC has provided that the first management report included in the Form 20-F for an issuer's first year of compliance will be deemed "furnished" rather than "filed" for liability purposes.

### 3. Section 404(b) Exemption for EGCs and First-time Registrants

<sup>87</sup> See SEC Release Nos. 33-8238; 34-47986 (June 5, 2003). Auditing Standard No. 4, Reporting on Whether a Previously Reported Material Weakness Continues to Exist, establishes the procedures necessary to allow an auditor to express a formal opinion that a previously reported material weakness in the issuer's internal control over financial reporting has been corrected without having to complete a new audit of such controls. See PCAOB Release No. 2005-001 (July 26, 2005) and SEC Release No. 34-53227 (Feb. 6, 2006).

In 2007, the SEC approved PCAOB Auditing Standard No. 5, An Audit of Internal Control over Financial Reporting that is Integrated with an Audit of Financial Statements, which superseded the prior Auditing Standard No. 2. Auditing Standard No. 5 maintains the previous requirements that the auditor (i) express an opinion in its attestation report not only on management's assessment but also on whether the company maintained, in all material respects, effective internal control over financial reporting; (ii) test controls, including by means of "walkthroughs" of significant processes; (iii) if there is a material weakness, express in its attestation report an adverse opinion on a company's control over financial reporting; and (iv) assess the effectiveness of the audit committee. The engagement of the auditor to provide any internal control-related services must be specifically pre-approved by the audit committee. In addition, Auditing Standard No. 5 provides rules on internal control audits, incorporates procedures and guidance intended to promote efficiency and scale down the audit to fit the size and complexity of the company and simplifies the auditing standard. See PCAOB Release No. 2006-007 (Dec. 19, 2006); SEC Release No. 34-56152 (July 27, 2007).

<sup>88</sup> See SEC Division of Corporation Finance, "Answers to Frequently Asked Questions Concerning Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports," (Sept. 24, 2007), [www.sec.gov/info/accountants/controlfaq.htm](http://www.sec.gov/info/accountants/controlfaq.htm).

<sup>89</sup> Rule 12b-2 under the 1934 Act. Subsequent SEC guidance relating to reporting on internal control over financial reporting under Section 404 of the Sarbanes-Oxley Act establishes a safe harbor for management evaluations of internal controls performed in accordance with the guidance. See SEC Release Nos. 33-8809; 34-55928 (June 20, 2007); SEC Release Nos. 33-8810; 34-55929 (June 27, 2007).



First-time registrants that do not qualify to be treated as EGCs pursuant to the JOBS Act are exempt from the requirement to provide a management report on internal control over financial reporting until their second annual report filed with the SEC. A first-time registrant that is subject to the requirement to include an auditor's attestation report must comply with this requirement at the same time that it furnishes its first management report on internal controls.<sup>90</sup> Issuers that qualify to be treated as EGCs are exempt from the requirements to provide management reports and auditors' attestation reports on their internal control over financial reporting as long as they continue to qualify as EGCs. An issuer that ceases to qualify as an EGC is required to begin complying with Section 404(b) in its next annual report.

Note, however, that the exemption for EGCs applies only to the reports regarding internal control over financial reporting and not to the requirement to maintain internal control over financial reporting. In other words, while EGCs are exempt from the management reporting of internal control over financial reporting and auditor attestation provisions of Section 404(b) of the Sarbanes-Oxley Act, they are still required to maintain a program of internal control over financial reporting compliant with the requirements of the 1934 Act and the rules thereunder.

#### 4. Audit Committee Requirements

The Sarbanes-Oxley Act requires that the SEC mandate that all companies (including foreign private issuers) listed in the United States have a fully independent audit committee. "Independent" in this context, as the SEC has defined the term in Rule 10A-3 under the 1934 Act, means that no member of the audit committee may be an "affiliated person" of the issuer or any subsidiary of the issuer, apart from his or her capacity as a member of the board of directors or any board committee, and may not accept any consulting, advisory or other "compensatory fee" (including fees paid directly or indirectly)<sup>91</sup> from the issuer or any of its subsidiaries, other than in his or her capacity as a member of the board of directors or any board committee (including the audit committee).<sup>92</sup>

Rule 10A-3 contains two general exemptions from the independence requirements. First, an issuer need only have one fully independent member at the time of its initial listing in the United States, a majority of independent members within 90 days of listing and a fully independent audit committee within one year of listing. Second, an audit committee member may sit on the board of directors of both a listed issuer and an affiliate of the listed

<sup>90</sup> See *supra* Note 86.

<sup>91</sup> Indirect payments include, for example, payments to a law firm or financial services provider in which the audit committee member is a partner, member or officer. See Rule 10A-3(e)(8).

<sup>92</sup> Section 10A(m)(3) of the 1934 Act. Under Rule 10A-3, the term "affiliate" of, or person "affiliated" with, a specified person means a person that directly or indirectly controls, or is controlled by or is under common control with, the person specified. The term "control" means "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." See Rule 10A-3(e)(4). The rule also provides that an executive officer, director (if the director is also an employee), general partner and managing member at an affiliate will themselves be deemed to be affiliates. The adopting release cautions that an affiliate cannot evade the prohibitions in the rule simply by designating a representative or agent that it directs to act in its place. Rule 10A-3 contains an explicit safe harbor for audit committee members who are not executive officers or beneficial owners, directly or indirectly, of more than 10% of any class of voting equity securities of the issuer, who are deemed not to control the issuer for purposes of the rule.

issuer if the member, except for being a director on each board of directors, otherwise meets the independence requirements for each entity.

Rule 10A-3 also includes three exemptions for foreign private issuers from the independence requirements that permit the following persons to sit on the audit committee: (i) any employee who is not an executive officer, if that employee is elected or named to the board of directors or audit committee pursuant to the issuer's governing law or constitutive documents, an employee collective bargaining or similar agreement or other home-country legal or listing requirements; (ii) a person that is an affiliate or representative of an affiliate (including a controlling shareholder) as a non-voting observer, if that person is not the chair of the audit committee or an executive officer of the issuer and does not receive any compensation prohibited by the independence requirements; and (iii) a representative of a foreign government that is an affiliate of the issuer, if that representative is not an executive officer of the issuer and does not receive any compensation prohibited by the independence requirements. Rule 10A-3 also exempts a foreign private issuer from all of the audit committee requirements if it has an alternative mechanism for overseeing the independent auditor, such as a board of auditors or statutory auditors, that are separate from the issuer's board of directors. Issuers are required to disclose their reliance on any of these exemptions in their Form 20-F annual reports. Foreign private issuers relying on the board of auditors or statutory auditors exemption will have to consider a number of interpretive issues relating to the responsibilities of the audit committee under other Sarbanes-Oxley rules, auditing rules and home-country law.

Rule 10A-3 also provides an accommodation for foreign private issuers that operate under a dual holding company structure. Given their unique structure, the companies may establish a joint audit committee made up of directors who serve on one or both companies' boards of directors. The rule provides that where a listed company is one of two dual holding companies, such companies may designate one audit committee for both companies so long as each member of the audit committee is a member of the board of directors of at least one of such dual holding companies. The rule also provides that dual holding companies will not be deemed affiliates of each other by virtue of their dual holding company arrangement.

The audit committee is responsible for, among other things, the appointment, compensation and oversight of the issuer's accounting firm and certain procedures regarding the conduct of audits. This committee must also establish procedures for the receipt, retention and treatment of complaints that the issuer receives regarding accounting, internal accounting controls or auditing matters and for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters, and has the authority to engage independent counsel and other advisors as the committee determines necessary to carry out its duties. The issuer must provide appropriate funding, as determined by the audit committee, to pay compensation to the independent auditor and any outside advisors so engaged.

## 5. Additional Disclosure Requirements

The Sarbanes-Oxley Act also mandates certain disclosures in annual reports relating to corporate governance practices, namely whether the issuer's audit committee includes

an “audit committee financial expert,”<sup>93</sup> whether such person is “independent” and whether or not an issuer has adopted a code of ethics for its CEO and senior financial officers regarding their conduct with respect to the business of the issuer.<sup>94</sup> A U.S.-listed foreign private issuer must disclose whether its audit committee financial expert is independent, as that term is defined by the U.S. securities exchange or U.S. securities association rules applicable to that issuer. A foreign private issuer not listed or quoted in the United States must disclose the independence of its audit committee financial expert (if it has one) using any of the exchange or association definitions that have been approved by the SEC.<sup>95</sup>

In addition, a foreign private issuer listed on the NYSE must disclose any significant ways in which its corporate governance practices differ from those followed by U.S. companies under the NYSE listing standards. Foreign private issuers must disclose these differences in their annual report on Form 20-F.<sup>96</sup> Similarly, a foreign private issuer listed on NASDAQ must disclose in its annual report on Form 20-F each corporate governance requirement applicable to NASDAQ-listed companies that it does not follow and describe the alternative home-country practice followed in lieu of such requirement.<sup>97</sup>

## 6. Other Sarbanes-Oxley Requirements

The Sarbanes-Oxley Act further imposes a number of other duties on, and prohibitions with regard to, the conduct of issuers. The Sarbanes-Oxley Act, among other things,

<sup>93</sup> The SEC’s rules define an “audit committee financial expert” as a person who has all of the following attributes: (i) an understanding of generally accepted accounting principles and financial statements; (ii) the ability to assess the general application of those principles in connection with the accounting for estimates, accruals and reserves; (iii) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to those that can reasonably be expected to be raised by the issuer’s financial statements or experience actively supervising persons engaged in such activities; (iv) an understanding of internal controls and procedures for financial reporting; and (v) an understanding of audit committee functions. *See*. The expert must have obtained these attributes through (i) education and experience as a principal financial officer or accounting officer, controller, public accountant or auditor, or experience in one or more positions that involve the performance of similar functions; (ii) experience actively supervising such a person; (iii) experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or (iv) other relevant experience. *See* SEC Release Nos. 33-8177; 34-47235 (Jan. 23, 2003) and *infra* Note 95 and accompanying text.

In the case of a foreign private issuer, for these purposes, the term “generally accepted accounting principles” means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the SEC. *See* Rule 101(b) of Regulation G; Item 10(e)(3) of Regulation S-K.

<sup>94</sup> In also covering CEOs, Item 16B of Form 20-F is broader than Section 406 of the Sarbanes-Oxley Act, which only addresses “senior financial officers.”

<sup>95</sup> Note that while a foreign private issuer not listed or quoted in the United States is not required to have an audit committee pursuant to the requirements of the Sarbanes-Oxley Act, this disclosure requirement will nonetheless apply. If a company does not have an audit committee, the full board of directors is the audit committee under the definition of that term in the Sarbanes-Oxley Act. Accordingly, such a company would be required to provide disclosure concerning the presence of an audit committee financial expert on its board of directors as a whole.

<sup>96</sup> NYSE LISTED COMPANY MANUAL § 203.01.

<sup>97</sup> NASDAQ STOCK MARKET RULES § 5615-3(B).

(i) imposes duties on an issuer's lawyers (including in-house lawyers) to report suspected violations of securities laws or fiduciary duties up-the-ladder, including, in certain circumstances, to the issuer's board of directors, (ii) prohibits any issuer, directly or indirectly, from extending or maintaining credit or arranging for the extension of credit, in the form of a personal loan, to or for any director or executive officer of that issuer,<sup>98</sup> (iii) requires the reimbursement to the issuer of incentive or equity-based compensation paid to CEOs and CFOs in the 12 months following the filing of a financial document subject to restatement as a result of "misconduct" and (iv) prohibits officers and directors, or any other person acting under their direction, from taking any action to fraudulently influence, coerce, manipulate or mislead an issuer's independent auditors for the purpose of rendering the issuer's financial statements materially misleading.<sup>99</sup>

### G. The Dodd-Frank Act

The Dodd-Frank Act, which was enacted in 2010, required the SEC to adopt rules regarding a number of requirements applicable to foreign private issuers.<sup>100</sup> The SEC has adopted and proposed rules with respect to some of these items, as noted below.

On June 20, 2012, the SEC released final rules, adopted as Rule 10C-1 under the 1934 Act, implementing Section 952 of the Dodd-Frank Act. The final rules direct the national securities exchanges to adopt listing standards<sup>101</sup> requiring each member of the listed issuer's committees that oversee executive compensation (whether or not the committee is formally designated as a compensation committee or performs duties routinely performed by a compensation committee) to be members of the board of directors and to be independent.<sup>102</sup> The

<sup>98</sup> The SEC has exempted certain qualifying foreign banks from the insider lending prohibitions of Section 13(k) of the 1934 Act, which was added by Section 402 of the Sarbanes-Oxley Act. Form 20-F requires foreign bank issuers to disclose "problematic" loans to insiders in a manner that more closely mirrors the disclosure required from domestic banks under Regulation S-K. *See* SEC Release No. 34-49616 (Apr. 26, 2004).

<sup>99</sup> SEC Release No. 34-47890 (May 20, 2003). Persons acting "at the direction of" an officer or director may include not only employees, but customers, vendors or creditors. The SEC noted in the adopting release that conduct may be unlawful under the rules even if the purpose of the conduct is not achieved.

<sup>100</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (July 21, 2010) (the "Dodd-Frank Act"), <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>.

<sup>101</sup> *See* SEC Release Nos. 33-9330; 34-67220 (June 20, 2012). On January 13, 2013, the SEC approved the listing standards for several exchanges that implemented Rule 10C-1, including NASDAQ and NYSE. *See* SEC Release Nos. 34-68643 (BATS); 34-68642 (CBOE); 34-68653 (CHX); 34-68640 (NASDAQ); 34-68641 (BX); 34-68662 (NSX); 34-68635 (NYSE); 34-68638 (NYSEARCA); 34-68637 (NYSEMKT). The SEC did not require any changes to the proposed listing standards from the NASDAQ or the NYSE. *See* NASDAQ STOCK MARKET RULES 5605(d)(1) & (2) (independence of directors); NYSE LISTED COMPANY MANUAL § 303A.00 (exemption for foreign private issuers), § 303A.02(a) (independence standard), § 303A.05 (compensation committee) and § 303A.11 (foreign private issuer disclosure requirements).

<sup>102</sup> The final rules direct the national securities exchanges to establish a definition of "independence" taking into account the following factors, which were included in Section 952 of the Dodd-Frank Act: (a) the sources of a compensation committee member's compensation (including consulting, advisory or other compensatory fees paid to the compensation committee member by the issuer) and (b) whether the compensation committee member is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer. The final rules require the listing rules to provide that if a compensation committee member ceases to be independent for reasons beyond the member's control, the member may, with notice by the issuer to the

rules also direct national securities exchanges to adopt rules requiring a listed issuer to give its compensation committee the authority, exercised in its sole discretion, to retain an independent compensation consultant, legal counsel or other adviser and to provide the compensation committee with sufficient funding for such retention. New Section 10C(b) of the 1934 Act provides that while a compensation adviser is not required to be independent, a listed company's compensation committee must undertake an evaluation of a compensation adviser's independence during the selection process.<sup>103</sup> Foreign private issuers are generally subject to the final rules implementing Section 952 of the Dodd-Frank Act, except those that disclose in their annual reports the reasons they do not have an independent compensation committee are exempt from the compensation committee independence requirements.<sup>104</sup> The final rules also implemented compensation committee consultant conflict of interest disclosure requirements applicable to all reporting companies (whether or not listed on a national exchange) subject to the U.S. proxy rules. Because foreign private issuers are not subject to the U.S. proxy rules,<sup>105</sup> they are exempt from these conflict of interest disclosure requirements.

On August 22, 2012, the SEC released a final rule, adopted as Rule 13p-1 under the 1934 Act, implementing Section 1502 of the Dodd-Frank Act. The final rule requires all issuers, including foreign private issuers, to disclose whether gold, wolframite, columbite-tantalite (coltan) or cassiterite, or their derivatives (tin, tantalum and tungsten), are necessary to the functionality or production of their products, and, if they are, whether any of these "conflict minerals" or derivatives originated in the Democratic Republic of the Congo (the "DRC") or an adjoining country.<sup>106</sup>

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applicable exchange, remain a compensation committee member until the earlier of the next annual meeting of shareholders or one year from the occurrence of the event that caused the member to no longer be independent.

<sup>103</sup> A compensation committee may retain non-independent legal counsel and use in-house counsel or outside counsel retained by the issuer or management and is not required to hire "independent" legal counsel. Other than with respect to in-house counsel, a compensation committee must consider the independence of any adviser from which it obtains advice, including outside counsel retained by the issuer or management. The final rules extend the requirement to consider the independence of a compensation adviser to individual directors responsible for a compensation committee's typical duties.

<sup>104</sup> See SEC Release Nos. 33-9330; 34-67220 (June 20, 2012).

<sup>105</sup> See Rule 3a12-3(b) under the 1934 Act.

<sup>106</sup> Dodd-Frank Act § 1502. If any of the "conflict minerals" used by the issuer or its suppliers did originate in the Democratic Republic of the Congo or adjoining countries, the issuer will be required to submit to the SEC a Conflict Minerals Report as an exhibit to Form SD that includes, among other information, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of those "conflict minerals" and a description of any products manufactured or contracted to be manufactured with such "conflict materials," along with an independent private sector audit of the report. The rules adopted by the SEC to implement the Dodd-Frank Act provisions regarding conflict minerals require issuer compliance for the calendar year beginning January 1, 2013 and the first reports were due May 31, 2014. See SEC Release No. 34-67716 (Aug. 22, 2012) and *infra* Note 169 and accompanying text. In July 2013, industry groups brought a challenge to this rule before the U.S. federal district court in the District of Columbia. The court rejected this challenge in Nat'l Ass'n of Mfrs. v. Sec. and Exch. Comm'n, 956 F.Supp.2d 43 (D.D.C. 2013). The industry groups appealed, and on April 14, 2014, the U.S. Court of Appeals for the District of Columbia Circuit held that certain of the rule's disclosure requirements violated the First Amendment. See Nat'l Ass'n of Mfrs. v. Sec. and Exch. Comm'n, 2014 WL 1408274, at \*11 (D.C. Cir. 2013). On May 2, 2014, the SEC stayed the application of the rule consistent with the holding of the Court of Appeals. The SEC has issued a statement of guidance in response to the decision of the Court of Appeals and issuers are still required to file the portions

On December 11, 2015, the SEC issued proposed rules on the disclosure of any non-*de minimis* payments to the United States or any other government by or on behalf of issuers involved in the commercial development of oil, natural gas or minerals, also known as resource extraction. The proposed rules are similar in many ways to the rules originally adopted by the SEC in 2012, which were subsequently vacated by a U.S. federal court in 2013. Issuers that must disclose such payments would also be required to include the types and amounts of each payment, the aggregate payments to each government and the project of the issuer to which the payments relate. However, until a final rule is adopted on resource extraction payments, affected issuers do not have any disclosure requirements.<sup>107</sup>

Finally, the Dodd-Frank Act provides that if any issuer (including a foreign private issuer) operates mines that are subject to oversight by the Mine Safety and Health Administration, the issuer will be required to disclose certain information regarding health and safety violations at those mines. Under the Dodd-Frank Act, this disclosure obligation became effective July 21, 2010 without further action by the SEC.<sup>108</sup>

#### H. Beneficial Ownership Reporting and Certain Other Consequences of 1934 Act Registration

Several other significant provisions of the 1934 Act (in addition to the reporting requirements discussed in Part III.C above) become applicable to a foreign private issuer when it registers securities under Section 12 of that Act.

##### 1. Beneficial Ownership Reporting

of Form SD that were upheld by the Court of Appeals. *See* SEC Division of Corporation Finance, “Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule” (Apr. 29, 2014). On August 18, 2015, a three-judge panel of the Court of Appeals, in a split decision, reaffirmed its April 2014 ruling, holding that the requirement to describe projects as not having been found to be “DRC conflict free” is compelled speech under the First Amendment. The litigation is ongoing. *See* this Firm’s memorandum entitled “Conflict Minerals: New D.C. Circuit Decision, but no Rule Changes—Yet,” dated Aug. 21, 2015.

<sup>107</sup> Dodd-Frank Act § 1504. The proposed rule requires disclosure of such payments even if the disclosure is prohibited by host country law. *See* SEC Proposes Rules for Resource Extraction Issuers Under Dodd-Frank Act, SEC Press Release No. 2015-277 (Dec. 11, 2015), SEC Release No. 34-76620 (Dec. 11, 2015) and *infra* Note 173 and accompanying text. On July 2, 2013, the U.S. federal district court for the District of Columbia vacated the SEC’s original disclosure requirement and remanded the matter to the SEC for further proceedings. In *Am. Petroleum Inst. v. Sec. and Exch. Comm’n*, 953 F.Supp.2d 5 (D.D.C. 2013), the court held the SEC wrongly concluded that § 1504 requires reports of resource extraction payments to be publicly available and that the SEC’s failure to provide an exemption for payments in countries that prohibit disclosure was arbitrary and capricious. *Am. Petroleum Inst.*, 953 F.Supp.2d 5 at 17-20; *see also* SEC Release No. 34-67717 (Aug. 22, 2012). The SEC declined to appeal the ruling but still had not made a new proposal more than a year after the decision vacating the original rule. In September 2015, the court held that the SEC unlawfully withheld action by not promulgating a final rule, and in October 2015, the SEC filed with the court an expedited schedule to put a final rule to a vote by June 27, 2016. However, the SEC could again face legal challenges once the final rule is adopted. For more information on the new proposed rule for resource extraction payments disclosure, *see* this Firm’s memorandum entitled “Resource Extraction Payments – The SEC Tries Again,” dated Dec. 15, 2015.

<sup>108</sup> Dodd-Frank Act § 1503. On December 21, 2011, the SEC adopted rules to “facilitate consistent compliance” with the currently applicable Dodd-Frank Act provisions regarding mine safety reporting. *See* SEC Release Nos. 33-9286; 34-66019 and *infra* Note 161 and accompanying text.

Persons who are directly or indirectly beneficial owners of more than five percent of any class of voting equity securities registered under Section 12 of the 1934 Act will be required to file reports under Sections 13(d) and 13(g) of that Act.<sup>109</sup> Regulation 13D-G under that Act generally requires each such person (or group of persons acting together for the purpose of acquiring, holding, voting or disposing of securities), within 10 days<sup>110</sup> after the five percent threshold is crossed, to file a report on Schedule 13D with the SEC and send copies to the issuer and relevant exchanges. Schedule 13D requires substantial disclosure regarding the identity of the acquirer, the source and amount of funds used to acquire the securities, the purpose of the acquisition, the amount and percentage of securities held by the acquirer and related details about the acquirer's involvement with the securities.

Certain investors, however, are permitted to report their beneficial ownership positions on the less burdensome Schedule 13G. For example, certain types of regulated institutional investors, such as U.S. banks and broker-dealers (or their foreign counterparts),<sup>111</sup> that have acquired the securities in the ordinary course of their business without the purpose or effect of changing or influencing the control of the issuer may qualify, under certain circumstances, to file a report on Schedule 13G within 45 days after the end of the calendar year in which the acquisition occurred. In addition, non-regulated investors that acquire beneficial ownership of less than 20% of a class of securities and that hold such securities without the purpose or effect of changing or influencing the control of the issuer may qualify to file under Schedule 13G within 10 days of such acquisition. Furthermore, investors that crossed the five percent threshold before the equity securities in question were registered under the 1934 Act are permitted to file on Schedule 13G rather than Schedule 13D, and such filing must be made within 45 days after the end of the calendar year in which the securities were registered under the 1934 Act. However, such investors must switch their beneficial ownership reporting to Schedule 13D if they acquire more than two percent of the relevant class of voting equity securities during any 12-month period after the issuer's equity securities are registered under the 1934 Act.

## 2. Tender Offers

Tender offers in the United States for the shares of issuers whose securities are registered under Section 12 of the 1934 Act generally are subject to the tender offer provisions of Section 14 of that Act. These provisions set certain requirements for the terms and timing of,

<sup>109</sup> Although the rules under the 1934 Act do not specifically address whether ADRs registered under the 1934 Act constitute a class of voting equity securities distinct from the securities underlying the ADRs, the SEC has stated that ADRs should not be treated as a separate class of voting equity securities for purposes of Section 13(d) or (g) of the 1934 Act. *See* SEC Release Nos. 33-6894; 34-29226 (May 23, 1991). Hence, as long as a person does not own ADRs representing (together with any underlying securities owned by that person) beneficial ownership of more than five percent of an issuer's underlying voting equity securities, he will not be subject to the reporting requirements under Section 13(d) or (g) of the 1934 Act.

<sup>110</sup> The Dodd-Frank Act authorizes the SEC to shorten this 10-day reporting period. As of the date of this memorandum, the SEC had not used this new authority. *See* Dodd-Frank Act § 929R(a).

<sup>111</sup> In 2008, the SEC adopted changes to Rule 13d-1 to allow a foreign institution that is subject to a regulatory scheme that is substantially similar to the regime applicable to the U.S. institutions listed in Rule 13d-1(b)(1)(ii)(A)-(J) to use Schedule 13G so long as it (i) certifies that it is subject to a substantially similar regulatory scheme and (ii) undertakes to provide the information required by Schedule 13D if requested by the SEC. *See* SEC Release Nos. 33-8957; 34-58957 (Sept. 19, 2008).

and disclosure regarding, tender offers to purchase a class of securities from its holders and, together with other provisions of the 1934 Act (*see* Part III.F above), generally prohibit fraudulent, deceptive or manipulative acts in connection with such purchases.

There are two significant exemptions to the tender offer rules applicable to securities of foreign private issuers. The “Tier I exemption” provides that tender offers for the securities of foreign private issuers, whether for consideration of cash or securities, are exempt from the tender offer rules if 10% or less of the class of securities subject to the tender offer is owned by U.S. persons. The “Tier II exemption” provides more limited relief from the tender offer rules to accommodate practices outside the United States. The Tier II exemption applies in circumstances where the target company is a foreign private issuer and 40% or less of the class of securities subject to the tender are owned by U.S. holders.<sup>112</sup> In calculating U.S. ownership for purposes of the Tier I and Tier II exemptions, the securities held by the bidder are excluded from the outstanding securities of the class (*i.e.*, such securities are excluded from both the numerator and the denominator).<sup>113</sup>

Repurchases of securities that do not constitute a tender offer may nonetheless give rise to concerns that those repurchases resulted in the manipulation of the price of the issuer’s securities. To mitigate this risk, issuers repurchasing their securities should consider doing so pursuant to Rule 10b-18 under the 1934 Act, which provides issuers and their affiliated purchasers with a safe harbor from liability under anti-manipulation provisions of the 1934 Act (including Rule 10b-5) when they repurchase the issuer’s common stock on the open market in accordance with the Rule’s manner, timing, price and volume restrictions.<sup>114</sup>

### 3. Books and Records

<sup>112</sup> When the SEC adopted these tender offer exemptions in January 2000, it also adopted two exemptions from 1933 Act registration of securities issued to holders of securities of foreign private issuers in exchange offers, business combinations and rights offerings if, in each instance, U.S. ownership is 10% or less. For more information about the SEC rules affecting cross-border tender offers, exchange offers, business combinations and rights offerings, see Chapters 7 and 9 of U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS (11th ed. 2014), written by current and former partners of this Firm.

<sup>113</sup> Instruction 2(ii) to Rule 14d-1 under the 1934 Act.

<sup>114</sup> In 2003, the SEC adopted amendments to Rule 10b-18 that (i) shorten the time period in which issuers meeting minimum average daily trading volume and public float thresholds must be out of the market prior to the scheduled close of trading to qualify for the safe harbor, (ii) apply a uniform price condition, regardless of where an equity security is traded and (iii) modify the treatment of block purchases in applying the Rule’s volume limitation and calculating a security’s average daily trading volume. Failure to meet any of the manner, timing, price and volume conditions will disqualify the issuer’s purchases from the safe harbor for that day. The SEC did not adopt a proposal that would have extended the Rule to cover issuer repurchases effected in markets outside the United States. *See* SEC Release Nos. 33-8335; 34-48766 (Nov. 10, 2003). The SEC has subsequently clarified that foreign trading volume should be disregarded when calculating the average daily trading volume of a security. *See* SEC Division of Market Regulation, “Answers to Frequently Asked Questions Concerning Rule 10b-18 (“Safe Harbor” for Issuer Repurchases),” (May 18, 2004). Form 20-F requires disclosure of all issuer repurchases of any class of equity securities registered under Section 12 of the 1934 Act, whether or not the repurchases are effected in accordance with Rule 10b-18. Disclosure is required regardless of whether the issuer has repurchased the shares themselves or ADRs that represent the underlying shares.



Pursuant to Section 13(b)(2) of the 1934 Act, any issuer that has registered a class of equity securities under Section 12 of that Act or otherwise has a periodic reporting obligation under the 1934 Act, and its subsidiaries (domestic or foreign), must maintain accurate books and records and an adequate system of internal controls.<sup>115</sup> Section 30A of the 1934 Act also prohibits any such issuer from using the mails or any means or instrumentality of interstate commerce (which includes communication between the United States and any foreign country) to make payments to foreign officials, foreign political parties or candidates for foreign political office for the purpose of corruptly influencing actions or decisions by them in order to assist the issuer in obtaining or retaining business for or with, or directing business to, any person.<sup>116</sup>

## I. Civil Liabilities under the 1933 Act and the 1934 Act

Various provisions of the 1933 Act and 1934 Act prohibit manipulation or fraud in connection with securities transactions. Under Section 11 of the 1933 Act, any person who purchases a security covered by a registration statement has a private right of action, if at the time the registration statement became effective it contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading,<sup>117</sup> against (i) the issuer, (ii) its principal executive officer, its principal financial officer and its principal accounting officer, (iii) its duly authorized representative in the United States<sup>118</sup>, (iv) every person who is, or who consented to be named as a person who is about to become, a director at the time the registration statement became effective, (v) every accountant, engineer, appraiser or other professional person who has with his consent been named as having prepared or certified any part of the registration statement, and (vi) every underwriter of the security. Section 11(a) provides that a person who purchases securities after an earnings statement covering a period of at least 12 months beginning after the effective date of the registration statement has been made available must prove that he acquired the securities in reliance on a materially false or misleading statement in the registration statement in order to have a right of recovery under Section 11. Accordingly, it is customary for a foreign issuer to agree in the underwriting agreement (*see* Part V.A below) to make generally available to its security holders such an earnings statement (which must include a reconciliation

<sup>115</sup> This requirement is separate from the requirements of the Sarbanes-Oxley Act and the rules thereunder to maintain and periodically evaluate disclosure controls and procedures and internal controls, as described in Part III.D above. The SEC has charged books and records violations to pursue a parent company for its subsidiary's actions without charging a violation of the anti-bribery provisions of Section 30A of the 1934 Act. *See, e.g., SEC v. Schering-Plough Corp.*, SEC Litigation Release No. 18740 (June 9, 2004).

<sup>116</sup> Note that a foreign private issuer that makes corrupt payments without using any means or instrumentality of interstate commerce may nevertheless be found to have violated Section 13(b)(2)'s books and records requirement if, as may well be the case, it does not record those payments accurately in its financial records.

<sup>117</sup> Rule 430B under the 1933 Act provides that, with respect to the issuer and the underwriters, the effective date for a shelf registration statement for liability purposes in respect of a "shelf takedown" is the date a prospectus supplement filed in connection with the takedown is deemed part of the registration statement (*i.e.*, the earlier of the date on which the supplement is first used and the date and time of the first contract of sale of securities pursuant to such supplement). This new effective date triggered by the takedown does not affect the information that was contained in the registration statement at the time of any prior sale, and the rights of an investor in a prior sale (with a previous effective date) remain unaffected by subsequently filed prospectus supplements or 1934 Act reports.

<sup>118</sup> Section 6(a) of the 1933 Act provides that the registration statement of a foreign private issuer must be signed by a duly authorized representative of such issuer in the United States.

to U.S. GAAP, if the issuer's financial statements are presented in accordance with accounting principles used in the issuer's home country other than IFRS). The filing of a Form 20-F is one method of satisfying the requirements of this provision.<sup>119</sup>

Under Section 11, the issuer is absolutely liable for material deficiencies in the registration statement irrespective of good faith or the exercise of due diligence. By contrast, the standard of liability imposed upon directors, officers and underwriters under Section 11 is somewhat less stringent. With respect to the "expertized portions" of the registration statement (any part of the registration statement purporting to be on the authority of an expert, such as financial statements to the extent certified by independent public accountants, or purporting to be a copy or an extract from a report or valuation of an expert), the officer, director or underwriter will not be liable if he can prove that he had "no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy or extract from the report or valuation of the expert." With respect to any non-expertized portion of the registration statement (including unaudited financial information), such a defendant must be able to prove that "he had, after reasonable investigation, reasonable ground to believe and did believe" at the time the registration statement became effective that the statements in such non-expertized portion of the registration statement were true and that there was no omission of a material fact required to be stated or necessary to make the statements not misleading.

Thus, officers, directors and underwriters must exercise "due diligence" with respect to the preparation of the registration statement. They may not avoid liability by relying solely upon counsel or some other person to prepare the registration statement. If the issuer has made provision for the indemnification of its officers and directors, these arrangements must be disclosed in the registration statement. Any indemnification by the issuer of the underwriters or their controlling persons against liability under the securities laws must also be disclosed in the prospectus.<sup>120</sup>

In addition, under Section 12(a)(2) of the 1933 Act, the purchaser of a security has a right of action for damages or rescission against the person who offered or sold the security to him by means of any prospectus or oral communication containing a material misstatement or omission (unless the purchaser was aware of the misstatement or omission). Section 12(a)(2) provides the seller with a "due diligence" defense, although one couched in somewhat different terms from that of Section 11: the seller is not liable if he can prove that "he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission."

<sup>119</sup> Rule 158 under the 1933 Act.

<sup>120</sup> The SEC has taken the position that indemnification by the issuer of its officers, directors or controlling persons for liability arising under the 1933 Act is against public policy and, therefore, unenforceable, and there is support for this position in court decisions. The SEC has also indicated that in addressing requests for prompt declaration of effectiveness of a registration statement (*see* Part III.A above), it will refuse to accelerate its declaration of effectiveness if the registrant indemnifies any of its officers, directors or controlling persons, unless: (i) such person waives the benefits of indemnification with respect to the proposed offering, or (ii) the registration statement contains a certain undertaking to submit to a court of appropriate jurisdiction the question whether such indemnification is against public policy and to be governed by the final adjudication of such issue.

Rule 159 under the 1933 Act provides that information conveyed to an investor *after* the time of sale should not be taken into account in determining whether the information conveyed to an investor *at* the time of sale (including any free writing prospectus) was materially deficient under Section 12(a)(2) of the 1933 Act. For these purposes, the SEC considers the time of sale to be the time at which the investment decision was made.<sup>121</sup> The determination of whether information has been conveyed to an investor at or prior to the time of sale is a facts and circumstances test, though the SEC has confirmed that the correct standard to apply is what information is “reasonably available” to the investor and not what the investor “truly knew.”<sup>122</sup>

One of the most significant anti-fraud and anti-manipulation provisions of the U.S. securities laws (although one that requires proof of scienter—*i.e.*, that the defendant engaged in willful misconduct or at least acted recklessly) appears in the 1934 Act. Section 10(b) of the 1934 Act forbids the use of any “manipulative” or “deceptive” device in connection with the purchase or sale of any securities. Rule 10b-5 prohibits: (i) the use of any device, scheme or artifice to defraud; (ii) the making of any untrue statement of a material fact or the omission of a material fact necessary to make the statements made not misleading; or (iii) the engaging in “any act, practice or course of business” that would operate to deceive any person in connection with the purchase or sale of any securities. Under Rule 10b-5, the issuer and its employees or agents may be liable for disseminating false or misleading information or suppressing material information about the issuer, whether or not the issuer or any of its employees or agents purchased or sold any securities. Such liability can be based on information filed in a registration statement or report filed with the SEC (including on Form 6-K), or upon public statements issued by the company.<sup>123</sup>

Press releases and other public information should, therefore, be carefully reviewed prior to release.<sup>124</sup> Furthermore, liability from “insider” trading in securities while

<sup>121</sup> See SEC Release Nos. 33-8591; 34-52056 (July 19, 2005).

<sup>122</sup> See *id.* To date, the SEC has not provided any safe harbors for determining when information is “reasonably available,” but we believe the SEC’s own emphasis on the integrated disclosure system makes it clear that information contained in 1934 Act reports filed electronically with the SEC is “reasonably available.” However, pending further judicial or regulatory guidance, it would be prudent to make use of the free writing prospectus rules to communicate to investors information that is clearly material that is added to the public record shortly before the time of sale.

<sup>123</sup> In addition, without having alleged fraud or recklessness tantamount to fraud as would be required under Rule 10b-5, the SEC has cited Rule 12b-20 under the 1934 Act as the basis for a proceeding against a foreign private issuer and one of its executives for allegedly providing materially misleading information in a Form 6-K. Rule 12b-20 requires that 1934 Act reports include any additional information “as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.” There is, however, no private right of action for a violation of Rule 12b-20.

<sup>124</sup> An SEC administrative ruling, *In re E.ON AG*, demonstrates the extent to which 10b-5 liability can attach to foreign private issuers. See SEC Release No. 34-43372 (Sept. 28, 2000). *In re E.ON AG* involved management denials that merger discussions between two German companies were occurring when in fact they were. E.ON AG asserted that the denials were not a violation of German law. Moreover, while one of the parties was listed on the NYSE, U.S. investors held only a small number of its shares. Both companies were persuaded that a no-comment policy would be construed by the German press as a confirmation that talks were going on, and premature disclosure would have jeopardized the eventual merger. The SEC ruled that denying the merger discussions was false and therefore constituted a violation of Rule 10b-5. E.ON AG subsequently adopted a no-comment policy, as have most other German companies publicly traded in the United States.

material information remains undisclosed may arise under Rule 10b-5, which creates a general prohibition on trading when the person or entity trading is “aware” of material non-public information and either breaches a fiduciary duty to the issuer in doing so or misappropriates the information in question from a third party.<sup>125</sup> Insiders should not trade when a material event (including a proposed financing or acquisition) is developing but is not yet ripe for disclosure. A corporate insider also may be held liable for the actions of persons to whom he discloses material non-public information, even though the insider himself did not trade (so-called “tipper” liability).

Because insider trading liability requires predicate misconduct beyond just use of material non-public information, the SEC adopted Regulation FD (Fair Disclosure) to regulate communication of material non-public information by issuers. Regulation FD prohibits issuers from selectively disclosing material non-public information to market professionals and holders of the issuer’s securities under circumstances in which it is reasonably foreseeable that the security holders will trade on the basis of the information. Although Regulation FD does not apply to foreign private issuers, both the NYSE and NASDAQ require that listed companies make prompt disclosure of material information similar to that required by Regulation FD, through any Regulation FD-compliant method (or combination of methods).<sup>126</sup>

<sup>125</sup> See SEC v. Adler, 137 F.3d 1325, 1337-39 (11th Cir. 1998). In 2000, the SEC adopted Rule 10b5-1, which sets forth two affirmative defenses to liability in circumstances where it is clear that a trade was not made “on the basis of” the material non-public information. The first affirmative defense provided by Rule 10b5-1(c)(1)(i) applies if: (i) a person had, before becoming aware of material non-public information (a) entered into a binding contract to purchase or sell the securities; (b) provided instructions to another person to purchase or sell the securities; or (c) adopted a written plan for trading the securities; (ii) the contract, instructions or plan: (a) specified the amount of, price of and date on which the securities were to be purchased or sold; (b) provided a written formula or computer program for determining the amount of, price of and date on which the securities were to be purchased or sold; or (c) did not permit the person to exercise any subsequent influence over how, when or whether to effect purchases or sales of the securities, and no person exercising such influence was aware of the material non-public information when doing so; and (iii) the purchase or sale occurred pursuant to the contract, instruction or plan. For example, an issuer operating a repurchase program need not specify with precision the amounts, prices and dates on which it will repurchase its securities. Rather, it could adopt a written plan, when it is not aware of material non-public information that uses a written formula to derive amounts, prices and dates. Or the plan could simply delegate all the discretion to determine amounts, prices and dates to another person who is not aware of the information, provided that the plan did not permit the issuer to (and the issuer in fact did not) exercise any subsequent influence over the purchases or sales. The second affirmative defense, provided by Rule 10b5-1(c)(2), is based on the existence of effective information barriers and generally relied on by securities professionals, such as broker-dealers. It negates entity liability for insider trading where the entity can demonstrate that (i) the individual making a decision to trade on behalf of the entity was not aware of material non-public information and (ii) the entity had implemented reasonable policies and procedures, taking into consideration the nature of its business, to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material non-public information. These policies and procedures focus on preventing individuals who trade for the entity from becoming aware of such information known to other employees of that entity. See 17 C.F.R. § 240.10b5-1; SEC Release Nos. 33-7881; 34-43154 (Aug. 15, 2000).

<sup>126</sup> See SEC Release Nos. 33-7881; 34-43154 (Aug. 15, 2000); NYSE LISTED COMPANY MANUAL § 202.06(A) and NASDAQ STOCK MARKET RULES § 5250(b)(1). For guidelines regarding communications between management and securities analysts in light of applicable case law and Regulation FD, see this Firm’s memorandum entitled “Communication with Financial Analysts and Related Disclosure Issues” dated Feb. 25, 2013.

Regulation M under the 1934 Act generally makes it unlawful for participants in a distribution of securities to purchase any such security, or any securities of the same class or series, from a specified date — ordinarily either one or five business days (depending on the trading characteristics of the securities being offered) — prior to the commencement of the offering (*i.e.*, after pricing) until completion of the distribution. The prohibition extends to underwriters, the issuer, any selling stockholders and certain of their respective affiliates. There are certain exemptions, including for the underwriters generally in the case of distributions of actively traded securities and for specified stabilizing transactions by underwriters, and the SEC may grant additional exemptions upon application.<sup>127</sup> In addition, Rule 105 of Regulation M prohibits a person from effecting a short sale of a security during a specified period prior to the pricing of a registered offering of the same class of securities and then purchasing securities in the offering.<sup>128</sup>

The Sarbanes-Oxley Act enhanced SEC enforcement powers and created new criminal provisions as well. These changes include:

- Giving the SEC the authority to freeze possible “extraordinary payments” to directors, officers, agents and employees during the course of an investigation involving “possible” violations of the U.S. federal securities laws;
- Giving the SEC the authority to bar persons from serving as directors or officers of public companies in cease and desist proceedings;
- Creating a new securities fraud crime with respect to public companies that does not contain a purchase or sale requirement, and simply prohibits defrauding any person (or attempting to do so) in connection with any security of an issuer, with violators subject to fines and imprisonment of up to 25 years;
- Increasing maximum prison terms for mail and wire fraud and violations of the 1934 Act; and
- Enacting a broad new “anti-shredding” prohibition and sweeping new

<sup>127</sup> In December 2004, the SEC proposed amendments to Regulation M that would, among other things, extend the restricted period for initial public offerings beyond the current five-day period, prohibit the conditioning or “tying” of an allocation of shares to an agreement to buy shares in another offering or to payment of excessive commissions to the underwriters, enhance transparency of syndicate covering bids, prohibit the use of penalty bids, institute a record-keeping requirement with respect to the existing *de minimis* exception and adjust certain dollar value thresholds for inflation. See SEC Release Nos. 33-8511; 34-50831 (Dec. 9, 2004). To date the proposed rule has not been adopted.

<sup>128</sup> Two exceptions exist. First, there is an exception for a person who established a short position that it closes out in a *bona fide* transaction prior to pricing. A *bona fide* transaction is a purchase of shares that equals or exceeds the quantity of shares in the short sale, subject to certain conditions. Second, there is an exception for a person who makes a Rule 105 short sale and a purchase through separate accounts, provided that such separate accounts are managed separately and without coordination or cooperation. This exception is likewise available to investment companies registered under Section 8 of the Investment Company Act of 1940, even if an affiliated investment company (or fund in the same family) made a Rule 105 short sale. See SEC Release No. 34-56206 (Aug. 6, 2007).

obstruction of justice offenses (not limited to document destruction).

In addition, the Dodd-Frank Act:

- Grants the SEC the power to impose civil penalties on persons or companies (or their directors, officers or employees) for violations of the 1933 Act and 1934 Act. Prior to the adoption of the Dodd-Frank Act, the SEC could request that such penalties be imposed through a court proceeding, but could not do so directly;
- Provides United States federal courts with jurisdiction to hear cases brought by the SEC or other agencies of the United States government under the anti-fraud provisions of the 1933 Act and 1934 Act that involve conduct (i) within the United States that constitutes significant steps in furtherance of a violation of those provisions, even if the securities transaction occurs outside the United States and involves only foreign investors and (ii) outside the United States, if that conduct would have a foreseeable substantial effect in the United States;<sup>129</sup>
- Establishes that persons who “knowingly” or “recklessly” provide substantial assistance to conduct that violates the anti-fraud provisions of the 1933 or 1934 Acts can be criminally or civilly liable for such conduct;
- Extends the statute of limitations for criminal violations of the 1933 Act and 1934 Act from five years to six years.

<sup>129</sup> This provision was adopted in response to the U.S. Supreme Court’s decision in Morrison v. Nat’l Austl. Bank Ltd., 130 S. Ct. 2869 (2010). In Morrison, the Supreme Court overturned the Second Circuit’s test for when Section 10(b) (and, by extension, Rule 10b-5) of the 1934 Act applied to conduct or transactions that occurred outside the United States. Prior to Morrison, the Second Circuit had held that Section 10(b) of the 1934 Act extended to “wrongful conduct that had a substantial effect in the United States or upon United States citizens” or “wrongful conduct [that] occurred in the United States.” SEC v. Berger, 322 F.3d 187, 192-193 (2d Cir. 2003). Morrison found the Second Circuit’s standard overly broad, and instead held that Section 10(b) of the 1934 Act applies only to (1) transactions in securities that are listed on a securities exchange in the United States, or (2) other securities transactions that occur in the United States. Morrison, 130 S. Ct. at 2886. The Dodd-Frank Act sought to restore the earlier, broader Second Circuit test with respect to actions brought by the SEC or other U.S. government agencies, but it left the Supreme Court’s more restrictive standard in place for private suits brought under the 1933 Act or the 1934 Act while the SEC studies whether private suits should also be subject to the broader standard. On Mar. 1, 2012, the Second Circuit further interpreted the extraterritorial reach of Section 10(b), holding that transactions involving securities that are unlisted in the United States are subject to Section 10(b) if title to the security is transferred within the United States or one party incurs irrevocable liability within the United States to purchase or sell the security. See Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012). On May 6, 2014, the Second Circuit clarified again the rules regarding extraterritorial enforcement of the 1934 Act, holding that persons who purchased shares of a foreign issuer on a foreign exchange could not bring suit under Section 10(b) in connection with that purchase even if the shares were cross-listed on a United States exchange. See City of Pontiac Policemen’s and Firemen’s Retirement Sys. v. UBS AG, 2014 WL 1778041, at \*3-4 (2d Cir. 2014).

#### IV. Other Legal Considerations

##### A. State “Blue Sky” and “Legal Investment” Requirements

Nearly every state of the United States requires that securities be registered under its laws prior to sale to the public in that state. These “blue sky” or state securities registration requirements are in addition to the filing requirements of the SEC at the U.S. federal government level.

The National Securities Markets Improvement Act of 1996 (“NSMIA”) amended Section 18 of the 1933 Act to provide for federal preemption of any state laws and regulations requiring registration of securities or securities transactions that apply to a “covered security.” Among other categories, a covered security includes a security that is listed, or authorized for listing, on the NYSE, the American Stock Exchange, NASDAQ (including NASDAQ Capital Market), the Philadelphia Stock Exchange, the Chicago Board of Trade Exchange or the International Securities Exchange or a security of the same issuer that is equal or senior in rank to a security so listed or authorized for listing. For the most part, this language tracks that of the current exemption under the Uniform Securities Act of 1956 (the “1956 USA”), which has been adopted in some version by most states and provides an exemption from securities registration for stock exchange listed and blue chip securities.<sup>130</sup> Federal preemption of state securities registration applies to any security that is a covered security or will be a covered security upon completion of the transaction. This means that preemption will apply as long as the offered securities are approved for listing prior to the effective date of the registration statement. To the extent that state securities regulation is preempted, no notice filings, sales reports or filing fee requirements may be imposed by the states in connection with an offering of listed securities.

If the offered securities are not listed, other exemptions from individual state securities registration requirements may be available in certain instances, *e.g.*, when sales within a state will be made exclusively to certain classes of institutional investors.<sup>131</sup>

Typically, legal counsel for the underwriters is responsible for obtaining approval of the necessary state securities registrations, and the issuer is responsible for paying the fees of underwriters’ counsel for blue sky work, any state filing fees and for executing individual state registration forms. If federal preemption under NSMIA does not apply and no other state

<sup>130</sup> This preemptive provision does not, however, include rights to purchase listed securities as does the 1956 USA listing exemption. The most recent version of the Uniform Securities Act (2002) (the “2002 USA”) specifically exempts covered securities that are listed and warrants or subscription rights with respect to such securities. As of the date of this memorandum, 18 states and the U.S. Virgin Islands have adopted the 2002 USA. Uniform Law Commission, “Legislative Fact Sheet – Securities Act,” [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Securities Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Securities%20Act).

<sup>131</sup> Another category of “covered securities” preempted under NSMIA from state securities registration requirements is an offer or sale of a security to “qualified purchasers, as defined by the Commission by rule.” In December 2001 the SEC proposed a definition of “qualified purchaser” to be contained in Rule 146 under the 1933 Act. The proposed definition mirrors the definition of “accredited investor” in Rule 501(a) under Regulation D of the 1933 Act. For purposes of this memorandum, “accredited investors” include investors that are “financially sophisticated by their nature,” such as “institutional investors and employee benefit plans where sophisticated fiduciaries make investment decisions.” *See* SEC Release No. 33-8041 (Dec. 19, 2001). To date the proposed rule has not been adopted.

exemption is available, securities registration applications must be filed with the state regulators. Generally, the application for registration in any state includes a uniform state application form, a copy of the registration statement and exhibits thereto, a consent to service of process and payment of a fee ranging from \$100 to \$2,000 depending upon the aggregate dollar amount of securities registered in the state.

The extent of the state regulators' review of the registration or filing materials submitted varies widely. Many states have adopted a standard of review that differs from the SEC's "full disclosure" requirements. In these states, the securities commissioner may deny registration if the offering is determined to be unfair, unjust or inequitable. Generally, these states have adopted regulations and policies which establish standards that an issuer must meet if its offering is to be considered "fair" and appropriate as an investment for the state's residents. These standards include: (i) a prohibition against offering a class of equity securities with no voting rights or rights unequal to other classes of outstanding shares; (ii) limitations on the maximum underwriting commissions and other selling expenses that may be incurred by the issuer in connection with the offering; (iii) limitations on the amount of securities that may be covered by options issued or to be issued to management and underwriter; (iv) limitations on the price-earnings ratio of the securities offered; (v) a prohibition against loans to management; and (vi) limitations on securities issued to management for a consideration less than the public offering price.

There do not appear to be fairness standards of special relevance to foreign issuers, other than the requirement of a number of states, including Texas, that the foreign issuer be able to show that it has substantial assets in the United States. This reflects a concern about the risk of unenforceability in the United States of any judgment against the foreign issuer obtained by a U.S. investor.

As distinguished from the state securities laws discussed above, there are also state statutory provisions (often referred to as "legal investment" laws) that govern the various types of investments that are permissible for state-regulated financial institutions. Typically, these institutions would include state commercial and savings banks, state savings and loan associations, life and casualty insurance companies and public pension and retirement systems.

Typically, legal investment provisions list permissible portfolio investments for these institutions, such as government obligations, corporate bonds, preferred stock and common stock, real estate mortgages and notes and similar types of investments. Most states impose quality standards on such investments, *e.g.*, the security may be required to have an investment grade rating. In addition to specified "legal investments," most states also permit regulated institutions to invest, under so-called "basket" provisions, a limited portion of funds in any type of security, including those that do not meet the required standards. The legality of investments in securities issued by foreign corporations and governments varies both from state to state and as among different types of regulated financial institutions. However, those states with the largest base of financial institutions usually permit the purchase of foreign securities, subject to certain quantitative limitations and provided the securities meet the same quality standards as those imposed on similar U.S. investment securities. Many legal investment provisions do not specifically list foreign securities among those investments that are legal for institutional investors. In those instances, regulated institutional investors may only purchase foreign securities under "basket" provisions as described above.



## B. Tax Considerations

For U.S. tax purposes, a holder of an ADR generally will be treated as the owner of the underlying shares of the company's stock represented by the ADR. The gross amount of all dividends paid with respect to an ADR or foreign equity security to a U.S. citizen or resident, a U.S. corporation or a holder that otherwise is subject to U.S. federal income tax on a net income basis in respect of an ADR or equity security (a "U.S. holder") will be treated as dividend income for U.S. tax purposes. Dividends paid with respect to foreign equity securities generally do not qualify under the U.S. Internal Revenue Code for the dividends-received deduction allowed to corporate holders of equity securities but may qualify for the special reduced tax rate on "qualified dividends" that is applicable to individuals.

Many countries impose a withholding tax on dividends paid to non-residents. It is not customary for foreign issuers to provide any gross-up for such withholding taxes. However, U.S. holders may be entitled to credit such taxes against their U.S. income tax liability, subject to the limitations and conditions generally applicable for U.S. tax purposes in determining the availability and amount of foreign tax credits. The United States has entered into tax treaties with most of its major trading partners under which the rate of withholding tax that may be imposed on payment of dividends is limited, generally to 15% for portfolio investors. The marketability of ADRs in the United States may be enhanced to the extent that an issuer makes arrangements with the depositary for expedited procedures for claiming a reduced rate of withholding and any other benefits to which a U.S. holder is entitled under a tax treaty.<sup>132</sup>

U.S. holders of ADRs will be subject to U.S. federal income tax on any gain realized on the disposition of such ADRs or the underlying equity securities. Additionally, non-resident alien individuals also will be subject to U.S. tax if they are present in the United States for a period or periods aggregating 183 days or more during the taxable year of the disposition and certain other conditions are met.

While there is no published ruling directly on the question, ADRs should be treated as stock of the foreign private issuer for purposes of the tax-free reorganization provisions of the U.S. Internal Revenue Code. Thus, it should be possible for the foreign private issuer to use ADRs as the consideration for an acquisition of the stock or assets of a U.S. corporation in a transaction designed to qualify in whole or in part for tax-free treatment, subject to a number of tax and other considerations that must be examined on a case-by-case basis. Similarly, it should in general be possible to use ADRs in connection with employee incentive stock option and stock ownership plans that are intended to qualify for favorable treatment under the U.S. Internal Revenue Code.

<sup>132</sup> Some countries have integrated or partially integrated systems for taxing the income of corporations and their shareholders. Under such an integrated system, shareholders typically are entitled to tax credits against their own tax liability for taxes paid by a corporation in respect of income distributed as dividends. Under certain tax treaties to which the United States is a party, U.S. investors are entitled to partial refunds of such taxes in lieu of the credits available to local investors. In the case of ADRs representing shares of a corporation that is a resident of such a jurisdiction, the depositary may be able to arrange for a U.S. holder of ADRs to obtain a refund of the corporate tax at the time the holder receives its dividend distribution if the holder complies with certain procedural requirements.

The issuance of equity securities to U.S. persons, either directly or in the form of ADRs, may involve other tax consequences (which, in certain cases, may be adverse to such persons). A certain amount of tax planning and diligence will, therefore, need to be accomplished prior to any such offering.

## V. Underwriting Arrangements and Listing

### A. Underwriting Agreement

Public offerings of securities in the United States generally are made through a syndicate of underwriters led by one or more managing underwriters. The underwriting agreement, which defines the relationship between the issuer and the underwriters, is prepared in preliminary form by counsel for the underwriters and filed with the registration statement. It is not finalized until the “pricing” of an offering, when the issue price, underwriters’ compensation and other final terms are fixed. At that time, the agreement is signed by the manager or managers on behalf of the underwriting group.

Typically, the underwriters agree to purchase the offered securities on a specified closing date, generally three business days after pricing.<sup>133</sup> Each underwriter is responsible to the issuer only for its individual underwriting commitment. The underwriting agreement also includes various representations and warranties by the issuer regarding its legal status and financial condition, and a covenant by the issuer to indemnify the underwriters in respect of liabilities that may arise out of any inaccuracy or incompleteness of the information contained in the registration statement. The agreement also describes in detail the conditions to be fulfilled by the issuer prior to the closing, including delivery of legal opinions, officers’ certificates and the accountants’ “comfort” letters.

It is customary in U.S. public offerings of common stock for the issuer to grant the underwriters a so-called “overallotment option,” also called a “green shoe option.” The overallotment option generally allows the underwriters, for a period beginning with the execution of the underwriting agreement and ending 30 days after the closing date, to purchase from the issuer, at the public offering price less the commissions provided for in the underwriting agreement, up to 15% of the shares (or ADRs) being offered but solely for the purpose of covering any overallotments.<sup>134</sup> Underwriters customarily are given an overallotment option at the offering price to protect them from an increase in the price of the securities in the secondary market that would make it costly for the underwriters to purchase shares they overallot in the offering. By over-allotting securities (*i.e.*, selling more securities than the underwriters have contracted to purchase from the issuer on a “firm” basis), the underwriters will create a short

<sup>133</sup> The three-business day settlement period is consistent with settlement requirements for securities traded generally in the United States. *See* Rule 15c6-7 under the 1934 Act. If pricing occurs after the U.S. markets close (which is typical in equity deals), settlement generally will occur on the fourth business day after pricing.

<sup>134</sup> Rule 5110(f)(2)(J) of the FINRA Securities Offering and Trading Standards and Practices prohibits the receipt by FINRA members in a firm commitment underwriting of an overallotment option relating to more than 15% of the securities being offered, without taking into account the securities offered pursuant to the overallotment option. The FINRA staff has indicated that it interprets this rule as prohibiting FINRA members participating in a firm commitment global offering from being allocated overallotment option securities in excess of 15% of the aggregate amount of securities registered with the SEC in the global offering, regardless of the number of securities actually sold by such members.

position that will serve as a hedge to purchases the underwriters make after completion of the offering in the secondary market should the price of the securities decline following the offering.

ADRs are sometimes offered as a single “tranche” of a “global” offering of the issuer’s shares in several countries. Generally in such cases, it is customary for underwriters to organize global offerings in two tranches: a “local” tranche, consisting of shares offered in an issuer’s home country, and an “international” tranche, consisting of ADRs (and sometimes shares) offered in the United States and elsewhere outside the issuer’s home country.

#### B. Listing on the New York Stock Exchange or the NASDAQ Stock Market

It is advisable that the ADRs publicly offered in the United States be listed on a U.S. national securities exchange such as the NYSE or NASDAQ, to provide a secondary trading market for the ADRs with readily available quotations, in U.S. dollars, based on actual trades. The listing requirements and procedures of the NYSE and NASDAQ are outlined in Appendix B. As discussed above, before any securities can be admitted to trading on a national securities exchange, the issuer must file with the SEC a 1934 Act registration statement covering such securities and this registration statement becomes automatically effective (upon the later of the effectiveness of the 1933 Act registration statement and receipt by the SEC of a certification from the relevant national securities exchange).<sup>135</sup> Once a registration statement under the 1933 Act has become effective and the NYSE or NASDAQ has approved listing, registration of ADRs under the 1934 Act generally becomes effective concurrently with the registration statement.

As a result of corporate governance failures, both the NYSE and NASDAQ have strengthened their corporate governance standards. Not all of these standards, however, apply to foreign issuers. The NYSE and NASDAQ have generally exempted foreign issuers from their corporate governance standards to the extent those standards exceed the requirements of the Sarbanes-Oxley Act so long as the issuer follows its home-country practice. Both the NYSE and the NASDAQ, however, require a foreign issuer to disclose any significant ways in which its corporate governance practices differ from the relevant listing standards; the corporate governance requirements for each exchange are outlined in Appendix B. In addition, any foreign issuer whose shares are listed on a national securities exchange is required to disclose in its annual report filed on Form 20-F any significant differences between its corporate governance practices and those followed by domestic companies under the listing standards of the securities exchange.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

<sup>135</sup> See related discussion on Form 8-A in Part III.E above.

## APPENDIX A

### Outlines of Forms Used in Registration<sup>136</sup>

The following is a description of each of the two SEC registration forms under the 1933 Act for use by a foreign private issuer and of the annual report on Form 20-F. As the organization and many of the requirements of Form F-1 and Form F-3 are virtually identical, only Form F-1 is described in detail.

Each of the registration forms is divided into two parts. Part I is the prospectus, which is required to be made available (and provided on request) to prospective purchasers, while Part II contains additional information that must be filed with the SEC but need not be provided to prospective purchasers. Form 20-F is divided into three parts, as described below. Item numbers in each of the summary descriptions correspond to official SEC numeration.

Certain portions of the prospectus, including the cover page, summary and risk factors, are required to be drafted in “plain English.”<sup>137</sup> The SEC’s plain English rules generally require the use of simplified sentence structure, non-technical language and the active voice.<sup>138</sup>

The deadline for filing the annual report on Form 20-F is four months after end of the issuer’s fiscal year.<sup>139</sup>

#### 1. Registration Statement on Form F-1

Part I of the registration statement on Form F-1 contains the prospectus and requires the following:

Item 1. Forepart of Registration Statement and Outside Front Cover Page of Prospectus. Pursuant to Item 501 of Regulation S-K, these sections must contain such basic information as the approximate date of the proposed offering, the issuer’s name (and, if not in English, an English translation), the title, amount and a brief description of the securities offered, including price, underwriting discounts and commissions and net proceeds to the issuer; and cross-reference to and identification of the risk factors section, highlighted in a prominent manner and including the page number where it appears in the prospectus. In addition, the cover page of the registration statement contains the calculation of the filing SEC fee.<sup>140</sup>

<sup>136</sup> As of the date of this report, the SEC has not yet amended Form 20-F to reflect all of the scaled-down disclosure requirements applicable to EGCs under the JOBS Act, including with respect to financial statements. However, the staff of the SEC has indicated that foreign private issuers may proceed as if these scaled disclosure requirements have been incorporated in Form 20-F. See SEC Division of Corporation Finance, “JOBS Act FAQ,” *supra* Note 26.

<sup>137</sup> See SEC Release No. 33-7497.

<sup>138</sup> The SEC encourages the use of “plain English” through the rest of the prospectus as well. See SEC Rule 421(b) under the 1933 Act and “A Plain English Handbook: How to create clear SEC disclosure documents” available at <https://www.sec.gov/pdf/handbook.pdf>.

<sup>139</sup> Previously, an issuer was required to file Form 20-F within six months of the end of its fiscal year. See SEC Release Nos. 33-8959; 34-58620 (Sept. 23, 2008).

<sup>140</sup> The SEC filing fee rate is available on the SEC website at [www.sec.gov/ofm/Article/feeatm.html](http://www.sec.gov/ofm/Article/feeatm.html).

Item 2. Inside Front and Outside Back Cover Pages of Prospectus. Pursuant to Item 502 of Regulation S-K, the issuer must furnish a reasonably detailed table of contents that must include a specific listing of the risk factors section. The issuer, using plain English, must also notify dealers of their prospectus delivery obligation, including the expiration date.

Item 3. Summary Information, Risk Factors, and Ratio of Earnings to Fixed Charges. Pursuant to Item 503 of Regulation S-K, the prospectus, if lengthy or complex, must include a summary of the information it provides. The summary, which must be written in plain English, should provide a brief overview of the key aspects of the offering. The prospectus must also include the address and telephone number of the principal executive offices of the issuer, a statement of any special risk factors concerning the issuer and the offering and, if debt or preferred equity securities are being registered, a statement of the ratio of earnings to fixed charges for the issuer.

Item 4. Information With Respect to the Registrant and the Offering. All of the information required by Part I of Form 20-F (as described below) is to be provided in the prospectus itself, as well as the information required by Item 18 of Form 20-F.<sup>141</sup>

Item 4A. Material Changes. Issuers that elect to incorporate information by reference must describe any and all material changes in their affairs since the end of the last fiscal year for which audited financial statements are included in the prospectus, to the extent such information has not been described in a 1934 Act report that is being incorporated by reference.

Item 5. Incorporation of Certain Information by Reference. Certain eligible reporting issuers that have filed at least one annual report and that are current in their 1934 Act reporting obligations may incorporate by reference into their Form F-1 information required by Items 3 and 4 from previously filed 1934 Act reports and documents. The ability to incorporate by reference is conditioned on an issuer making its 1934 Act reports and other documents available through its web site. The issuer must also list in the Form F-1 all reports and information incorporated by reference, state that copies of such reports and information will be provided at no cost upon request and that reports and information filed with the SEC may be read and copied at the SEC's public reference room. No information may be incorporated by reference if filed after the Form F-1 was effective (*i.e.*, no "forward incorporation"). Form F-3, by contrast, permits forward incorporation.

<sup>141</sup> MJDS filers may still use Item 17 of Form 20-F.

Item 5A. Disclosure of Commission Position on Indemnification for Securities Act Liabilities. Pursuant to Item 510 of Regulation S-K, in the rare case that the issuer does not request acceleration of the effective date of the registration statement, the prospectus must include a brief description of indemnification arrangements relating to directors, officers and controlling persons of the registrant against liabilities under the 1933 Act, as well as a statement of the SEC's position that provisions for indemnification of such persons against such liabilities are against public policy and unenforceable.

\* \* \*

Part II of the registration statement on Form F-1 contains supplemental information not required in the prospectus and includes the following:

Item 6. Indemnification of Directors and Officers. Pursuant to Item 702 of Regulation S-K, the general effect of any statute, corporate charter or by-law provisions or other arrangements that purport to indemnify the issuer's officers or directors or persons controlling the issuer against liability incurred in these capacities must be stated.

Item 7. Recent Sales of Unregistered Securities. Pursuant to Item 701 of Regulation S-K, if the issuer has sold any securities within the three years prior to the filing of the registration statement that were not registered under the 1933 Act, the issuer must disclose the title, amount and date of sale of such securities, the names of the principal underwriters of the offering (along with underwriting discounts and commissions with respect to securities sold for cash) or other principal purchasers of the securities, the nature of the exemption claimed from registration under the 1933 Act and the use of proceeds.

Item 8. Exhibits and Financial Statement Schedules. Form F-1 requires that the issuer furnish the financial statement schedules mandated by the SEC's Regulation S-X.<sup>142</sup> In addition, a list of all exhibits filed with the registration statement, as required by Item 601 of Regulation S-K, must be provided. For Form F-1, these include:

- (a) copies of all underwriting agreements with respect to the securities being registered;
- (b) copies of plans of acquisition, reorganization, arrangement, liquidation or succession;
- (c) copies of the issuer's charter and by-laws or corresponding instruments;
- (d) instruments defining the rights of security holders, including indentures;

<sup>142</sup> First-time adopters of IFRS and EGCs and foreign private issuers that prepare their financial statements in accordance with U.S. GAAP filing their initial registration statement are required to present only two years of financial statements instead of three (with three years of balance sheet information required for foreign private issuers that are first-time adopters of IFRS). *See supra* Notes 62 to 64 and accompanying text; *see generally* Part III.D.5 above.

- (e) an opinion of counsel as to the legality of the securities being registered;<sup>143</sup>
- (f) an opinion of counsel, or revenue ruling from the Internal Revenue Service, supporting statements made in the filing concerning tax consequences to shareholders, if material;
- (g) any voting trust agreements and amendments thereto;
- (h) copies of every contract of the issuer, material to the issuer or referred to in the prospectus, made other than in the ordinary course of business within two years prior to the registration statement or to be performed in whole or in part at or after the filing of the registration statement;<sup>144</sup>
- (i) statements of computation of per share earnings and any required ratios;
- (j) where applicable, a letter from the independent accountant acknowledging awareness of the use in a registration statement of unaudited interim financial statements;
- (k) a list of the names of subsidiaries of the issuer and the jurisdiction of incorporation or organization of each;
- (l) copies of consents required to be filed and of any powers of attorney (for any name signed pursuant to a power of attorney);
- (m) a statement of eligibility and qualification of each person designated to act as a trustee under an indenture to be qualified under the Trust Indenture Act of 1939; and
- (n) any additional exhibits the issuer may wish to file or any document incorporated by reference in the filing that is not otherwise required.

<sup>143</sup> On October 14, 2011, the SEC staff released guidance on preparing legality and tax opinions filed in connection with registered securities offerings, including ADRs. Because ADRs are considered to be different securities than the underlying securities, counsel for the issuer of the underlying securities is required to file an opinion as to the legality of the underlying securities in connection with ADR-related registration statements on Form F-1, F-3 or 20-F, and counsel for the depositary registrant must file a separate opinion as to the legality of the ADRs on Form F-6. Counsel for the issuer may also be required to file an opinion as to the material United States federal tax consequences for an investor in the ADRs, and local counsel may be required to file an opinion regarding the material foreign tax consequences for an investor in the ADRs. *See* SEC Division of Corporation Finance, “Legality and Tax Opinions in Registered Offerings,” Staff Legal Bulletin No. 19 (CF) (Oct. 14, 2011).

<sup>144</sup> Special consideration must be given to contracts containing representations and warranties made by the issuer in respect of its affairs, business, assets or liabilities. On March 1, 2005, the SEC issued a Report of Investigation on potential liability under Sections 10(b) and 14(a) of the 1934 Act in connection with settling an enforcement action against The Titan Corporation. *See* SEC Release No. 34-51283 (Mar. 1, 2005). In its Report, the SEC noted that, depending on the context in which the disclosure is made (including the significance of the representations and the total mix of available information), a reasonable investor could conclude that a contractual representation describes the actual state of affairs of the issuer and could be material information. As a result, issuers should carefully review the provisions of material contracts that will be included as exhibits to public filings and consider adding adequate disclaimers and disclosure in the body of the filing regarding these provisions.

Item 9. Undertakings. Pursuant to Item 512 of Regulation S-K, the issuer must make certain undertakings with respect to the disclosure of further information (by post-effective amendment to the registration statement or otherwise), to the incorporation by reference of certain documents in the registration statement and to various other matters. If, as will usually be the case, the issuer requests that the SEC declare the registration statement “effective” on a date selected by the issuer and the underwriters, the issuer must state the SEC’s position that provisions for indemnification of the issuer’s directors or officers or of persons controlling the issuer against liability under the 1933 Act are against public policy and unenforceable and undertake to submit this question to a court of competent jurisdiction upon the making of any such claim for indemnification by such persons, unless such legal question has previously been settled.

Form F-1 must be signed on behalf of the registrant and, in their individual capacities, by the issuer’s principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, at least a majority of its board of directors or persons performing similar functions and its authorized representative in the United States.

## 2. Registration Statement on Form F-3

Part I of the registration statement on Form F-3 includes the following:

Items 1-5; 7. The requirements of Items 1 through 5 and 7 of Form F-3 are, except for minor variations, identical to the requirements of Items 1 through 4A and 5A of Form F-1.

Item 6. Incorporation of Certain Information by Reference. For Form F-3, the issuer need only incorporate by reference: (i) its most recent Form 20-F filed with the SEC, and (ii) if securities of the same class have been registered under the 1934 Act, the description of this class of securities contained in a registration statement filed under the 1934 Act, including amendments updating this description. The issuer must state that all subsequent filings on Form 20-F prior to termination of the offering shall be deemed incorporated by reference into the prospectus. The issuer may also incorporate by reference its filings on Form 6-K if they contain interim financial statements or other information that otherwise would have to be included in the prospectus.<sup>145</sup>

\* \* \*

Part II of the registration statement on Form F-3 (Items 8 through 10) is, with minor variations, identical to Part II of Form F-1, except that pursuant to Item 9, only the following exhibits must be included:

- (a) copies of all underwriting agreements with respect to the securities being registered;

<sup>145</sup> However, filings on Form 6-K may not be incorporated by reference if they contain non-GAAP financial measures that would not be permitted to be included in a 1933 Act filing. *See supra* Notes 46 to 54 and accompanying text. Issuers may incorporate only the portion of the Form 6-K that does not include non-GAAP financial measures. *See* SEC Division of Corporation Finance, “Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 106.02,” (last updated July 8, 2011).



- (b) copies of plans of acquisition, reorganization, arrangement, liquidation or succession;
- (c) instruments defining the rights of security holders, including indentures;
- (d) an opinion of counsel as to the legality of the securities being registered;<sup>146</sup>
- (e) an opinion of counsel, or revenue ruling from the Internal Revenue Service, supporting statements made in the filing concerning tax consequences to shareholders, if material;
- (f) where applicable, a letter from the independent accountant acknowledging awareness of the use in a registration statement of unaudited interim financial statements;
- (g) copies of consents required to be filed and of any powers of attorney (for any name signed pursuant to a power of attorney);
- (h) a statement of eligibility and qualification of each person designated to act as a trustee under an indenture to be qualified under the Trust Indenture Act of 1939;
- (i) if the securities are to be offered at competitive bidding, any form of communication which is an invitation for competitive bids sent or given to any person; and
- (j) any additional exhibits the issuer may wish to file or any document incorporated by reference in the filing that is not otherwise required.<sup>147</sup>

Form F-3 must be signed by the same persons as are required to sign Form F-1.

### 3. Annual Report on Form 20-F

Part I of Form 20-F includes the following:

Cover Page. The cover page must contain basic information including the name and address of the issuer, an English translation of the name, the jurisdiction of its incorporation, the title of each class of securities to be (or, in the case of an annual report, that have been) registered under the 1934 Act, the name of the securities exchanges on which its securities are listed and the number of outstanding shares of each of its classes of capital or common stock as of the close of the most recent fiscal year.

In addition, the issuer must certify:

<sup>146</sup> See *supra* Note 143.

<sup>147</sup> Although Part II of Forms F-1 and F-3 also requires financial statements in an interactive data format (XBRL), this requirement is inapplicable for most foreign private issuers unless the registrant prepares its financial statements under U.S. GAAP. In addition, XBRL files would not be required in an IPO registration statement. See SEC Release No. 33-9002 at note 73 (Jan. 30, 2009) and *infra* Notes 148 and 165.

- (a) whether it is a well-known seasoned issuer as defined in Rule 405 under the 1933 Act;
- (b) whether the issuer is required to file reports under Section 13 or 15(d) of the 1934 Act, and if so, whether it has filed all such required reports;
- (c) whether the issuer has posted on its corporate web site, if any, all interactive data files required under Rule 405 of Regulation S-T during the preceding 12 months (or period required, if shorter);<sup>148</sup>
- (d) whether the issuer is an accelerated, a large accelerated, or a non-accelerated filer as defined in Rule 12b-2 under the 1934 Act;
- (e) whether the basis of accounting for its financial statements is U.S. GAAP, IFRS or “Other,” and if “Other” is the basis of accounting for its financial statements, whether it has chosen to provide financial statements pursuant to Item 17 or Item 18 of the form; and
- (f) in the case of an annual report, whether the issuer is a shell company as defined in Rule 12b-2 under the 1934 Act.

In addition, if the issuer has been subject to bankruptcy proceedings within the past five years, the issuer must certify whether it has filed all the reports required by Sections 12, 13 or 15(d) of the 1934 Act subsequent to the distribution of securities pursuant to a confirmation plan.

Item 1. Identity of Directors, Senior Management, and Advisers. Subject to certain exceptions, this item requires a listing of the names and business addresses of the issuer’s directors, senior management, auditors and principal bankers and legal advisers, to the extent the issuer has a continuing relationship with them. If Form 20-F is being filed as an annual report under the 1934 Act, the information in Item 1 does not have to be provided. Information regarding the issuer’s principal bankers and legal advisers is required only if the issuer is obligated to disclose it in a jurisdiction outside the United States.

Item 2. Offer Statistics and Expected Timetable. This item requires the issuer to provide key information about the offering, such as the price of the issue or the method of determining the price and the total amount of securities expected to be issued. In addition, the issuer must identify important dates relating to the offering. This information does not have to be provided if Form 20-F is being used as a registration statement or annual report under the 1934 Act.

Item 3. Key Information. This four-part item requires the issuer to summarize key information about the issuer’s financial condition, capitalization, reasons for the offering and risk factors. Part (a) requires disclosure of selected income statement and balance sheet data of

<sup>148</sup> To date, XBRL taxonomy has not been released for issuers presenting financial statements under IFRS, and therefore those issuers are not yet required to post interactive data files. Issuers presenting financial statements under home-country GAAP are not required to post interactive data files. See *infra* Note 167 and accompanying text.

the issuer and, in certain cases, its predecessor, for the five most recent years (or three most recent years if five years of information is impossible or unduly burdensome to provide)<sup>149</sup> and for any interim period for which financial statements are required.<sup>150</sup> This part also requires exchange rate disclosure for the five years and any interim period where the financial statements are not prepared in U.S. dollars. Part (b) requires a statement of capitalization and indebtedness as of a date within 60 days prior to filing (and does not apply to annual reports). Part (c) requires an estimate of the net amount of proceeds to be realized from the offering and the intended use thereof (and does not apply to annual reports). Part (d) requires disclosure of risk factors.

Item 4. Information on the Company. The issuer must provide information about its business operations and the products or services it provides. This item requires information concerning the issuer's history; a description of the issuer's operations and its principal activities, markets, suppliers, sources, competitive position and seasonality; organizational structure; and information regarding any material tangible fixed assets, including leased property, plant and equipment as well as information about size, use, capacity, improvements, financing and environmental issues with respect to such property. This item requires disclosure responsive to any of the SEC's industry guides applicable to the issuer.<sup>151</sup>

<sup>149</sup> Any foreign private issuer submitting its first SEC registration statement or annual report under IFRS, and any foreign private issuer that presents its financial statements under U.S. GAAP and is a first-time filer, may provide only two years of selected financial data. *See supra* Note 60 and accompanying text. In addition, an EGC need only present two years of selected financial data for its initial registration statement (*see supra* Note 64 and accompanying text), and in subsequent annual reports and registration statements, is only required to present selected financial data through the earliest audited period presented in connection with its first registration statement. An EGC is also permitted to omit from a filing or confidential submission annual financial statements that it reasonably believes will not be required to be included in the registration statement at the time of effectiveness. *See supra* Note 27.

<sup>150</sup> If the issuer chooses to provide any non-GAAP financial information, it must also provide (i) a presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP, (ii) a quantitative reconciliation between the GAAP measure and the non-GAAP measure in question; (iii) a statement explaining why management believes the non-GAAP measure provides useful information regarding the issuer; and (iv) to the extent material, any additional purposes for which management uses the measure. There are also a number of prohibitions regarding the manner in which non-GAAP information may be presented, which are subject to limited exemptions for foreign issuers. *See supra* Notes 46 to 54 and accompanying text.

<sup>151</sup> Items 801 and 802 of Regulation S-K list the industry guides under the 1933 Act and 1934 Act, respectively. The industry guides provide instructions on enhanced disclosure requirements for issuers in certain industries including bank holding companies, oil and gas companies, interests in real estate limited partnerships, unpaid claims and claim adjustment expenses of property & casualty insurance underwriters and companies engaged in significant mining operations.

Item 4A. Unresolved Staff Comments. This item requires the issuer to disclose the substance of any written comments made by the SEC staff regarding its periodic filings under the 1934 Act not less than 180 days before the end of the fiscal year to which the Form 20-F relates that the issuer believes are material and that remain unresolved at the time the Form 20-F is filed. The disclosure may include the position of the issuer with respect to any such comment.

Item 5. Operating and Financial Review and Prospects. This item requires a discussion of the financial condition, changes in financial condition and results of operations for each year and interim period for which financial statements are required.<sup>152</sup> It calls for disclosure corresponding to what historically has been provided as MD&A of financial condition and results of operations, including with respect to the issuer's U.S. GAAP reconciliation.<sup>153</sup> This item also requires disclosure of off-balance sheet arrangements that may have a current or future material effect on the issuer's financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources and certain tabular information about specified contractual obligations.<sup>154</sup>

Item 6. Directors, Senior Management and Employees. This item requires disclosure of the name, business experience, function, outside business activities, date of birth, share ownership and compensation (including pursuant to stock bonus or option plans) of directors and senior management of the issuer. Compensation information must be provided on an individual basis, unless individual disclosure is not required in the issuer's home country.<sup>155</sup> The issuer also must disclose any arrangement or understanding between a director or executive officer and any other person pursuant to which he was selected as a director or executive officer, and any family relationship between any director or executive officer and any other director or executive officer. In addition, information regarding board terms and committees (including the audit committee or board of auditors where relevant) and the total number of persons employed by the issuer, broken down by category and geographic location, must be disclosed. In particular, an issuer listed or quoted in the United States must disclose whether its entire board of directors is acting as the company's audit committee.

Item 7. Major Shareholders and Related Party Transactions. Information regarding major shareholders (*i.e.*, beneficial owners of 5% or more of any class of the issuer's voting securities) must be provided. The name, number of shares held, significant changes in the number of shares held and explanation of voting rights for each major shareholder is required.

Disclosure of transactions and the key terms thereof, including loans, between the issuer and directors, major shareholders, key management personnel, unconsolidated affiliates or

<sup>152</sup> For first-time adopters of IFRS and EGCs filing their initial registration statement that elect to provide only two years of financial statements, the MD&A should only cover the prior two fiscal years and any subsequent interim periods. *See supra* Note 142.

<sup>153</sup> Each registration statement and Form 20-F is required to contain an MD&A section for the periods covered by the financial statements included in the filing, including interim periods. *See supra* Part III.D.2.

<sup>154</sup> In 2010, the SEC issued an interpretive release highlighting the need for issuers to provide adequate disclosure of their liquidity and capital resources, including the impact of short-term financings on liquidity, and clarifying the SEC's existing policy on disclosure of leverage ratios. *See* SEC Release Nos. 33-9144; 34-62934 (Sept. 17, 2010).

<sup>155</sup> *See supra* Part III.D.3.

by enterprises owned or controlled (with 10% ownership giving rise to presumptive control) by directors, major shareholders or key management also is required.<sup>156</sup>

Additionally, for registration statements only, the issuer must disclose whether any expert or counsel it retains is employed on a contingent basis or otherwise has a material, direct or indirect, economic interest in the issuer.

Item 8. Financial Information. Item 8 sets out the Form 20-F financial statement requirements, which are described in some detail in Part III.B of this memorandum.

Item 9. The Offer and Listing. The issuer must provide information regarding the offer or listing of the securities and the plan for their distribution. The information that must be provided includes the expected price of the offering<sup>157</sup>; the manner of determining the offering price if there is no established market for the securities; the price history of the securities; the markets on which they trade; the type and class of the securities being offered; and dilution. For annual reports disclosure is required only for price history and trading markets.

With respect to the plan of distribution, the issuer must provide the names and addresses of all underwriters; material features of the underwriting arrangements; material relationships between the issuer and the underwriters; a description of any overallotment option granted to the underwriters; a description of any group of targeted investors; whether to the issuer's knowledge securities will be purchased by any major shareholders or officers or directors of the issuer; the names, addresses and beneficial ownership of any selling shareholders; and the expenses of the offering, including underwriters' discounts or commissions.

Item 10. Additional Information. This item requires disclosure mainly regarding the issuer's capital stock, including outstanding options; certain provisions of the issuer's constituent instruments; material contracts; home-country exchange controls and other trade or dividend-related restrictions; and taxes applicable to U.S. holders. The disclosure regarding the issuer's capital stock is not required for annual reports.

Item 11. Quantitative and Qualitative Disclosures About Market Risk. The issuer must provide, in its reporting currency, very detailed quantitative information about market risk sensitive instruments (*e.g.*, derivatives, outstanding floating rate debt, fixed rate investments or debt or investments denominated in a currency other than its reporting currency) as of the end of the latest fiscal year. The issuer must also provide qualitative information concerning the issuer's primary market risk exposures (*e.g.*, interest rate and foreign currency exposure) and how those exposures are managed.

Item 12. Description of Securities Other than Equity Securities. This item consists of a description of the securities being registered (other than equity securities), and does

<sup>156</sup> If the issuer, its parent or any of its subsidiaries is a "foreign bank" as defined in Rule 13k-1 under the 1934 Act, and it has made loans to any of the foregoing persons, the key terms of the loans need not be disclosed; rather, the issuer may disclose only the identity of the person receiving their loan and their relationship with the foreign bank.

<sup>157</sup> See *supra* Note 34.

not apply to annual reports. If the securities registered are ADRs, the information must include: (i) the name of the depositary and the address of its principal office; (ii) the title of the ADRs and the identity of the deposited security; (iii) the amount of deposited securities represented by one ADR; (iv) the procedure for voting the deposited securities (if any); (v) the collection and distribution of dividends; (vi) the transmission of notices and reports received from the issuer; (vii) the sale or exercise of rights; (viii) the deposit or sale of securities resulting from dividends or reorganization; (ix) the amendment, extension or termination of the deposit; (x) rights of ADR holders to inspect the transfer books of the depositary and list of ADR holders; (xi) restrictions upon the right to deposit or withdraw the underlying securities; and (xii) any limitation upon the liability of the depositary. Any direct or indirect fees or charges payable by ADR holders to the depositary, as well as any fees or other direct or indirect payments made by the depositary to the issuer, must also be disclosed.

\* \* \*

Part II of Form 20-F includes the following:

Item 13. Defaults, Dividend Arrearages and Delinquencies. The issuer must identify any of its or its subsidiaries' indebtedness exceeding 5% of the issuer's or its subsidiaries' assets on which there has been any material default in the payment of principal, interest, any sinking or purchase fund installment or any other material default not cured within 30 days, and must state the nature of the default. Any material arrearage in the payment of dividends that has occurred, or any other material delinquency not cured within 30 days, with respect to any class of preferred stock of the issuer which is registered or which ranks prior to any class of registered securities, or with respect to any class of preferred stock of any significant subsidiary of the issuer, must also be disclosed. Information called for by this item previously reported on a Form 6-K may be incorporated by reference.

Item 14. Material Modification to the Rights of Security Holders and Use of Proceeds. The issuer must disclose any material modification of the rights of holders of registered securities either in the instruments defining such rights or through the issuance of any other class of securities. Any material withdrawal or substitution of assets securing any class of registered securities of the issuer must also be disclosed, as well as any change in the trustees or paying agents of registered securities. Information called for by this item previously reported on a Form 6-K may be incorporated by reference. This item also requires that certain issuers (those subject to Rule 463 of the 1933 Act) submit a detailed report regarding the use of proceeds after the effective date of the first registration statement filed by the issuer.

Item 15. Controls and Procedures. Where the Form 20-F is being used as an annual report, the issuer must disclose the conclusions of its principal executive officer or officers and principal financial officer or officers, or persons performing similar functions, about the effectiveness of its disclosure controls and procedures, based on management's evaluation thereof as of the end of the period covered by the report. The issuer must also disclose whether or not there were significant changes in its internal controls or in other factors that could significantly affect these controls subsequent to the date of that evaluation, including any corrective actions taken with regard to significant deficiencies and material weaknesses.

Items 15(b), (c) and (d) require a management report on internal control over financial reporting, a related attestation report of the auditor and any changes in internal control over financial reporting identified in connection with the evaluation that occurred during the period covered by the Form 20-F that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting. The requirement to disclose changes in the issuer's internal control over financial reporting occurring during the period that materially affected, or are reasonably likely to materially affect, such internal control, currently applies to all issuers. If the issuer has not filed an annual report with the SEC for the past fiscal year and was not required to do so pursuant to Section 13 or 15(d) of the 1934 Act (*i.e.*, because the issuer is making its initial public offering), it need not comply with Items 15(b) or 15(c), but instead must include the following statement in its first annual report: "This annual report does not include a report of management's assessment regarding internal control over financial reporting or an attestation report of the company's registered public accounting firm due to a transition period established by rules of the Securities and Exchange Commission for newly public companies."<sup>158</sup>

Item 16A. Audit Committee Financial Expert. If the Form 20-F is being used as an annual report, the issuer must disclose whether it has at least one "audit committee financial expert" serving on its audit committee and, if so, the name of the expert. If an issuer does not have an audit committee financial expert, it must disclose this fact and explain why it has no such expert.<sup>159</sup>

Item 16B. Code of Ethics. If the Form 20-F is being used as an annual report, the issuer must disclose whether it has adopted a code of ethics that applies to its CEO, CFO, principal accounting officer or controller and persons performing similar functions. If the issuer has not adopted a code of ethics governing its CEO and senior financial officers, it must disclose that fact. A "code of ethics" means written standards that are reasonably designed to deter wrongdoing and to promote (i) honest and ethical conduct; (ii) full, fair, accurate, timely and understandable disclosure in documents filed with the SEC and in other public communications; (iii) compliance with applicable laws, rules and regulations; (iv) the prompt internal reporting of violations of the code to an appropriate person or persons; and (v) accountability for adherence to the code. The code of ethics must be filed with the SEC, posted on the issuer's web site or otherwise made available to any person requesting a copy without charge. This item also requires the disclosure, on an annual basis, of any waiver (including any implicit waiver) granted to the CEO or any of the senior financial officers subject to the code, and any amendments that may be made to the code.

Item 16C. Principal Accountant Fees and Services. If the Form 20-F is being used as an annual report, the issuer must disclose, with certain specified breakdowns for audit

<sup>158</sup> Certain issuers are exempt from portions of this requirement. *See supra* Notes 86 to 88 and accompanying text. EGCs are exempt from delivering an attestation report pursuant to Section 404(b) of the Sarbanes-Oxley Act. *See supra* Section III.F.3.

<sup>159</sup> Note that while a foreign private issuer not listed or quoted in the United States is not required to have an audit committee pursuant to the requirements of the Sarbanes-Oxley Act, this disclosure requirement will nonetheless apply. If a company does not have an audit committee, the full board of directors is the audit committee under the definition of that term in the Sarbanes-Oxley Act. Accordingly, such a company would be required to provide disclosure concerning the presence of an audit committee financial expert on its board of directors as a whole. *See also supra* Note 93 and accompanying text.

fees, audit-related fees, tax fees and other fees, the aggregate fees billed in each of the prior two fiscal years for products and services provided by the issuer's independent auditor and other information relating to fee approval.

Item 16D. Exemptions from the Listing Standards for Audit Committees. If the Form 20-F is being used as an annual report, the issuer must disclose whether it has relied on any of the exemptions from the listing standards for audit committees that are required to be disclosed by Rule 10A-3 of the 1934 Act.

Item 16E. Purchases of Equity Securities by the Issuer and Affiliated Purchasers. Item 16E requires disclosure of all repurchases of shares (or other units) of any class of the issuer's equity securities<sup>160</sup> that is registered under Section 12 of the 1934 Act by or on behalf of the issuer or any affiliated purchaser.

Issuers are required to present much of this disclosure in tabular format in their periodic reports. Specifically, a foreign private issuer would be required to disclose in its Form 20-F for each month included in the period covered by the report all repurchases of its registered equity securities (both open market and private transactions), including:

- The total number of shares (or units) purchased;
- The average price paid per share (or unit);
- The number of shares (or units) purchased as part of publicly announced repurchase plans or programs; and
- The maximum number (or approximate dollar value) of shares (or units) that may still be purchased under such plans or programs.

Item 16F. Change in Registrant's Certifying Accountant. Item 16F requires disclosure of any changes in the accountant that certifies the issuer's financial statements that are included in the Form 20-F and the reason for the change (*e.g.*, resignation, declined to stand for re-election or dismissal). An issuer that has changed accountants is also required to disclose any disagreements between the issuer and its accountant that would have been described in the accountant's report, as well as any of the following issues:

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<sup>160</sup> The term "equity securities" is defined differently for U.S. issuers and non-U.S. issuers. For the corresponding disclosure required of U.S. issuers in Form 10-K and Form 10-Q, "equity securities" has the definition set forth in Section 3(a)(11) of the 1934 Act, while for purposes of Form 20-F, "equity securities" is defined in General Instruction F to Form 20-F. Section 3(a)(11) defines "equity security" as "any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the [SEC] shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security." Under General Instruction F to Form 20-F, equity security "includes common or ordinary shares, preferred or preference shares, options or warrants to subscribe for equity securities, and any securities, other than debt securities, which are convertible into or exercisable or redeemable for equity securities of the same company or another company." (Emphasis added.) As a result, U.S. issuers are required to disclose repurchases of convertible debt securities, while non-U.S. issuers are not.



- The accountant having advised the issuer that sufficient internal controls to develop reliable financial statements do not exist;
- The accountant having advised the issuer that information has come to its attention that resulted in it no longer being able to rely on management's representations or that has made it unwilling to be associated with the financial statements prepared by management;
- The accountant having advised the issuer that it needed to expand significantly the scope of its audit; and
- The accountant having advised the issuer that information has come to its attention that materially impacts the fairness or reliability of prior audit reports or the underlying financial statements or financial statements subsequent to the date of the most recent financial statements, and the issue has not been resolved because of the change in accountants.

The issuer must provide the former accountant with a copy of this report prior to filing the Form 20-F, and include any response that the accountant provides as an exhibit.

In addition, if the issuer has engaged a new principal accountant, it must disclose the identity of the accountant and whether the accountant has been consulted regarding certain issues, including disagreements with the prior accountant, and what the new and former accountants' views were on those issues.

Item 16G. Corporate Governance. Item 16G is applicable only for issuers whose securities are listed on a national securities exchange. A listed issuer must disclose any significant differences between its corporate governance practices and those followed by domestic companies under the listing standards of the securities exchange on which its securities trade. This is intended to be a general narrative discussion, rather than a detailed, item-by-item analysis.

Item 16H. Mine Safety Disclosure. Item 16H requires disclosure of mine safety violations in the United States. Issuers may determine the format in which they wish to present the disclosure, although the SEC has provided a sample tabular presentation.<sup>161</sup>

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Part III of Form 20-F includes the following:

Items 17 and 18. Financial Statements. Most foreign private issuers are required to present financial statements that comply with Item 18, including full operating segment

<sup>161</sup> The required disclosure of mine safety violations is limited to mines located in the United States and is required on a mine-by-mine basis; disclosure of violations is not permitted on an aggregate or regional basis. However, the SEC has noted that to the extent that mine safety issues present concerns that should be addressed in other areas of the annual report, such as risk factors, the description of the business, legal matters or MD&A, issuers should include such additional disclosure. Issuers are not required to disclose mine safety data in XBRL format. See SEC Release Nos. 33-9286; 34-66019 (Dec. 21, 2011).

financial disclosure. Item 17 has been phased out for foreign private issuers other than Canadian MJDS filers. Item 17 is less stringent than Item 18, as it allows the omission of many items (including segment data) ordinarily required to be disclosed in financial statements presented in accordance with the SEC's Regulation S-X.<sup>162</sup> Items 17 and 18 are identical in all other respects.

Under Item 18, the financial statements must be in essentially the same format as financial statements included in a filing on Form 10-K for U.S. domestic corporations. They may be presented in accordance with accounting principles other than those generally accepted in the United States or IFRS as issued by the IASB, but in such cases the issuer must provide a numerical reconciliation of the differences between financial statement amounts presented in accordance with the foreign generally accepted accounting principles and those presented in accordance with U.S. GAAP (except that for first-time registrants the numerical reconciliation of net income is required only for the two most recent fiscal years and any required interim period). This numerical reconciliation must be set forth on the face of, or in the notes to, the financial statements.<sup>163</sup>

The SEC's segment reporting requirements with respect to segment data are consistent with those of the Financial Accounting Standards Board's Statement of Financial Accounting Standards ("SFAS") No. 131.<sup>164</sup> Among other things, SFAS No. 131 defines an "operating segment" as a component of a business enterprise that engages in business activities from which it may earn revenues and incur expenses (including revenues and expenses relating to transactions with other components of the same enterprise), whose operating results are regularly reviewed by the enterprise's chief operating decision maker to make decisions about resources to be allocated to the segment and assess its performance, and for which discrete financial information is available.

To be reportable, an operating segment of an enterprise must meet any of the following thresholds: (i) its reported revenue, including both sales to external customers and inter-segment sales and transfers, must represent 10% or more of the combined revenue of all reported operating segments, whether generated inside or outside the company; (ii) its reported profit or loss must be 10% or more of the greater, in absolute amounts, of: (a) the combined reported profit of all operating segments that did not report a loss or (b) the combined reported loss of all operating segments that did report a loss; or (iii) its assets must be 10% or more of the combined assets of all operating segments. For each reportable segment, issuers must disclose the factors used to identify the enterprise's reportable segments, including the basis of organization and the types of products and services from which each reportable segment derives its revenues. In addition, issuers must disclose information about reported segment profit or loss, including certain revenues and expenses included in the reported segment profit or loss, segment assets, and the basis of measurement. The following items must be disclosed for each reportable

<sup>162</sup> Nevertheless, an issuer reporting under IFRS may be required to include segment financial information, in which case such information must be included in the financial statements included in accordance with Items 17 or 18. See *supra* Note 55.

<sup>163</sup> Foreign private issuers filing a Form 20-F for their first year of reporting under IFRS may file two years rather than three years of financial statements. See SEC Release Nos. 33-8567; 34-51535 (Apr. 12, 2005); SEC Release Nos. 33-8879; 34-57026 (Dec. 21, 2007) and *supra* Note 52.

<sup>164</sup> See SEC Release Nos. 33-7620; 34-40884 (Jan. 5, 1999).

segment if management considers them in measuring profit or loss: revenues from external customers and other operating segments, interest income and expense, depreciation, depletion, amortization and other significant non-cash items, unusual and extraordinary items, equity in net income of equity method investees and income taxes.

The SEC has begun phasing in a requirement that issuers provide financial statements to the SEC in interactive data (“XBRL”) format.<sup>165</sup> XBRL is an interactive data format that makes an issuer’s financial statements machine-readable so they can be downloaded, analyzed and compared using certain software applications. This requirement currently applies to Form 20-Fs filed by all issuers using U.S. GAAP.<sup>166</sup> An issuer that is required to provide financial statements in XBRL format must prepare two versions of its financial statements. The first version consists of the financial statements in ASCII or HTML format included directly in the 20-F. The second version is the XBRL version, which must be filed as an exhibit to the 20-F. Issuers that are required to present their financial statements in XBRL format must also post their financial statements on their web site in XBRL format, and the financial statements must remain there for at least 12 months. Foreign private issuers that use IFRS as issued by the IASB are not required to provide financial statements in XBRL format until the SEC releases an IFRS “taxonomy,” or standardized dictionary, of XBRL data tags<sup>167</sup> and those that continue to use home-country accounting standards reconciled to U.S. GAAP are not required to submit financial statements in XBRL format.

Item 19. Exhibits. The issuer must provide a list of the exhibits filed as part of the Form 20-F, including exhibits incorporated by reference. Where the Form 20-F is being used as an annual report, the certifications to be provided by the CEO and CFO pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act must be filed and furnished, respectively, as exhibits.<sup>168</sup>

Form 20-F must be signed on behalf of the issuer by an authorized officer.

<sup>165</sup> According to the original adoption schedule published by the SEC, foreign private issuers using IFRS would also have been required to use XBRL for financial statements in respect of fiscal years ended on or after June 15, 2011.

<sup>166</sup> An issuer need not file interactive data for an IPO registration statement. In recognition of the additional compliance burden, the SEC has provided that each issuer will have a 30-day grace period to file the interactive data for the first set of their financial statements that are required to be filed in interactive data format. In addition, for the first year that the interactive data format applies to each issuer, such issuer will only have to fully tag the face of the financial statements at the individual data element level; notes to the financial statements will only have to be tagged as block text.

<sup>167</sup> See Center for Audit Quality, SEC No-Action Letter (Apr. 8, 2011).

<sup>168</sup> See Part III.F.1 above.

#### 4. Form SD: Specialized Disclosure Report

Rather than amending Form 20-F to implement Sections 1502 and 1504 of the Dodd-Frank Act relating to “conflict minerals” and resource extraction payments by issuers, the SEC created Form SD for this disclosure. Disclosure on Form SD is considered to be “filed” rather than “furnished” for purposes of 1934 Act liability.

Conflict Minerals. Form SD requires disclosure regarding whether “conflict minerals” (gold, wolframite, columbite-tantalite (coltan) or cassiterite, their derivatives (tantalum, tin and tungsten) or any other mineral or its derivatives determined by the U.S. government to be financing conflict in the DRC) are necessary to the functionality or production of their products, and, if they are, whether any of these “conflict minerals” originated in the DRC or an adjoining country. Issuers subject to reporting obligations with respect to these conflict minerals must conduct a “reasonable country of origin” inquiry to determine whether any of these conflict minerals originated in the DRC or any adjoining countries. If an issuer is able to determine that none of its conflict minerals originated in the DRC or adjoining countries, it is required to disclose that determination and the process used to reach it in its report on Form SD, and to post this information on its web site for at least one year and retain records regarding the origin of its conflict minerals and its inquiry process.

If an issuer has knowledge (or has reason to believe) that its conflict minerals originated in the DRC or adjoining countries and did not (or may not have) come from scrap or recycled sources, the issuer must disclose that determination and include a “Conflict Minerals Report,” which must include a description of its products manufactured or contracted to be manufactured containing conflict minerals that are have not been found to be “DRC conflict free,” the facilities used to process those conflict minerals, those conflict minerals’ country of origin, the efforts to determine the mine or location of origin and the measures it took to exercise due diligence on the conflict minerals’ source and chain of custody. The issuer’s diligence process in preparing this report must be audited by an independent private sector auditor, with the results certified by the issuer, and the Conflict Minerals Report must be filed as an exhibit to the disclosure on Form SD.

Conflict minerals disclosure for each calendar year must be filed annually no later than May 31 of each year, covering the prior calendar year. All affected issuers were required to file the conflict minerals disclosure on Form SD for the first time on May 31, 2014.<sup>169</sup> There is a temporary transition period for disclosure covering calendar years 2013-2016 during which smaller reporting companies, as defined in Rule 12b-2 under the 1934 Act,<sup>170</sup> may describe their products as “DRC conflict undeterminable.”<sup>171</sup>

<sup>169</sup> Since this date fell on a Saturday, the filing deadline was extended to June 2, 2014 under Rule 0-3(a) under the 1934 Act.

<sup>170</sup> To qualify as a smaller reporting company, the issuer must have a public float of less than \$75 million. If an issuer has no common equity outstanding or no market price for its outstanding common equity, then the standard will be less than \$50 million in revenue in the last fiscal year. *See* Rule 12b-2 under the 1934 Act.

<sup>171</sup> The term may be used if a smaller reporting company is unable to determine that their minerals meet the statutory definition of “DRC conflict free” for one of two reasons: (1) The issuer is unable to determine if its conflict minerals financed or benefited armed groups in the DRC or an adjoining country, or (2) the issuer had a

Resource Extraction Payments. To implement Section 1504 of the Dodd-Frank Act, the SEC has recently proposed rules that would require issuers (including foreign private issuers) engaged in resource extraction to report information on any non-*de minimis* payments made to governments to further the commercial development of oil, natural gas or minerals. Issuers would be required to report the payments made with respect to each “project” and the aggregate amount of payments to each government.<sup>172</sup>

The reporting obligations would encompass providers of services that are “directly related to the commercial development” of oil, natural gas or minerals, but would not apply to manufacturers or distributors of products, equipment or services ancillary to extractive industries, such as manufacturers of drill bits and providers of oil and gas transportation services. Nonetheless, whether an issuer is a resource extraction issuer would depend on the specific facts and circumstances. “Payments” would include single payments or a series of related payments equal to or exceeding \$100,000 paid to further the commercial development of oil, natural gas or minerals, and include taxes, royalties, fees, production entitlements, bonuses, dividends and infrastructure improvement payments. Issuers could also meet their reporting obligations by providing disclosure that complies with requirements of any “alternative reporting regime” if the SEC determines that those requirements are “substantially similar” to the proposed rule. Importantly, the SEC’s proposed rule would not exempt issuers that are subject to confidentiality obligations (either by law or contract) with respect to extractive industries payments.

Issuers subject to these rules would be required to file resource extraction payments disclosures in tabular format on Form SD and in an XBRL annex no later than 150 days after the end of its fiscal year. If the current timetable is met and the final rule is adopted in June 2016, an issuer would have to file its first resource extraction payment report by no earlier than February 2018 for the fiscal years ending on or after September 30, 2017.<sup>173</sup>

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reason to believe that its necessary conflict minerals may have originated in the DRC or an adjoining country and may not have come from recycled or scrap sources and the information it gathered as a result of their required due diligence failed to clarify the conflict minerals’ country of origin, whether the conflict minerals financed or benefited armed groups in those countries, or whether the conflict minerals came from recycled or scrap sources. These issuers are still required to file a Conflict Minerals Report describing their due diligence, and must additionally describe the steps they have taken or will take, if any, since the end of the period covered in their most recent prior Conflict Minerals Report, to mitigate the risk that their necessary conflict minerals benefit armed groups, including any steps to improve their due diligence. *See* SEC Release No. 34-67716 (Aug. 22, 2012).

<sup>172</sup> *See supra* Note 107.

<sup>173</sup> Issuers would be required to comply with these rules no earlier than one year after their effective date. *See* SEC Release No. 34-76620 (Dec. 15, 2015). For more information on the resource extraction rules, see this Firm’s memorandums entitled “SEC Adopts Disclosure Rules on Resource Extraction Payments” (Sept. 12, 2012), “Court Vacates SEC Rule on Resource Extraction Payments and Remands to Commission” (July 2, 2013) and “Resource Extraction Payments – The SEC Tries Again” (Dec. 15, 2015).

APPENDIX B  
Listing Standards and Procedures for Foreign  
Corporations on the New York Stock Exchange and NASDAQ

I. New York Stock Exchange

Under U.S. securities law and the rules of the NYSE, all corporate securities must be registered under the 1934 Act before being admitted to trading on the NYSE. A foreign private issuer qualifies to list its securities on the NYSE if it satisfies certain eligibility requirements. In addition, for ADRs to qualify for listing, the ADRs must be sponsored by the foreign private issuer.<sup>174</sup> The NYSE requires companies seeking to list their securities on the NYSE to obtain written preliminary clearance to list (a “clearance letter”), on the basis of a free confidential review of eligibility.<sup>175</sup> A company must list within nine months of the date of issuance of the clearance letter. In the event that a company does not list within that nine-month period, the clearance letter will no longer be valid, and the issuer will need to request another confidential review as a condition to the issuance of a new clearance letter.

In order to make U.S. equity markets more accessible to foreign private issuers, the NYSE has adopted special standards and procedures for the listing of shares (or ADRs) of foreign private issuers where there is a broad, liquid market for their shares in their home country. The principal criteria include distribution and size requirements that require the foreign private issuer to have, worldwide, a minimum of 5,000 holders of 100 or more shares,<sup>176</sup> and a minimum of 2.5 million shares held publicly having a market value of at least \$100 million.<sup>177,178</sup> The alternate listing standards for foreign private issuers also require the issuer to meet one of

<sup>174</sup> Historically, the NYSE required that holders of sponsored ADRs receive without charge such services as cash and stock dividend payments, transfer of ownership and distribution of company financial statements and notices. However, in 2006, the NYSE amended its rules to eliminate restrictions on ADR depositary dividend and servicing fees, noting that the restrictions adversely affected the NYSE’s competitive position relative to other exchanges and quotation systems that did not limit these fees. *See* SEC Release No. 34-53978 (June 13, 2006). Nonetheless, the ability of the depositary to charge these fees to ADR holders is governed by the terms of the relevant deposit agreement, which, in the case of some older agreements, may not allow the depositary to charge these fees and, accordingly, will require an amendment to reflect the rule change. Foreign private issuers with a sponsored ADR facility are required to disclose in their annual report on Form 20-F the fees the depositary charges to investors, as well as payments, if any, made by the depositary to the issuer (including payments for expenses of the issuer that are reimbursed by the depositary). *See* Section II above.

<sup>175</sup> NYSE LISTED COMPANY MANUAL § 104.00 and § 702.00.

<sup>176</sup> Determined on the basis of beneficial ownership (if known) in addition to holders of record. *See* NYSE LISTED COMPANY MANUAL § 103.01(A).

<sup>177</sup> In connection with initial public offerings, the NYSE will accept an undertaking from the underwriters setting forth the anticipated value of the offering.

<sup>178</sup> Shares held by directors, officers or their immediate families and other concentrated holdings of 10% or more are excluded from the calculation of the number of publicly held shares. If an issuer has a significant concentration of shares or an issuer’s public market value has been adversely affected by market forces and would otherwise qualify for a listing, the NYSE will consider stockholders’ equity of at least \$100 million, as an alternate measure of size, if the issuer’s public market value is no more than 10% below the minimum of \$100 million.

the following three financial standards (determined under U.S. GAAP or IFRS) based on earnings, operating cash flow or global market capitalization:<sup>179</sup>

- (i) to have pre-tax earnings from continuing operations, after minority interest, amortization and equity in the earnings or losses of investees and as adjusted for certain specified items,<sup>180</sup> which total \$100 million in the aggregate for the last three fiscal years (with a minimum of \$25 million in each of the most recent two fiscal years);<sup>181</sup> or
- (ii) for companies with a total worldwide market capitalization of not less than \$500 million and revenues (in the most recent 12-month period) of \$100 million, to have aggregate operating cash flow (calculated in accordance with NYSE specifications) for the last three fiscal years of at least \$100 million (with a minimum of \$25 million, as adjusted for certain specified items, in each of the two most recent fiscal years); or
- (iii) to have not less than \$750 million in total worldwide market capitalization (with not less than \$75 million in revenues in the most recent fiscal year).<sup>182</sup>

The NYSE has also adopted special standards for the listing of shares or ADRs of affiliated companies of a listed company in good standing (as evidenced by a written representation from the company or its financial adviser excluding that portion of the balance sheet attributable to the new entity) where the listed company retains “control” of the entity or is under “common control” with the entity. “Control” for these purposes means the ability to exercise significant influence over operating and financial policies, and is presumed to exist when the listed company involved holds directly or indirectly 20% or more of the affiliate entity’s voting stock. Other indicia that may be taken into account for this purpose include board representation, participation in policymaking processes, material intercompany transactions, interchange of managerial personnel and technological dependency. In addition, the company must have a market capitalization of \$500 million or greater and a minimum 12 month operating history (although it is not required to have been a separate corporate entity for such period). Finally, the market value of publicly-held shares of the foreign private issuer must be at least \$60 million.

A foreign private issuer can alternatively elect to qualify under the NYSE’s domestic listing standards, which impose substantially less stringent financial tests but require a minimum of (i) 400 U.S. holders of 100 shares or more (or of a unit of trading if less than 100

<sup>179</sup> NYSE LISTED COMPANY MANUAL § 103.01(B).

<sup>180</sup> These adjustments include non-operating adjustments for currency devaluations when associated with translation adjustments representing a significant devaluation of a country’s currency (but not those associated with normal currency gains or losses).

<sup>181</sup> Reconciliation to U.S. GAAP for the third year would only be required if the NYSE determines it is necessary to demonstrate the \$100 million threshold is satisfied. Foreign private issuers that are emerging growth companies and present only two years of financial statements can qualify under the pre-tax earnings test by meeting the test’s requirements for the last two fiscal years.

<sup>182</sup> In the case of (ii) and (iii), companies listing in connection with an IPO must provide a written representation by the underwriter that demonstrates the company’s ability to meet the market capitalization requirement.

shares) or (ii) 2,200 total U.S. stockholders and average monthly U.S. trading volume of 100,000 shares during the most recent six months or (iii) 500 total U.S. stockholders and average monthly U.S. trading volume of 1 million shares during the most recent 12 months and in each case a minimum of 1.1 million shares publicly held in the United States with a market value of at least \$40 million (in the case of companies that list at the time of their initial public offerings),<sup>183</sup> or \$100 million (for other companies), excluding shares held by directors, officers, their immediate families or 10% or greater shareholders<sup>184</sup>, and a minimum share price of \$4.00.<sup>185</sup> Under the domestic listing standards, the NYSE also requires companies to meet one of two alternative financial standards (determined under U.S. GAAP or IFRS) based on earnings or global market capitalization, as follows:<sup>186</sup>

(i) to have aggregate pre-tax earnings from continuing operations, after minority interest, amortization and equity in the earnings or losses of investees and as adjusted for certain specified items, of at least (a) \$10 million in the aggregate over the last three fiscal years together with a minimum of \$2 million in each of the two most recent fiscal years and positive amounts in all three years; (b) \$12 million in the aggregate over the last three fiscal years together with a minimum of \$5 million in the most recent fiscal year and \$2 million in the next most recent fiscal year; or (c) for EGCs presenting only two years of audited financial statements in connection with an IPO registration statement, \$10 million in the aggregate over the last two fiscal years together with a minimum of \$2 million in each year; or

(ii) to have a global market capitalization of not less than \$200 million, provided that currently publicly traded companies must meet the test and have a minimum share price of \$4.00 for at least 90 consecutive trading days to be considered for listing, and companies listing for their initial public offering must provide a written representation from their underwriter that the company can meet the global market capitalization requirement post-offering. The NYSE requires issuers whose securities are

<sup>183</sup> This includes both initial public offerings and “Initial Firm Commitment Underwritten Public Offerings,” which is defined as an offering of common stock (i) by a company that has a class of common stock registered under the 1934 Act, (ii) that has not been listed on a national securities exchange since the commencement of its current registration and (iii) that is the company’s first public offering involving a firm commitment underwriting since the commencement of its current registration. The NYSE has indicated that it will nevertheless apply the higher \$100 million threshold for companies engaging in Initial Firm Commitment Underwritten Public Offerings if there is significant trading volume in the company’s securities in the over-the-counter market prior to listing, or if the company has previously registered in one or more 1933 Act registration statements the sale of significant numbers of shares of the class that the company proposes to list, unless there is evidence that subsequent trading has been very limited. *See* SEC Release No. 34-61407 (Jan. 14, 2010); NYSE LISTED COMPANY MANUAL § 102.01(B).

<sup>184</sup> If an issuer has a significant concentration of shares or an issuer’s public market value has been adversely affected by market forces and would otherwise qualify for a listing, the NYSE will consider stockholders’ equity of at least \$40 million or \$100 million, as applicable, as an alternate measure of size, if the issuer’s public market value is no more than 10% below the minimum of \$60 million or \$100 million, as applicable.

<sup>185</sup> The NYSE has historically calculated the \$4.00 minimum share price based on the price of an ADR, rather than the underlying shares. As a result, companies that fail to maintain the \$4.00 minimum share price based on underlying shares may set the shares per ADR ratio such that it complies with the listing standards, and may subsequently adjust this ratio through amendments to their deposit agreement if the need arises.

<sup>186</sup> NYSE LISTED COMPANY MANUAL § 102.01(C). *See also* SEC Release No. 34-73265 (Sept. 30, 2014).



listed on the exchange to comply with certain financial reporting and corporate governance policies. Foreign private issuers are generally exempt from compliance with the corporate governance requirements set forth in Section 303A of the NYSE Listed Company Manual (except with respect to the independent audit committee and audit committee financial expert requirements mandated by the Sarbanes-Oxley Act) provided they disclose any significant way in which their corporate governance practices differ from those followed by domestic companies under NYSE standards. A foreign private issuer includes this disclosure in its annual report on Form 20-F or, in the case of a foreign private issuer that files its annual report on Form 40-F or Form 10-K, may either include this disclosure in its annual report that is filed with the SEC or make it available on its web site and refer to the web site in the annual report filed with the SEC.<sup>187</sup> CEOs must promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any non-compliance with any applicable corporate governance standard.<sup>188</sup> In addition, foreign private issuers are required to submit to the NYSE (i) annual written affirmations (with respect to, among other things, compliance with Section 303A and the composition and governance structure of the company's audit and, for domestic issuers, nominating and compensation committees) and (ii) interim written affirmations (with respect to, among other things, changes in director independence determinations and audit and, for domestic issuers, nominating and compensation committees, and compliance with Section 303A).<sup>189</sup>

The NYSE may issue a public reprimand letter to any listed company that violates a NYSE listing standard. Repeated or flagrant violations may lead the NYSE to suspend trading in the stock of, or delist, a listed company.<sup>190</sup>

The NYSE requires a foreign private issuer to post its annual report on Form 20-F on its web site and include a prominent undertaking in English on its web site to provide holders the ability, upon request, to receive a hard copy of the audited financial statements (and not the complete annual report) free of charge. Simultaneously, the company must issue a press release, stating that the Form 20-F has been filed with the SEC, specifying the company's web site address and indicating that shareholders have the ability to request a free hard copy of the financial statements.<sup>191</sup> Any foreign private issuer that provides audited financial statements to beneficial holders of its shares in a manner consistent with the physical or electronic delivery

<sup>187</sup> Regarding the content of the disclosure, the NYSE is concerned with actual corporate governance practices of foreign private issuers and not general home country corporate governance standards. *See* NYSE LISTED COMPANY MANUAL § 303A.11. For ease of reference, many foreign private issuers use chart style disclosure to compare and contrast the NYSE's standards with their practices.

<sup>188</sup> The NYSE previously required written notification of only *material* non-compliance with NYSE governance standards of which an executive officer becomes aware. *See* SEC Release No. 35-61067 (Nov. 25, 2009); NYSE LISTED COMPANY MANUAL § 303A.12(b).

<sup>189</sup> *See* NYSE LISTED COMPANY MANUAL § 303A.12(c). The NYSE has published the annual written affirmation form for a foreign private issuer on its web site at [https://www.nyse.com/publicdocs/nyse/regulation/nyse/FPI\\_Annual\\_WA\\_1\\_4\\_10.pdf](https://www.nyse.com/publicdocs/nyse/regulation/nyse/FPI_Annual_WA_1_4_10.pdf).

<sup>190</sup> NYSE LISTED COMPANY MANUAL § 303A.13.

<sup>191</sup> *See* SEC Release No. 34-54344 (Aug. 21, 2006); NYSE LISTED COMPANY MANUAL § 203.01.

requirement set forth in the proxy rules applicable to domestic issuers need not comply with the undertaking or press release requirements described above.<sup>192</sup>

In 2016, the NYSE adopted a new rule requiring foreign private issuers to submit semi-annual unaudited financial information.<sup>193</sup> Under new Section 203.03 of its Listed Company Manual, issuers must, at minimum, submit to the SEC a Form 6-K with (i) an interim unaudited balance sheet as of the end of its second fiscal quarter and (ii) a semi-annual unaudited income statement that covers its first two fiscal quarters. The financial information on Form 6-K must be presented in English and submitted no later than six months following the end of the issuer's second fiscal quarter. The information is not required to be presented in IFRS or reconciled to U.S. GAAP, and there is no requirement that the information be presented on a consolidated basis or in U.S. dollars or that it comply with home-country GAAP. An amendment to the Listed Company Manual also clarifies that, despite a provision allowing foreign companies to follow home-country practice in lieu of complying with the NYSE's interim reporting obligations applicable to domestic companies, all NYSE-listed foreign private issuers would be required to disclose semi-annual interim financial information on Form 6-K.<sup>194</sup>

A foreign private issuer must also quickly release to the public certain information that could reasonably be expected to have a material effect on the market for its securities and act promptly to dispel unfounded rumors that result in unusual market activity or price variations, as well as publish interim statements of earnings as soon as they become available.<sup>195</sup> Information divulged pursuant to these rules should be released by means of a method that complies with Regulation FD. Issuers are encouraged, although not required, to comply with these rules by issuing press releases, which should be given to Dow Jones & Company, Inc., Reuters Economic Services and Bloomberg Business News (Wires). Issuers are also encouraged to send the press releases to the Associated Press, United Press International and newspapers in New York City and in cities where the issuer is located or has plants or other major facilities.<sup>196</sup>

<sup>192</sup> See SR-NYSE-2008-128 (filed with the SEC on Dec. 16, 2008); SEC Release No. 34-59123 (Dec. 14, 2008) (approving the rule change).

<sup>193</sup> See SR-NYSE-2016-12 (filed with the SEC on Jan. 25, 2016); SEC Release No. 34-77198 (Feb. 19, 2016) (approving the rule change).

<sup>194</sup> See NYSE LISTED COMPANY MANUAL § 103.00.

<sup>195</sup> See NYSE LISTED COMPANY MANUAL § 202.05; § 203.02.

<sup>196</sup> Although foreign private issuers are not subject to Regulation FD, the NYSE states that such issuers may comply with the timely alert policy through any method that would constitute compliance with Regulation FD for a domestic U.S. issuer, such as by filing or furnishing a Form 6-K or by distributing a press release through a widely disseminated news or wire service. In February 2015, the NYSE amended its rules to expand the pre-market hours during which listed companies must notify it prior to disseminating material news. Between the hours of 7:00 a.m. ET and 4:00 p.m. ET, listed companies are required to call the NYSE Market Watch Group at least ten minutes in advance of issuing news that is of a material nature or that might impact trading in the company's securities and provide a copy of any written form of that announcement via e-mail. In response to this rule change, many companies have decided to disseminate press releases in the afternoon, after market close, rather than the morning, before market open. After market hours, the NYSE requests companies that intend to issue material news to delay doing so until the earlier of publication of such company's official closing price on the NYSE or fifteen minutes after the close of trading on the NYSE. See NYSE LISTED COMPANY MANUAL § 202.06(A)-(C) and *supra* Note 126 and accompanying text.

The other corporate governance requirements of the NYSE are found in the NYSE's rules and relate to such matters as mandatory annual shareholders' meetings, oversight by each listed company of transactions with its officers and directors, purchases and sales of a listed company's stock by its directors and officers, awards of stock options to directors and officers, redemption of listed securities and tender offers by a listed company for its securities. These requirements are not subject to waiver by the NYSE and are applicable to foreign private issuers.<sup>197</sup>

The NYSE also has established rules with respect to the solicitation of proxies and other matters relating to annual meetings of shareholders and to certain transactions involving the issuer or its securities.<sup>198</sup> These rules include a requirement that issuers solicit from each shareholder a proxy (a written authorization given by the shareholder to someone else to vote his shares at a shareholders' meeting) for all shareholder meetings.<sup>199</sup> The NYSE may grant, in very limited circumstances, an exemption from this rule when applicable law precludes or makes virtually impossible the solicitation of proxies in the United States.<sup>200</sup>

During the confidential preliminary review of eligibility, a foreign private issuer should consult with representatives of the NYSE regarding the issuer's desire for exemption

<sup>197</sup> See NYSE LISTED COMPANY MANUAL § 302.00; § 314.00; § 309.00; § 311.00.

<sup>198</sup> The NYSE has taken a number of steps in recent years to restrict a practice among member companies known as broker discretionary voting. In 2009, the NYSE eliminated broker discretionary voting in elections of members of the boards of directors of U.S. listed companies, *see* SR-NYSE-2006-92 (filed with the SEC Oct. 24, 2006, as amended Feb. 26, 2009); SEC Release No. 34-60215 (July 1, 2009), followed by the elimination in 2010 of broker discretionary voting on executive compensation matters for all listed companies, including foreign private issuers. *See* SR-NYSE-2010-59 (filed with the SEC Aug. 26, 2010); SEC Release No. 34-62874 (Sept. 9, 2010). In 2012, the NYSE eliminated broker discretionary voting on additional matters, including proposals to destagger a board of directors, implement majority voting in director elections, eliminate supermajority voting requirements and override certain types of antitakeover provisions. *See* NYSE LISTED COMPANY MANUAL § 451. Notably, these restrictions apply to all member brokers of the NYSE, regardless of whether the securities being voted are actually listed on the NYSE. *See* NYSE Rules 450 to 460, "Applicability of Proxy Rules." Given that there is significant overlap among NYSE member brokers and NASDAQ member brokers, the NYSE rule effectively applies to securities listed on both exchanges, as well as unlisted securities.

Depositories generally have taken the position that these rules do not apply to them because they are acting in their capacities as depositories, and not brokers. Nevertheless, because broker discretionary voting for these matters is no longer allowed, depositories and issuers may feel pressure from an investor relations perspective to eliminate proxies for these matters from their deposit agreements.

<sup>199</sup> *See* NYSE LISTED COMPANY MANUAL § 402.04. In contrast, the SEC's rules governing proxy solicitations, including the internet delivery amendments adopted in 2006, are not applicable to foreign private issuers. *See* Rule 3a12-3 under the 1934 Act.

<sup>200</sup> The NYSE listing agreement for foreign private issuers requires the issuer to "solicit proxies for all meetings of stockholders," NYSE LISTING AGREEMENT FOR FOREIGN PRIVATE ISSUER EQUITY SECURITIES, and the NYSE listing rules provide that "actively operating" issuers are required to solicit proxies except where "applicable law precludes or makes virtually impossible the solicitation of proxies in the United States," *id.* §402.04(A). Certain ADR depositories take the view that the proxy solicitation requirement is satisfied by mailing voting instruction cards to registered holders (rather than beneficial owners) of the underlying securities; these registered holders typically pass along the voting instruction cards to beneficial owners. Other depositories believe the NYSE requirement is only met if an issuer solicits proxies directly from beneficial owners, which is generally accomplished by sending owners a voting instruction card through a proxy solicitation firm, who then coordinates the delivery of the voting instruction card with the Depositary Trust & Clearing Corporation (DTCC).

from NYSE policies. Waivers are granted on a case-by-case basis and foreign private issuers are required to provide the NYSE with a written certificate from independent counsel in the issuer's home country confirming that the practices the issuer wishes to follow in lieu of those required by the NYSE are not prohibited by the laws of that country. Upon listing, the issuer is required to enter into a listing agreement with the NYSE detailing the continuing obligations applicable to the issuer.

The following is a summary of the information to be submitted in connection with a confidential preliminary review of eligibility for listing ADRs:

- (a) A certified copy of the issuer's charter and by-laws (translated into English);
- (b) Specimens of certificates traded or to be traded in the U.S. market;
- (c) A copy of the deposit agreement;
- (d) Copies of the issuer's annual reports to stockholders for the last five years, with two copies of the report for the latest year. If English versions are not available, translations of the last three years' reports must be provided;
- (e) The latest available prospectus covering an offering under the 1933 Act (where available) and the latest annual SEC filing, if any. Where no SEC documents are available, a copy of the most recent document utilized in connection with an offering of securities to the public or existing shareholders as well as any filings made with any regulatory authority;
- (f) The proxy statement or equivalent material made available to stockholders for the most recent annual (general) meeting (translated into English);
- (g) Worldwide and U.S. stock distribution schedules;
- (h) Supplementary data to assist the exchange in determining the character of the share distribution and the number of publicly held shares. This information on both U.S. and worldwide holdings includes: (i) the names of the 10 largest holders; (ii) NYSE member organizations holding 1,000 or more shares; (iii) a list of the various stock exchanges or other markets upon which the issuer's securities are currently traded as well as the price range and volume of those securities over the past five years; (iv) stock owned or known to be controlled by officers, directors and their immediate families, or other holdings of 10% or more; (v) any type of restriction (and the details thereof) relating to shares of the company; (vi) an estimate of non-officer employee ownership; and (vii) shares of the issuer held in profit-sharing, savings, pension or similar plans for benefit of its employees;
- (i) If the issuer has any partially-owned subsidiaries, a description of the ownership (public or private) of the remainder, including ownership by any of the issuer's officers or directors;
- (j) A list of the issuer's principal bankers and a statement of the holdings of its stock by any one of these bankers in excess of 5%;

(k) The identity of any regulatory agency which regulates the issuer or any portion of its operations, and a description of the extent and impact of such regulation on taxation, accounting, foreign exchange control, etc.;

(l) Identification of the issuer's principal officers and directors, including name, title and principal occupation;

(m) Total number of employees and general status of labor relations; and

(n) A description of pending material litigation and opinion as to potential impact upon the issuer's operations.

After the NYSE completes its eligibility review, it will allow an issuer to file an NYSE listing application, which will consist primarily of information from the issuer's registration statement, together with certain opinions and ancillary documents.

The NYSE also has a "Fast Path" program, under which issuers that are applying for listing, or that are already listed, on the NYSE may apply for cross-listing on NYSE Euronext's European markets using documentation previously filed with the SEC, with or without a simultaneous capital raising. This program is available to all foreign private issuers other than those incorporated in the European Economic Area.

## II. NASDAQ

The substantive and procedural requirements for inclusion of common shares (or ADRs) of foreign private issuers in the NASDAQ Capital Market are considerably less burdensome than the corresponding NYSE standards. More stringent requirements must be met for such securities to be included in the NASDAQ Global Select Market or the NASDAQ Global Market.<sup>201</sup> The principal difference between these markets and the NASDAQ Capital Market is that the former presents the last sale prices of a security on an immediate basis, while the latter reports only current bid and asked quotations.

The listing requirements for any of the NASDAQ markets consist of criteria relating to distribution of the issuer's stock and the size of the issuer. Effective September 28, 2004, NASDAQ applies the same quantitative initial inclusion standards to non-Canadian foreign private issuers seeking to list on the NASDAQ Capital Market as those applicable to U.S. and Canadian issuers. The initial listing standards for the NASDAQ Capital Market include the following requirements: (i) a minimum bid price of \$4.00<sup>202</sup>; (ii) at least 1 million publicly held shares of the issuer's common stock worldwide (in the case of ADRs, there must be at least 400,000 ADRs outstanding at the time of such inclusion); (iii) at least 300 round lot holders of the security; (iv) at least three registered and active market makers for the security (two for

<sup>201</sup> On July 1, 2006, the NASDAQ National Market, which was formerly the higher tier of NASDAQ on which the most active and liquid stocks were traded, was renamed the NASDAQ Global Market. In conjunction with this, NASDAQ created the new NASDAQ Global Select Market, a segment of the NASDAQ Global Market with higher initial listing standards that are currently more stringent than those of the NYSE.

<sup>202</sup> A company may qualify under a closing price alternative of \$3.00 or \$2.00 if the company meets certain other requirements.

continued inclusion); and (v) the issuer must comply with FINRA's corporate governance requirements.

In order to meet the NASDAQ Capital Market issuer size criteria, the issuer must meet one of three alternative requirements.

Under the first alternative, the issuer must have stockholders' equity of at least \$5 million, market value of publicly held shares of at least \$15 million and a two-year operating history.

Under the second alternative, the issuer's total outstanding listed shares must have a market value of \$50 million, stockholders' equity of at least \$4 million and a market value of publicly held shares of at least \$15 million.<sup>203</sup>

Under the third alternative, the issuer must have net income from continuing operations of at least \$750,000 in the most recently completed fiscal year or in two of the three most recently completed fiscal years, stockholders' equity of at least \$4 million and a market value of publicly held shares of at least \$5 million.

The requirements for inclusion of securities in the NASDAQ Global Market apply to all issuers, both U.S. domestic and foreign. There are four alternative sets of criteria for initial listing on the NASDAQ Global Market. In each case, certain basic requirements must also be met, including (i) a public float of 1.1 million shares or ADRs worldwide, (ii) 400 round lot holders of the shares or ADRs and (iii) a minimum bid price for such securities within a period of approximately five business days preceding inclusion in the NASDAQ Global Market, or a projected offering price of such securities in the case of an initial public offering, of at least \$4.00.

Under the first alternative, the public float must have an aggregate market value of at least \$8 million. In addition, the issuer must have had pre-tax operating income of at least \$1 million in its most recent fiscal year or in two of its three most recent fiscal years and stockholders' equity of \$15 million. Finally, the issuer must have at least three registered and active market makers.

Under the second alternative, the public float must have an aggregate market value of at least \$18 million. There is no pre-tax income requirement, but the issuer must have stockholders' equity of at least \$30 million and an operating history of at least two years. Finally, the issuer must have at least three registered and active market makers.

Under the third alternative, there are no pre-tax income or operating history requirements, and the public float must have an aggregate market value of at least \$20 million.

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<sup>203</sup> If a current publicly traded company is qualifying to list only under this standard, it must meet the \$50 million market value requirement and the applicable bid price requirement for 90 consecutive days prior to applying for listing.

In addition, the issuer must have a market value of total outstanding listed shares of \$75 million.<sup>204</sup> Finally, the issuer must have four registered and active market makers.

Under the fourth alternative, there also are no pre-tax income or operating history requirements, and the public float must have an aggregate market value of at least \$20 million. In addition, the issuer must have had total assets of \$75 million and total revenues of \$75 million for most recent fiscal year or in two of its three most recent fiscal years. Finally, the issuer must have four registered and active market makers.

The requirements for inclusion of securities in the NASDAQ Global Select Market also apply to all issuers, and there are four alternative sets of criteria for initial listing. In each case, certain basic requirements must also be met, including: (i) a public float of 1.25 million shares or ADRs worldwide; (ii) any of (1) 550 beneficial holders of the shares or ADRs with an average monthly trading volume over the prior 12 months of at least 1.1 million shares per month, (2) 2,200 beneficial holders of the shares or ADRs or (3) 450 round lot holders; (iii) a minimum bid price for such securities within a period of approximately five business days preceding inclusion in the NASDAQ Global Select Market, or a projected offering price of such securities in the case of an initial public offering, of at least \$4.00; (iv) a “public float” (*i.e.*, shares that are not held directly or indirectly by any officer or director of the issuer or by any other person who is the beneficial owner of more than 10% of the total shares outstanding) with an aggregate market value of any of (1) \$110 million, (2) \$100 million and stockholders’ equity of \$110 million, (3) \$45 million in the case of a company listing in connection with its initial public offering or that is affiliated with or being spun off from another issuer listed on the NASDAQ Global Select Market or (4) \$70 million in the case of a closed-end management investment company registered under the Investment Company Act of 1940; and (v) at least three<sup>205</sup> registered and active market makers.

Under the first alternative, the issuer must have had (i) aggregate pre-tax operating income of at least \$11 million in its three most recent fiscal years, (ii) pre-tax operating income of at least \$2.2 million in each of its two most recent fiscal years and (iii) pre-tax operating income (as opposed to a loss) in each of the prior three fiscal years.

Under the second alternative, the issuer must have had (i) revenue of at least \$110 million in the previous fiscal year and (ii) aggregate net cash from operating activities of at least \$27.5 million in the prior three fiscal years (with positive net cash from operating activities in each of the prior three fiscal years). In addition, the issuer must have a market value of total outstanding listed shares of at least \$550 million over the prior 12 months. There is no pre-tax income requirement.

Under the third alternative, there are no pre-tax income or cash flow requirements, but the issuer must have (i) a market value of total outstanding listed shares of at least \$850

<sup>204</sup> If a current publicly traded company is qualifying to list only under this standard, it must meet the \$75 million market value requirement and the minimum \$4.00 bid price requirement for 90 consecutive days prior to applying for listing.

<sup>205</sup> Under circumstances where the issuer does not meet certain income or equity thresholds, the issuer will be required to have at least four registered and active market makers.

million over the prior 12 months and (ii) revenue of at least \$90 million in the previous fiscal year.

Under the fourth alternative, the issuer must have (i) a market value of total outstanding listed shares of \$160 million, (ii) total assets of at least \$80 million for the most recently completed fiscal year and (iii) stockholders' equity of at least \$55 million.

The standards related to the market value of total outstanding shares are based on the market value of securities listed on any national securities exchange.

The NASDAQ Stock Market Rules<sup>206</sup> establish a set of "corporate governance requirements," generally similar in scope to the corresponding NYSE rules, which are applicable to issuers whose securities are listed on NASDAQ.<sup>207</sup> These rules, like the NYSE rules, generally exempt foreign private issuers from compliance with the corporate governance requirements (except with respect to the independent audit committee and audit committee financial expert requirements mandated by the Sarbanes-Oxley Act) provided that they (1) disclose in their annual reports on Form 20-F each requirement that is not followed and describe the alternative home-country practice followed in lieu of such requirement,<sup>208</sup> (2) provide FINRA a written statement from local counsel certifying that the laws of its home country do not prohibit the issuer's practices and (3) participate in the Direct Registration Program (unless prohibited by home-country laws).<sup>209</sup> In addition, foreign private issuers may not disparately reduce or restrict the voting rights of shareholders through corporate actions or issuances of securities. Unlike the NYSE, the NASDAQ stock market rules permit an issuer to follow home-country practice in lieu of soliciting proxies.<sup>210</sup>

Pursuant to the NASDAQ Stock Market Rules, an issuer whose securities are listed on NASDAQ is required to:

- (i) distribute annual and interim reports to shareholders (foreign private issuers must make available interim reports disclosing any information submitted to the SEC on Form 6-K and relating primarily to operations and financial position);
- (ii) have a majority of independent directors on its board of directors, which must have regularly scheduled meetings ("executive sessions") at which only independent directors are present;

<sup>206</sup> NASDAQ STOCK MARKET RULES §§ 5601-5640.

<sup>207</sup> NASDAQ offers guidance on how to comply with its corporate governance-related requirements in the form of a list of "frequently asked questions" with responses, available under the "Legal and Compliance" section of the "Listed Companies" page on its web site ([www.nasdaq.com](http://www.nasdaq.com)).

<sup>208</sup> In addition, any waivers of an issuer's code of conduct or code of ethics for directors or executive officers must be disclosed in a report on Form 6-K or issuer's annual report on Form 20-F following such waiver. *See* NASDAQ STOCK MARKET RULES § 5610.

<sup>209</sup> *See* NASDAQ Stock Market Rule Interpretation IM-5615-3.

<sup>210</sup> NASDAQ STOCK MARKET RULES § 5250(c)(2).



- (iii) adopt certain mechanisms for the determination of compensation and the nomination of the issuer's CEO and members of the board of directors;
- (iv) have, and certify that it has and will continue to have, an audit committee of at least three members, comprised solely of independent directors, each of whom is financially literate and at least one of whom must have an accounting or related financial management experience;
- (v) adopt a formal written audit committee charter;
- (vi) hold annual meetings of shareholders, prepare proxy statements, solicit proxies for shareholders' meetings and establish a quorum of at least 33 1/3% of the outstanding common shares for shareholders' meetings;
- (vii) comply with certain specified conflict of interest rules in connection with related-party transactions;
- (viii) obtain shareholder approval prior to the issuance of securities (a) under certain stock option or purchase plans pursuant to which stock may be acquired by officers, directors, employees or consultants of the issuer, (b) when the issuance or potential issuance will result in a change of control of the issuer, (c) in certain cases, in connection with the acquisition of stock or assets of another company and (d) in certain cases of private offerings of securities;
- (ix) be audited by an independent public accountant who has in turn received external quality control by an independent peer or is enrolled in a peer review program, which itself must be subject to oversight by an independent body such as the PCAOB, and will receive such control within 18 months;
- (x) be eligible for a Direct Registration Program (which allows for the electronic transfer of securities);
- (xi) adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available; and
- (xii) provide NASDAQ with prompt notification after one of its executive officers becomes aware of any material non-compliance by the issuer of FINRA's corporate governance standards.

Additionally, if the issuer establishes or maintains a Direct Registration Program for its shareholders, it must participate, directly or through its transfer agent, in an electronic link with a registered securities depository to facilitate the electronic transfer of securities held pursuant to such program. Finally, issuers are also required to enter into a listing agreement with FINRA in which they agree to comply with those of the foregoing requirements applicable to them.

### III. Schedule of Listing Fees For Equity Securities

- A. NYSE. The following table summarizes the fee schedules for the NYSE:

1. Original Listing Fee<sup>211</sup>

Base Amount \$50,000<sup>212</sup> plus \$0.0032 per share (or ADR)<sup>213</sup>

2. Additional Listing Fee with Respect to Subsequent Issues<sup>214</sup>

Up to 75 million shares (or ADRs) \$4,800 per million

Over 75 and up to 300 million shares (or ADRs) \$3,750 per million

In excess of 300 million shares (or ADRs) \$1,900 per million

Minimum additional listing fee \$5,000

3. Continuing Annual Fee<sup>215</sup>

Primary class of common shares

Fee per million shares (or ADRs) \$1,000

Minimum annual fee \$45,000

Each additional class of common shares

Fee per million shares (or ADRs) \$1,000

Minimum annual fee \$20,000

B. NASDAQ. The fee structures for the NASDAQ markets are considerably simpler than the fee schedule for the NYSE. NASDAQ charges “entry” or original listing fees and annual fees.

<sup>211</sup> The minimum and maximum original listing fee for the NYSE is \$125,000 and \$250,000, respectively, which includes the base amount of \$50,000. In addition, there is a \$500,000 cap on aggregate fees (including most listing and annual fees) per issuer in any given calendar year (which includes and encompasses all classes of securities except derivatives issued by listed companies as part of their capital structure). The cap does not apply to closed-end funds and certain structured products.

<sup>212</sup> Payable once by an issuer upon the original listing of any type of securities.

<sup>213</sup> A foreign company that issues ADRs in the United States would list the ADRs rather than the underlying shares on the NYSE. The NYSE fees set forth on this schedule would then be determined on the basis of the number of ADRs, rather than the number of shares, outstanding and issued in the United States at the time of listing.

<sup>214</sup> An additional listing is aggregated with earlier listings, including the original listing, for purposes of determining the fee per million shares. A reduced additional listing fee may be payable if a new listing results only from a technical change in an issuer’s corporate structure. Listing fees on shares issued in conjunction with stock splits and stock dividends are capped at \$150,000 per split or issuance. The additional listing fee is the greater of the fees calculated on a per-share basis and the minimum cap on the additional listing fee.

<sup>215</sup> The applicable NYSE fee is the greater of the minimum annual fee and the fee calculated on a per share basis, subject to the fee cap described above. See *supra* Note 211. The annual fee structure differs for closed-end funds and certain structured products.

## 1. NASDAQ Capital Market

Entry Fee.<sup>216</sup> The fee is calculated based on the aggregate number of shares to be listed at the time of initial listing, regardless of class,<sup>217</sup> according to the schedule below. This fee does not include a one-time fee of \$5,000 representing a non-refundable application fee.

Up to 15 million ADRs	\$50,000
Over 15 million ADRs	\$75,000

Annual Fee. The issuer is charged either the standard annual fee or the all-inclusive annual fee, which also includes all other listing costs such for listing additional shares, corporate actions and certain regulatory fees. All issuers listing on NASDAQ as of 2015 are automatically enrolled in the all-inclusive annual fee program.<sup>218</sup> For foreign private issuers listing ADRs, the annual fee is calculated based on total ADRs issued and outstanding in the United States, according to the schedule below.

### Standard Annual Fee.<sup>219</sup>

Up to 10 million ADRs	\$32,000
Over 10 million ADRs	\$40,000

### All-Inclusive Annual Fee:

Up to 10 million ADRs	\$37,000
Over 10 million ADRs	\$45,000

## 2. NASDAQ Global Market and NASDAQ Global Select Market

Entry Fee.<sup>220</sup> The fee is calculated based on the aggregate number of shares to be listed at the time of initial listing, regardless of class,<sup>221</sup> according to the schedule below. This fee does not include a one-time fee of \$25,000 representing a non-refundable application fee.

<sup>216</sup> Total entry fees paid by a company for all classes of securities listed on the NASDAQ Capital Market, regardless of date listed, may not exceed \$50,000 (excluding the \$5,000 non-refundable processing fee required for each application).

<sup>217</sup> For foreign private issuers, entry fees are levied only on those shares or ADRs issued and outstanding in the United States.

<sup>218</sup> All issuers listing on NASDAQ will be subject to the all-inclusive annual fee program as of January 1, 2018.

<sup>219</sup> For foreign private issuers, an additional annual fee of \$7,500 is assessed for the subsequent listing of more than 49,999 additional shares, or in the case of ADRs, the issuance of additional shares underlying the ADRs in any year of a class of shares that is already listed on the NASDAQ Capital Market.

<sup>220</sup> Total entry fees paid by a company for all classes of securities listed on the NASDAQ Global Market or Global Select Market, regardless of date listed, may not exceed \$225,000 (excluding the \$25,000 non-refundable processing fee required for each application).

<sup>221</sup> For foreign private issuers, entry fees are levied only on those shares or ADRs issued and outstanding in the United States.

Up to 30 million ADRs	\$125,000
30+ to 50 million ADRs	\$150,000
50+ to 100 million ADRs	\$200,000
Over 100 million ADRs	\$225,000

Annual Fee. The issuer is charged either the standard annual fee or the all-inclusive annual fee, which also includes all other listing costs such for listing additional shares, corporate actions and certain regulatory fees. For foreign private issuers listing ADRs,<sup>222</sup> the annual fee is calculated based on total ADRs issued and outstanding in the United States, according to the schedule below.

Standard Annual Fee:<sup>223</sup>

Up to 50 million ADRs	\$40,000
50+ to 75 million ADRs	\$46,500
Over 75 million ADRs	\$69,000

All-Inclusive Annual Fee:

Up to 50 million ADRs	\$45,000
50+ to 75 million ADRs	\$52,500
Over 75 million ADRs	\$75,000

<sup>222</sup> ADRs meaning the aggregate of all classes of ADRs listed on the NASDAQ Global Market as show in the foreign private issuer's most recent periodic report.

<sup>223</sup> For foreign private issuers, an additional annual fee of \$7,500 is assessed for the subsequent listing of more than 49,999 additional shares, or in the case of ADRs, the issuance of additional shares underlying the ADRs, during the fiscal period. The fee is assessed annually based on the foreign private issuer's total shares outstanding as reporting on its period reports filed with the SEC. There is no fee for issuances of up to 49,999 additional shares per year. *See* NASDAQ STOCK MARKET RULES § 5910(b)(2) and (b)(3).

## APPENDIX C

### List of Designated Offshore Securities Markets

A “designated offshore securities market” is defined as any foreign securities exchange or non-exchange market designated by the SEC under Regulation S under the 1933 Act. The following is a list of designated offshore securities markets by country, as of the date of this memorandum:

#### **Australia**

Australian Stock Exchange Limited

#### **Austria**

Vienna Stock Exchange (Wiener Börse)

#### **Bahamas**

Bahamas International Securities Exchange

#### **Bermuda**

Bermuda Stock Exchange

#### **Canada**

Alberta Stock Exchange  
Canadian National Stock Exchange  
(and Pure Trading)  
Canadian Venture Exchange Inc.  
Montreal Stock Exchange  
Toronto Stock Exchange

#### **Channel Islands**

Channel Islands Stock Exchange

#### **Czech Republic**

Prague Stock Exchange

#### **Denmark**

NASDAQ OMX Copenhagen A/S  
(formerly the Copenhagen Stock Exchange)

#### **Egypt**

Egyptian Stock Exchange (including the Cairo and Alexandria Stock Exchanges)

#### **England**

London Stock Exchange (including SEAQ International and the Alternative Investment Market)

#### **Europe**

Eurobond market (as regulated by the International Securities Market Association)

Euronext Amsterdam N.V.

Euronext Brussels S.A./N.V.

#### **Finland**

NASDAQ OMX Helsinki Ltd. (formerly the Helsinki Stock Exchange)

#### **France**

Euronext Paris (formerly Bourse de Paris) (including the Eurolist Market and the Alternext Market)

#### **Germany**

Berlin Stock Exchange  
Frankfurt Stock Exchange

#### **Hong Kong**

Stock Exchange of Hong Kong Limited (including the Growth Enterprises Market)

#### **Ireland**

Irish Stock Exchange

#### **Israel**

Tel Aviv Stock Exchange Ltd.

#### **Italy**

Borsa Valori di Milano

**Japan**

Tokyo Stock Exchange (including the Market of High Growth and Emerging Stocks (Mothers))

**Korea**

Korea Exchange

**Luxembourg**

Bourse de Luxembourg

**Malaysia**

Bursa Malaysia Securities Berhad and, for the limited purpose of permitting the secondary market trading of certain bonds, Bursa Malaysia Bonds Sdn Bhd

**Malta**

Malta Stock Exchange

**Mexico**

Mexican Stock Exchange

**Norway**

Oslo Stock Exchange

**Panama**

Panama Stock Exchange

**Peru**

Bolsa de Valores de Lima

**Poland**

Warsaw Stock Exchange.

**Singapore**

Stock Exchange of Singapore Ltd.

**South Africa**

Johannesburg Stock Exchange

**Spain**

Barcelona Stock Exchange

Bilbao Stock Exchange

Madrid Stock Exchange

Valencia Stock Exchange

**Sweden**

NASDAQ OMX Stockholm AB (formerly the Stockholm Stock Exchange) (including First North)

**Switzerland**

SWX Swiss Exchange

**Taiwan**

Taiwan Stock Exchange

**Turkey**

Istanbul Stock Exchange

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