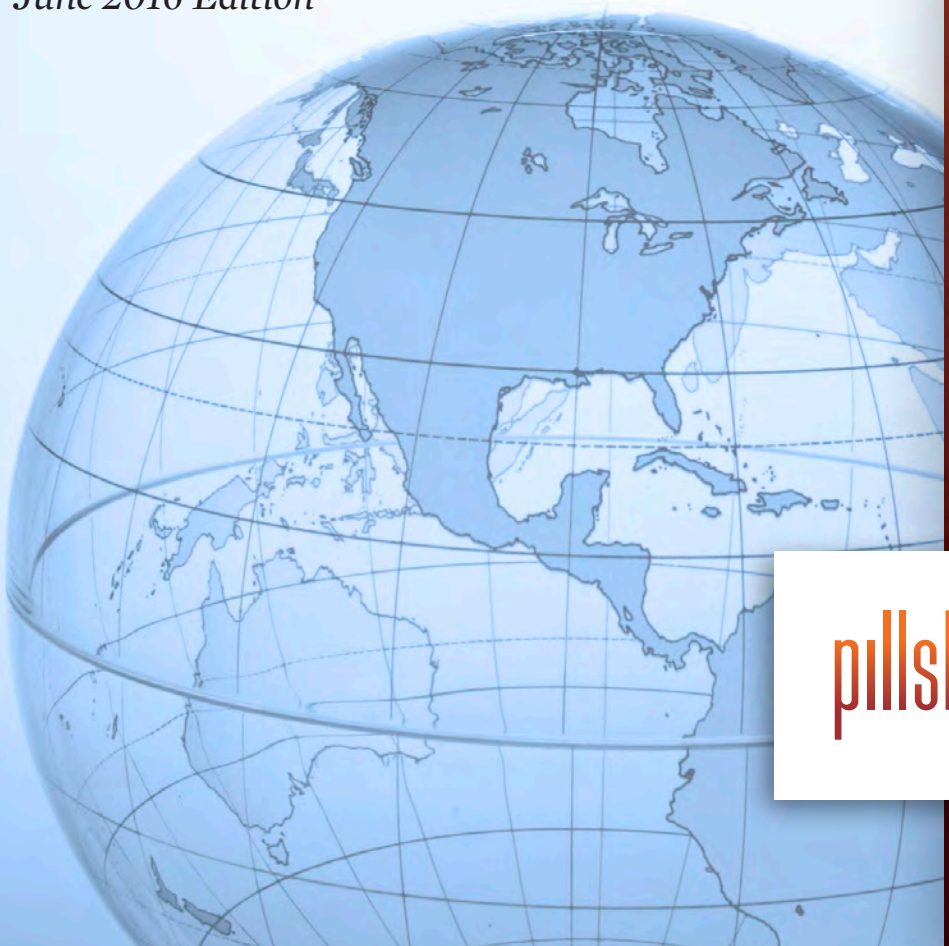
Pillsbury Winthrop Shaw Pittman LLP

U.S. Capital Markets Regulation and Practices

An Overview for Non-U.S. Companies

June 2016 Edition



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The needs of Pillsbury's clients are often international in scope. To meet those needs, Pillsbury's U.S. and international offices form a fully integrated network that advises clients doing business around the globe. As a result, nearly one-third of our work touches overseas.

Our recent recognition includes:

- *Chambers USA* 2016 ranked our Corporate/M&A practice regionally in Washington DC, New York and Virginia, and our California Capital Markets: Debt & Equity practice. Twelve of our partners were recognized for their practice excellence and client service.
- *Best Lawyers/US News & World Report* 2016 recognized Pillsbury's national Corporate, Securities/Capital Markets, Mergers & Acquisitions and Venture Capital practices as Tier 1.
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- In 2015, *Legal 500* US recognized our M&A: Middle Market (sub- $500m) and Venture Capital and Emerging Companies practices.
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- 2015 *Legal 500 Asia Pacific* ranks Pillsbury's China Practice under the best foreign firms for Corporate M&A work.

- *Latin Lawyer* recognized Pillsbury as counsel to Deutsche Bank Trust Company on its 2015 Restructuring Deal of the Year.
- Named "Best Onshore Law Firm-Client Service" by *HFMWeek* at its HFM U.S. Hedge Fund Services Awards 2015.
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- The *M&A Advisor* named Pillsbury as a 2014 winner for "Corporate/ Strategic Acquisition of the Year" in the Over $100mm to $1 Billion category.
- Trade Finance Journal Awards for Excellence voted Pillsbury as "Best Trade Law Firm in North America" in 2013 and 2010, and "Best Global Export Credit Agency/Development Finance Law Firm" in 2012.

I. Introduction

Capital markets in the United States provide an unparalleled source of investment capital, measured in trillions of dollars, for companies located outside the United States. For non-U.S. companies (which we refer to in this publication as "**foreign**" companies) that sell securities in the United States, U.S. markets and rules allow companies to raise funds on an expedited and economically efficient basis with significant benefits, including:

- the ability to use securities as currency to make acquisitions and fund future growth;
- access to a large and highly liquid trading market;
- the ability to enhance market value by broadening the investor base and market visibility; and
- enabling equity-based compensation structures to attract and retain key personnel.

The offer and sale of securities in the United States is a highly-regulated process and creates significant obligations and potential liabilities for foreign issuers. This publication provides an overview of regulation and practices, highlighting those aspects of U.S. law that are the most pertinent to foreign companies engaged in accessing the U.S. capital markets.

Foreign companies may issue securities both to the general U.S. public, in a registered (public) offering, and to selected persons in an unregistered (private) offering. To issue securities in a public offering, the issuer must prepare and file a registration statement with the Securities and Exchange Commission (the "**SEC**"), which is the arm of the U.S. government that regulates the U.S. securities market. Once the registration statement is declared effective by the SEC (or upon the listing of securities on a U.S. national securities exchange), the issuer becomes subject to reporting and disclosure obligations under the U.S. federal securities laws. In addition, each securities exchange on which a security is listed imposes certain listing and maintenance rules on the issuer relating to securities issuances, information disclosure, corporate governance and shareholder rights. (The state securities laws of the various U.S. states also regulate the offer and sale of securities within the particular U.S. state, but those laws are beyond the scope of this publication; note that Section 18 of the U.S. Securities Act of 1933 (the "**Securities Act**") provides exemptions from most U.S. state securities laws for many types of securities.) The concepts of corporate governance, shareholder rights, investor protections and disclosure obligations of companies issuing securities in the United States tend to be more demanding than in other countries. Notwithstanding these regulatory requirements, as of December 31, 2014, 912 foreign companies from 52 countries were registered with the SEC.[1]

1 See Number of Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission December 31, 2014, available at http://www.sec.gov/divisions/corpfin/internatl/foreignsummary2014.pdf.

However, foreign companies can avoid the regulatory burden and certain obligations associated with public offerings of securities by issuing securities in private transactions, also called "**exempt transactions**."

The purpose of this publication is to assist business executives from outside the United States in developing a business plan for accessing the U.S. capital markets. We provide a basic outline of U.S. federal securities laws, concentrating on:

- the process for issuing securities in the United States in both public and exempt transactions;
- registering a class of securities under the U.S. Securities Exchange Act of 1934 (the "**Exchange Act**") in connection with a U.S. stock exchange listing;
- meeting reporting obligations under the Exchange Act; and
- establishing an American Depositary Receipt (ADR) program.

Readers are encouraged to refer to the Appendices to this publication for some practical guides and answers to some of the more frequent questions that arise during the course of an offering. We also discuss some typical challenges that may arise in connection with these transactions based on our experiences. In addition, **Annex A** to this publication contains a glossary of common terms used throughout this publication.

II. Regulatory Framework of the U.S. Federal Securities Laws

In general, every offer and sale of a security in the United States is registered with the SEC, is exempt from such registration or is illegal. The two principal statutes governing the offer and sale of securities in the United States are the Securities Act and the Exchange Act . Generally, the Securities Act governs public distributions of securities, including the offer and sale of securities in initial public offerings, while the Exchange Act governs secondary offers and sales (i.e. trading) of securities.

Section 5 of the Securities Act requires that every offer and sale of a security involving interstate commerce (including by mail, telephone, email or facsimile) in the United States be registered with the SEC, unless an exemption from registration is available. Section 3 of the Securities Act contains exemptions from registration for certain types of securities (e.g. municipal securities, commercial paper and bank notes). Section 4 of the Securities Act contains exemptions from registration for certain types of transactions. Section 4(a)(1) of the Securities Act exempts transactions by anyone other than an issuer, an underwriter or a dealer. Section 4(a)(2) exempts transactions by an issuer not involving any public offering (i.e. private offerings). Section 4(a)(3) of the Securities Act exempts transactions by dealers. The definition of what is

an "underwriter" is a key element of the regulatory framework of the U.S. federal securities laws. Anyone can be deemed an underwriter if (i) it has purchased securities from an issuer or its affiliates with a view to the distribution of the securities or (ii) it has offered or sold securities for an issuer or its affiliates in connection with the distribution of the securities. For a more detailed discussion regarding exemptions, see "Exemptions from Securities Act Registration" at Part VI. (page 39) of this publication.

Registration with the SEC requires the filing of a registration statement containing specified information about the security, the issuer and how the securities will be offered and sold. Section 5 of the Securities Act requires that any sale or delivery of a security be accompanied or preceded by a prospectus meeting the requirements of Section 10 of the Securities Act (a so-called "**statutory prospectus**"), which specifies certain information that must be included in communications with prospective security purchasers. See **Appendix A**: Initial Public Offering (IPO) Process Overview for Foreign Private Issuers for a summary of the initial public offering process and **Appendix B**: Timeline and Responsibility Charts for a chronology of steps required in certain common securities transactions, including an initial public offering and a private offering of debt securities. See also **Appendix J**: Publicity Restrictions in Securities Offerings: Safe Harbors and Permissible Offers for an overview of the safe harbors and permissible offers available to issuers and certain other offering participants. Once the offer and sale of a security are registered, U.S. federal securities laws impose certain ongoing obligations on the issuer. These obligations include the need to file periodic reports with specified disclosures and the adoption of procedures with respect to corporate governance and interaction with shareholders. The Exchange Act separately requires the registration of any security that is listed on a U.S. stock exchange and imposes continuous disclosure obligations on the issuer of registered securities. The SEC has made several compliance accommodations to foreign companies that sell securities in the United States in registered transactions. See "Accommodations for Foreign Private Issuers" at Part III.B. (page 12) of this publication.

The Securities Act and the Exchange Act regulate all participants (including issuers, underwriters, dealers, sellers and purchasers) and transactions (including original issuances, sales by insiders such as directors, officers and certain large shareholders, and resales of unregistered securities). Failure to comply with the requirements of the Securities Act or the Exchange Act is a criminal offense, punishable by fines or imprisonment or both, and can also give rise to civil actions for rescission by purchasers of securities. See **Appendix C**: Outline of Liabilities under the U.S. Federal Securities Laws for a summary of liabilities under the U.S. federal securities laws.

III. Foreign Companies under the U.S. Federal Securities Laws

A. Qualifying as a Foreign Private Issuer

Using its rule-making authority, the SEC has afforded foreign companies trying to raise capital in the United States certain accommodations with respect to the reporting and disclosure obligations of companies issuing securities in the United States. To avail itself of such accommodations, a foreign company must meet the definition of a "foreign private issuer."

A foreign private issuer is defined in both Rule 405 under the Securities Act and Rule 3b-4 under the Exchange Act as an organization incorporated or organized under the laws of a foreign country (other than a foreign government or political subdivision thereof), excluding (i) organizations where more than 50% of the organization's outstanding voting securities are directly or indirectly owned of record by residents of the United States ***and*** *(ii) where any of the following are true:*

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

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

(C) the business of the organization is administered principally in the United States (which could be determined based on the location of the organization's headquarters, principal business segments or operations, board and shareholders meetings and most influential key executives (potentially a subset of all executives)).

To determine the percentage of outstanding voting securities held by U.S. residents, the method of calculating record ownership in Rule 12g3-2(a) under the Exchange Act shall be used (see ***Appendix F****: Counting Holders), except that (1) the inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in (i) the United States, (ii) the issuer's jurisdiction of incorporation and (iii) the jurisdiction that is the primary trading market for the issuer's voting securities, if different than the issuer's jurisdiction of incorporation, and (2) notwithstanding Rule 12g5-1(a)(8) under the Exchange Act, the issuer shall not exclude securities held by persons who received the securities pursuant to an employee compensation plan. If, after reasonable inquiry, the issuer is unable to obtain information about the amount of shares represented by accounts of customers resident in the United States, the issuer may assume, for purposes of the definition of "foreign private issuer," that*

the customers are residents of the jurisdiction in which the nominee has its principal place of business. Shares of voting securities beneficially owned by residents of the United States shall be counted as reported on reports of beneficial ownership provided to the issuer or filed publicly and based on information otherwise provided to the issuer.

An organization filing a registration statement with the SEC for the first time must assess its status as a "foreign private issuer" as of a date within 30 days prior to the filing of the registration statement. Thereafter, to maintain its status as a foreign private issuer, the organization must assess its status each year as of the last business day of its second fiscal quarter. If the organization no longer qualifies as a foreign private issuer as of the last business day of its second fiscal quarter, it must comply with the requirements otherwise applicable to U.S. issuers at the start of the subsequent fiscal year.

The citizenship and residency of each of the organization's executive officers and directors must be analyzed separately. The terms "executive officer" and "director" may have different meanings in jurisdictions outside of the United States; therefore, foreign companies should refer to the definition of "executive officer" contained in Rule 405 under the Securities Act and Rule 3b-7 under the Exchange Act (i.e. a person involved in performing policy making functions for the issuer) to determine the individuals for which they should perform the analysis. When performing the analysis for "directors," foreign companies should consider individuals that perform the functions generally performed by directors of a U.S. company.

Foreign private issuers are afforded a number of key benefits not available to U.S. companies, including (as discussed in more detail below):

- less burdensome annual report requirements;
- not required to file quarterly reports or current reports;
- ability to choose among U.S. generally accepted accounting principles (GAAP), International Financial Reporting Standards (IFRS) or local GAAP;
- exemption from beneficial ownership reporting and short-swing profits rule;
- exemption from proxy rules; and
- exemption from Regulation FD.

While foreign private issuers may benefit from the dispensations set forth above, many foreign companies voluntarily comply with the more stringent requirements in an effort to follow best practices in investor protection and corporate governance.

B. Accommodations for Foreign Private Issuers

The following accommodations provided by the SEC make it easier for foreign private issuers to meet the reporting and disclosure obligations of the Exchange Act and certain other U.S. federal securities laws.

1. Periodic Reporting

Under the Exchange Act, just as a U.S. issuer is required to file annual reports on Form 10-K within two to three months after the end of the issuer's fiscal year, a foreign private issuer that has registered securities in the United States is required to file annual reports on Form 20-F, which requires filing with the SEC within four months after the end of the issuer's fiscal year. While a U.S. issuer is also required to file quarterly reports on Form 10-Q with the SEC, a foreign private issuer is not required to file such reports unless the foreign private issuer is required to do so under the laws of its home country, in which case the foreign private issuer would be required to furnish a report on Form 6-K with the SEC. Also, unlike U.S. issuers that are required to file current reports on Form 8-K to provide prompt notification, generally within four business days, of the occurrence of certain enumerated events to the investing public, foreign private issuers do not have the same obligation.

The ability to file annual reports on Form 20-F rather than Form 10-K represents a more attractive option for foreign private issuers. Form 20-F allows foreign private issuers to apply less stringent disclosure rules allowing the exclusion, for example, of the onerous Compensation Discussion and Analysis and executive compensation regime applicable to U.S. issuers under the SEC's Regulation S-K. To the extent a foreign private issuer discloses more extensive executive compensation information in accordance with home market requirements or voluntarily, such information must also be disclosed under Form 20-F. Form 20-F also allows foreign private issuers to use IFRS or home-country GAAP (with a reconciliation note to U.S. GAAP if non-International Accounting Standards Board (IASB) IFRS or home-country GAAP is used) in lieu of U.S. GAAP.

The SEC's Division of Corporation Finance has published informal, non-authoritative guidance on financial reporting matters in its Financial Reporting Manual available at https://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.shtml; in particular, Topic 6 of that manual addresses matters specific to foreign private issuers.

In certain limited circumstances, a foreign private issuer may be required to furnish a Form 6-K if certain material information about the foreign private issuer is:

- made or is required to be made public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized;
- filed or is required to be filed with a stock exchange on which its securities are traded and that was made public by that exchange; or
- distributed or is required to be distributed to its security holders.

It is important to note that information that is "filed" is subject to the liability provisions under Section 18 of the Exchange Act and may be automatically incorporated by reference into the issuer's registration statement that accordingly carries potential liability for material misstatements or omissions. Information that is "furnished" is not subject to liability under Section 18 of the Exchange Act and may not be automatically incorporated by reference into a filed registration statement. See **Appendix C**: Outline of Liabilities under the U.S. Federal Securities Laws for more information on liabilities under the U.S. federal securities laws. Information provided in a Form 6-K is deemed "furnished" for purposes of the U.S. federal securities laws. If a foreign private issuer wants to incorporate a Form 6-K into a registration statement, it must expressly provide for its incorporation by reference into the registration statement and in any subsequently submitted Form 6-K.

All filings made with the SEC must be in English. If a filing or submission requires the inclusion of a document that is in a foreign language, the issuer must submit instead a fair and accurate English translation of the foreign language document pursuant to Rule 403 under the Securities Act and Rule 12b-12 under the Exchange Act. Whereas summaries may be provided for certain documents, others require a full translation. Among other requirements, any summary submitted must both fairly and accurately summarize the terms of each material provision of the foreign language document and fairly and accurately describe the terms that have been omitted or abridged.

2. Beneficial Ownership Reporting

Beneficial owners of more than 10% of a class of equity securities registered under the Exchange Act, directors of an issuer of such a security and officers of an issuer of such a security are required by Section 16(a) of the Exchange Act to file certain reports disclosing their ownership of such securities. In addition, those persons are restricted by Section 16(b) of the Exchange Act in their purchase and sale of such securities within a prescribed period to avoid liability for "**short-swing**" profits. Specifically, Section 16(b) of the Exchange Act requires that any profits realized from the purchase and sale of the issuer's securities by these persons are recoverable by the issuer if both the purchase and the sale occur within a six-month period. Rule 3a12-3(b) under the Exchange Act exempts securities registered by a foreign private issuer from Section 16 of the Exchange Act.

3. Proxy Materials and Reports to Shareholders

The SEC's proxy rules (including Section 14 of the Exchange Act) regulate the timing of and the means by which any person, including the issuer, may solicit the proxy, consent or authorization of security holders or furnish any communication to security holders that could reasonably result in such proxy, consent or authorization. Pursuant to Rule 3a12-3(b) under the Exchange Act, a foreign private issuer is not required under U.S. federal securities laws or the rules of the U.S. national securities exchanges to file proxy solicitation materials on Schedule 14A or Schedule 14C in connection with annual or special meetings of its security holders. However, foreign private issuers that are listed on a U.S. national securities exchange generally file with the SEC and the exchange the proxy solicitation materials used pursuant to the law of the jurisdiction where the issuer is organized and also comply with the timing deadlines of the exchange concerning record dates.

4. Regulation FD Disclosures

The SEC's Regulation FD provides that, when an issuer discloses material nonpublic information to certain persons (including, among others, institutional investors, analysts and other securities professionals or holders of the issuer's securities who may trade on the basis of the information), the issuer must simultaneously disclose such information to the public. In practice, this means that the issuer must make disclosure to the public prior to the selective disclosure to the audience otherwise targeted.

Regulation FD does not apply to foreign private issuers. However, many foreign private issuers that have adopted best practices have elected to comply with the principles of Regulation FD. Despite the exemption of foreign private issuers from the disclosure obligations of Regulation FD, the anti-fraud and insider trading provisions of the Exchange Act apply to the disclosure practices of foreign private issuers. In the adopting release for Regulation FD, the SEC stated that selective disclosures bear a "close resemblance" to insider trading.

5. Emerging Growth Companies

Foreign private issuers that qualify as emerging growth companies may take advantage of provisions applicable to all emerging growth companies. See "Relief from Certain Regulations for Emerging Growth Companies" at Part IV.C. (page 22) of this publication for a more detailed discussion of provisions available to emerging growth companies.

IV. The Registration Process

A. Practical Considerations for an Initial Public Offering (IPO)

"Going public" is a desired milestone for most emerging companies. However, the IPO journey is a challenging process replete with pitfalls and potential setbacks that can test a company's perseverance and resources. IPO candidates must be able to show a compelling business model, a solid track record, an actionable plan to sustain growth and an efficient capital structure. IPO investors will demand details about the use of funds, which should be consistent with the company's "growth story." Successful IPOs are achieved by companies that understand the transformational nature of the process and embrace accountability and scrutiny as the necessary elements to operate as a public company, ideally in advance of the commencement of the IPO.

The months-long IPO process starts with retaining a law firm to engage in the tedious process of assembling the detailed public disclosures needed. There are many blue-chip law firms from which to choose, all with significant credits and accolades, but companies need to choose their counsel carefully. The attorney leading the charge must be exceptional at holding the client's hand and have great attention to detail. Companies should focus on who will actually be doing the work, as many law firms parade senior lawyers as enticement, but ultimately leave their inexperienced junior lawyers to struggle with the monumental task of day-to-day management of the IPO process. Equally important is the choice of underwriters' counsel. One of the quickest ways to kill an IPO is to assemble a group of law firms that cannot work together. Accordingly, the company should insist on selecting its own counsel that it is comfortable working with and, in consultation with the law firm it retains, agree upon competent and compatible underwriters' counsel. No less important is lining up one or more investment banks as underwriters. Ideally the company should identify one or more underwriters with longstanding experience both with the company and its management team. The overriding goal is to assemble a cohesive work team and avoid mega personalities and inflated egos.

A company should commence an IPO only when it is truly ready. It is of course advisable to consult potential underwriters, lawyers, accountants and other professionals for input, but the decision ultimately lies with the company, which needs to be fit for the task of a process that will take many months of management's time and resources. Flexibility will be crucial to navigate swiftly through changing market conditions. A company will want to price its IPO at a time when it can achieve an optimal valuation and provide investors with the greatest return on their investment. This will require a careful analysis of comparable companies and market variables such as interest rates, inflation, political developments and general economic conditions.

A badly timed IPO, where a company has hurried through the process driven by the immediate need for capital or a desire to capitalize on a perceived limited window of opportunity based on bad advice, can lead to a stock offered at a lower price. Accordingly, it is crucial that IPO candidates be able to execute alternative strategies in case the IPO is delayed or postponed.

Appendix A: Initial Public Offering (IPO) Process Overview for Foreign Private Issuers presents a summary of the initial public offering process, and **Appendix B:** Timeline and Responsibility Charts presents a sample timeline of the significant steps to consummate an IPO. A discussion of the critical elements that are required to build robust business and financial processes and infrastructure are beyond the scope of this publication, but a public company must possess strong budgeting and forecasting capabilities and retain a highly qualified accounting staff capable of generating accurate and timely financial statements and reports. See **Appendix D:** Financial Statement Requirements in U.S. Securities Offerings for Foreign Private Issuers for more information relating to financial statement requirements. Another critical area of focus, especially with greater scrutiny on, and liability for, public company directors, is the creation of corporate governance policies that inspire investor confidence. See **Appendix C:** Outline of Liabilities under the U.S. Federal Securities Laws for a summary of liabilities under the U.S. federal securities laws, and see **Appendix E:** Corporate Governance and Audit Matters for more information relating to corporate governance and audit matters. The company's management team should include investor relations and communications professionals that will help sustain the market's interest in the company well beyond the IPO.

While an IPO may be the endgame in a capital raising strategy, it is always important to evaluate all possible alternatives that could serve as a stepping stone to an IPO and stock listing. Many companies that seek to complete an IPO often do not go public. If the IPO transaction is aimed at a sale of the company or of a significant portion of the business, or to simply raise funds, companies may also consider:

- a sale to a private equity firm, financial buyer or strategic buyer through the M&A market;
- a private placement as a pre-IPO step;
- a joint venture or strategic alliance; or
- a high yield offering followed by an exchange offer.

Increasingly, companies need to be clear on what the options are and, inasmuch as possible, adopt a "dual or multi-track" approach whereby the company prepares for an IPO while simultaneously pursuing a sale, a strategic transaction like a joint venture or another funding alternative like a debt financing.

B. Corporate Governance Considerations

Both the U.S. federal securities laws and rules of the principal U.S. stock exchanges contain directives with respect to the structure, operation and disclosure in respect of a company's corporate governance. Many of these directives were implemented through such seminal acts of the U.S. Congress as the U.S. Sarbanes-Oxley Act of 2002, the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act enacted into law in July 2010 and the U.S. Jumpstart Our Business Startups Act (or the "**JOBS Act**") enacted into law in April 2012. These requirements emphasize the need for independent judgment by the board of directors generally and the role of independent directors on key board oversight committees. A majority of a company's board must meet the "independence" standards for compliance with the rules of the stock exchange where its securities are listed. A company contemplating going public should be aware of how these corporate governance rules apply and ensure that it has an infrastructure in place to comply with these requirements, given that it will immediately become subject to many of these provisions upon filing its registration statement for its IPO with the SEC. Set forth below are certain key considerations that we discuss in greater detail in **Appendix E**: Corporate Governance and Audit Matters.

1. Audit Committees and Auditors

The primary purpose of the company's audit committee should be to oversee the accounting and financial reporting processes of the company and the audits of the financial statements of the company. The audit committee of a foreign private issuer, with certain exceptions, must have a minimum of three members, each of whom must be independent directors. Pursuant to Section 10A of the Exchange Act, the audit committee:

- is directly responsible for the appointment, compensation and oversight of the company's outside auditors (and the outside auditors must report directly to the audit committee);
- has the authority to engage, and determine appropriate funding for, independent counsel and other advisors as it determines necessary;
- must establish procedures for the receipt, retention and treatment of complaints received by the company regarding accounting, internal accounting controls or auditing matters and the confidential, anonymous submission by employees of the company of concerns regarding questionable accounting or auditing matters (also known as whistleblower requirements); and
- must pre-approve all auditing services and permitted non-audit services provided by the company's outside auditors.

The following non-audit services are prohibited (pursuant to Section 10A(g) of the Exchange Act):

- *bookkeeping or other services related to the accounting records or financial statements of the company;*
- *financial information systems design and implementation;*
- *appraisal or valuation services, fairness opinions or contribution-in-kind reports;*
- *actuarial services;*
- *internal audit outsourcing services;*
- *management functions or human resources;*
- *broker or dealer, investment adviser or investment banking services; and*
- *legal services and expert services unrelated to the audit.*

Rule 2-01 of the SEC's Regulation S-X contains requirements regarding a company's auditor being independent in each period for which an audit report will be issued for an IPO. Consequently, well in advance of an IPO, a company will want to anticipate the SEC's auditor independence requirements and determine whether it should adopt a pre-approval policy for auditing and non-audit services or have those services pre-approved by the audit committee on a case-by-case basis. Additionally, a company should continue to review the services performed by its outside auditor to ensure that no prohibited services are being provided to the company and establish oversight mechanisms so that permissible non-audit services subject to pre-approval are approved in advance. Companies need to be mindful of the SEC's one-year "cooling off" period before hiring audit team members for a "financial reporting oversight role" such as chief executive officer, chief financial officer, chief accounting officer or controller. SEC rules require the lead audit partner responsible for the company's audit to rotate off of the audit engagement at least every five years.

2. Civil and Criminal Certifications of Annual Report on Form 20-F

A foreign private issuer's chief executive officer (CEO) and chief financial officer (CFO) must provide certifications on an ongoing basis in connection with its Annual Report on Form 20-F. CEO and CFO certifications in reports initially filed with the SEC after the IPO will cover pre-IPO periods. Executives who knowingly certify to non-compliant reports face civil and criminal penalties, including potential imprisonment. Therefore, company executives will want to have a strategy sufficiently far in advance of the completion of the IPO to ensure that they will be able to compile the information for periodic reports and to ensure that they can comfortably certify to those reports. Such a strategy may become essential as underwriters engaged for an IPO may insist upon assurances from the company regarding the ability of the CEO and CFO to provide the required certifications shortly after completion of the IPO process.

3. Disclosure Controls and Procedures

An Annual Report on Form 20-F must contain a conclusion of the company's principal executive and financial officers regarding the effectiveness of the company's disclosure controls and procedures. One of the purposes of this requirement is to focus the attention of companies and their senior officers on the quality and efficiency of procedures employed to collect and disseminate material information. While there can be no "one size fits all" set of disclosure controls and procedures, a private company preparing for its IPO should consider implementing one or more of the following:

- establishing a disclosure committee, which should, among other functions, consider the materiality of information and determine the company's disclosure obligations on a timely basis;
- creating detailed time and responsibility schedules that identify key dates and deadlines in preparing periodic reports and other documents;
- appointing a disclosure controls monitor, who would be responsible for documenting the review process for each filing;
- having the CEO and CFO and other members of senior management involved early in the process and having them set the tone and policies for reporting; and
- having the CEO and CFO meet with the company's audit committee to go over the results of their review and evaluation of the company's disclosure controls and procedures.

After the initial development and implementation of disclosure controls and procedures, a company will want to develop and refine its review process and procedures over time with the benefit of experience. The need to implement appropriate disclosure controls and procedures, as well as periodic reviews and updates to those disclosure controls and procedures, well in advance of an IPO is important because a public company is subject to a strict deadline to file its annual report and faces significant negative consequences for failure to file on a timely basis.

What are disclosure controls and procedures?

Disclosure controls and procedures (pursuant to Rule 13a-15(e) and Rule 15d-15(e) under the Exchange Act) are controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the Exchange Act is recorded, processed, summarized and reported, within the time periods specified in the SEC's rules and forms. Disclosure controls and procedures include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the Exchange Act is accumulated and communicated to the issuer's management, including its principal executive and principal financial officers, or persons performing similar functions, as appropriate to allow timely decisions regarding required disclosure.

4. Internal Control Over Financial Reporting

An Annual Report on Form 20-F must contain a report of the company's management on the company's internal control over financial reporting, which are compliance-oriented controls meant to ensure that the company has a formal system of policies in place to ensure acceptable bookkeeping under GAAP. For certain companies, the outside auditor's attestation report on management's assessment of the issuer's internal control over financial reporting is also required to be provided as part of the Annual Report on Form 20-F. As part of an assessment of internal control over financial reporting, a company's management must document, test and evaluate the five components of internal control. Newly public companies are exempt from these requirements until their second annual report is filed with the SEC. The need to implement appropriate internal control over financial reporting, as well as periodic reviews and updates to those internal controls over financial reporting, well in advance of an IPO is important because a public company is subject to a strict deadline to file its annual report and faces significant negative consequences for failure to file on a timely basis.

What are the components of internal control over financial reporting?

- *Control Environment — The control environment establishes the overall tone for the organization and is the foundation for all other components of internal control.*
- *Risk Assessment — For an entity to exercise effective control, it must establish objectives and understand the risks it faces in achieving those objectives.*
- *Control Activities — Control activities are those policies and procedures that help to ensure that management's directives are implemented.*
- *Information & Communication — This component includes the systems that support the identification, capture and exchange of information in a form and time frame that enable personnel to carry out their responsibilities and financial reports to be generated accurately.*
- *Monitoring Activities — Monitoring is the continuous process that management uses to assess the quality of internal control performance over time.*

5. Code of Ethics

A public company is required to disclose on each Annual Report on Form 20-F whether or not it has adopted a code of ethics for its principal officers and, if not, the reasons for failing to adopt such a code of ethics. A company with a code of ethics must file a copy of its code of ethics with the SEC and post its code of ethics to its web site and must publicly disclose any waivers from its code of ethics.

A company with a pre-existing code of ethics should review its code of ethics to determine if it meets and is designed to comply with the SEC's requirements. In addition, a company with a pre-existing code of conduct that addresses broader topics and contains specific rules, such as how the company deals with sexual harassment and other workplace conduct policies, may wish to bifurcate its code of conduct into a code of ethics responsive to the public disclosure required by the SEC and a separate code of conduct covering the remaining contents of the pre-existing code of conduct.

What is a "Code of Ethics"?

Item 16B to Form 20-F defines a code of ethics as written standards that are reasonably designed to deter wrongdoing and to promote:

- *honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;*
- *full, fair, accurate, timely and understandable disclosure in reports and documents that a company files with, or submits to, the SEC and in other public communications made by the company;*
- *compliance with applicable governmental laws, rules and regulations;*
- *the prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and*
- accountability for adherence to the code.

6. Personal Loans to Executive Officers and Directors

A company preparing for the filing of its initial registration statement with the SEC will need to address the Exchange Act's prohibitions on companies making or arranging personal loans, directly or indirectly, to their directors and executive officers (or making material modifications to such loans) on or after July 30, 2002 (i.e. the date that the U.S. Sarbanes-Oxley Act of 2002 was enacted into law). Material modifications can include changes in the interest rate, repayment schedule and collateral. Loans entered into or materially modified since July 30, 2002 need to be repaid or forgiven before the initial filing of the company's registration statement. Regardless of whether a loan may be grandfathered, a company's underwriters may insist upon repayment of such loans prior to the initial filing of the company's registration statement as a marketing matter.

Loans made for business (as opposed to personal) purposes, such as business travel, are generally believed to be outside of the scope of the prohibition. Loans "arranged" by a company through a third party are included in the prohibition. It is generally understood that a program under which a company has negotiated favorable lending terms (such as for mortgage loans) from a third party lender for the benefit of its employees is prohibited. Relocation and home loans and the use of promissory notes to exercise, or allow early exercise of, stock options are likewise prohibited.

Counsel should review for compliance with the Exchange Act for any broker-assisted "cashless exercise" features under a company's stock option plan, in which the company provides stock to a broker to sell before the company receives payment for the exercise price or where a broker extends a short-term margin loan to facilitate the exercise of stock options.

Private companies accordingly will need to review any outstanding loans, option plans and benefit programs that the company has with its directors and executive officers. These prohibitions can make it more difficult for a company on the verge of becoming public in the United States to recruit executive officers.

Who is an "executive officer"?

An executive officer is defined in Rule 3b-7 under the Exchange Act as a company's president, any vice president in charge of a principal business unit, division of function (such as sales, administration or finance), any other officer who performs a policy making function, or any other person who performs similar policy making functions. Executive officers of subsidiaries of a parent company may be deemed executive officers of the parent company if they perform such policy making functions for the parent company.

C. Relief from Certain Regulations for Emerging Growth Companies

The JOBS Act, enacted into law in April 2012, was enacted among other things to ease and defer certain regulations in connection with the SEC-registered IPO process for "emerging growth companies," including any foreign private issuer that qualifies as an emerging growth company, by providing those companies with an "on ramp" to an IPO. An emerging growth company has as many as five years after consummation of its IPO, depending on revenue, size and public float, to transition to compliance with the SEC regulations, including confidential submissions of registration statements, "testing the waters" communications in the pre-marketing period to determine investor interest, reduced financial statement disclosures and deferral of the auditor attestation requirement. Accordingly, a company should be aware of whether it qualifies as an emerging growth company, and for how long, in order to evaluate the full range of opportunities.

1. Definition of Emerging Growth Company

In order to qualify as an emerging growth company pursuant to Section 2(a)(19) of the Securities Act (promulgated by the JOBS Act), a company must have annual gross revenues during its most recently completed fiscal year of less than $1 billion. After the initial determination of emerging growth company status (which occurs at the time

of the company's initial confidential submission of its registration statement and at the time of the company's first public filing of its registration statement), a company will remain an emerging growth company until the earliest of:

- the last day of any fiscal year in which the company had annual gross revenues of $1 billion or more;
- the last day of the fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act;
- the date on which the company has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or
- the date on which the company is deemed to be a "large accelerated filer" (i.e. at least $700 million in equity held by non-affiliates).

Pursuant to Section 6(e)(1) of the Securities Act (promulgated by the JOBS Act), an issuer that was an emerging growth company at the time it submitted a confidential registration statement or, in lieu thereof, a publicly filed registration statement for review under the Securities Act but ceases to be an emerging growth company thereafter shall continue to be treated as an emerging growth company for the purposes of the Securities Act through the earlier of the date on which the issuer consummates its initial public offering pursuant to such registration statement or the end of the one-year period beginning on the date the company ceases to be an emerging growth company.

For purposes of the "testing the waters" communications provisions, a company should test whether it qualifies as an emerging growth company at the time that it would engage in those communications.

For prospective emerging growth companies that report in a currency other than U.S. dollars, the company would use the exchange rate for its reporting currency as of the last day of the preceding fiscal year to determine whether it meets the threshold.

2. Confidential Submission of Registration Statement

Section 6(e) of the Securities Act (promulgated initially by the JOBS Act) provides that an emerging growth company may confidentially submit to the SEC a draft registration statement for confidential nonpublic review by the SEC's staff prior to public filing, provided that the initial confidential submission and all amendments thereto are publicly filed with the SEC not later than 15 days before the date on which the issuer conducts a road show (as defined in Rule 433(h)(4) under the Securities Act).

3. Testing the Waters Communications

It is a common practice in non-U.S. deals prior to the completion of the offering document and often prior to the filing of the offering document to "test the waters" and hold "anchor marketing," "pilot-fishing" or "cornerstone" meetings with sophisticated, prospective investors outside the United States in a "pre-marketing" process to determine investor appetite and possible terms under which the proposed offering may proceed. Such activities in the United States historically constituted offers in violation of Section 5 of the Securities Act, exposing the company (and its underwriters) to potential liability. Section 5(d) of the Securities Act (promulgated by the JOBS Act) allows emerging growth companies and their authorized persons (which could include underwriters) to "test the waters" by meeting with qualified institutional buyers ("**QIBs"**) and institutional accredited investors before or after confidentially submitting or publicly filing a registration statement to determine interest in a planned offering. Book-building and the formal solicitation of orders are not likely to occur during these meetings due to Rule 15c2-8(e) under the Exchange Act, which requires broker-dealers to make a preliminary prospectus available before the solicitation of customer orders. For a more detailed summary of the publicity restrictions applicable to securities offerings, see **Appendix J**: Publicity Restrictions in Securities Offerings: Safe Harbors and Permissible Offers.

4. Reduced Financial Statement Disclosures

Pursuant to Section 7(a)(2) of the Securities Act (promulgated by the JOBS Act), an emerging growth company may present only two years (rather than three years) of audited financial statements in the offering document for its initial public offering and may present as few as two years (rather than five years) of selected financial data.

Section 102(d) of the JOBS Act further provides that an issuer filing a registration statement (or submitting the statement for confidential review) on Form F-1 may omit financial information for historical periods otherwise required by the SEC's Regulation S-X as of the time of filing (or confidential submission) of such registration statement, provided that (A) the omitted financial information relates to a historical period that the issuer reasonably believes will not be required to be included in the Form F-1 at the time of the contemplated offering and (B) prior to the issuer distributing a preliminary prospectus to investors, such registration statement is amended to include all financial information required by the SEC's Regulation S-X at the date of such amendment. This provision can result in significant savings of cost and time for a company engaged in an IPO, where the preparation of financial statements can be a costly and lengthy affair.

See **Appendix D**: Financial Statement Requirements in U.S. Securities Offerings for Foreign Private Issuers for more information relating to financial statement requirements for foreign private issuers.

5. Deferral of Auditor Attestation Requirement

15 U.S.C. 7262(b) (as revised pursuant to the JOBS Act) exempts emerging growth companies from the requirement that a company's outside auditors attest to, and report on, the assessment made by the company's management with respect to the company's internal control over financial reporting. In effect, this exemption provides for up to a five-year transition period for emerging growth companies versus the current one-year transition period for newly public companies. Accordingly, the auditor attestation requirement, which has been one of the most burdensome requirements of the U.S. Sarbanes-Oxley Act of 2002, has been deferred for emerging growth companies. Nonetheless, an emerging growth company must still establish and maintain internal controls over financial reporting.

D. Publicity During the Registration Process

Companies must be aware that U.S. federal securities laws impose a number of restrictions on publicity while the company is "in registration." A company will be "in registration" starting from the time it reaches an understanding with an investment bank that the bank is to act as its managing underwriter for the offering. See **Appendix J**: Publicity Restrictions in Securities Offerings: Safe Harbors and Permissible Offers for a more detailed summary of the rules governing permissible communications during the securities offering process.

The restrictions on publicity under the U.S. federal securities laws can affect communications with employees, investors, media and other third parties, as well as advertising materials and web site content. These limitations are based on securities laws and SEC rules that generally prohibit:

- publicity that excites or conditions the market for the sale of a company's securities prior to the company's registration statement being declared effective by the SEC (often referred to as "**gun jumping**"); and
- use of written materials in the offering process that do not comply with the strict prospectus requirements of the securities laws.

In addition to the legal restrictions outlined below, it is important to remember that anti-fraud laws apply to a company's publicity activities at all times.

1. Consequences of Engaging in Gun Jumping

The consequences of engaging in gun jumping can be serious. It has not been unusual for the SEC to impose a mandatory delay or "cooling-off" period for an offering where the SEC has gun jumping concerns, and in some cases these SEC-mandated delays have resulted in companies missing out on favorable market conditions. In addition, gun jumping can provide investors with a right under the securities laws to "rescind" or cancel the transaction and receive a refund of the purchase price.

The SEC has often required companies to include a risk factor in its prospectus to disclose a possible gun jumping violation and the potential consequences, including rescission. In some cases, this has led to the company's accountants requiring that the company recognize a corresponding contingent liability in its financial statements related to investors' potential rescission rights. In addition, media publicity after a company publicly files its registration statement may require the company to file one or more media reports with the SEC, which can subject the company and other relevant offering participants to liability under the securities laws for those documents (which would not normally contain the typical prophylactic cautionary and risk factor language found in prospectuses). Private conversations with third parties before a company is in registration (as well as during the time it is in registration) can result in unintentional gun jumping violations while the company is in registration (e.g., when a reporter prints a story after gathering facts from the company before registration or when conversations subsequently are recalled to third parties). As a result, a company should proceed with caution in giving media interviews in the months leading up to potential initiation of the IPO process.

SEC rules currently permit companies to disseminate written communications outside of the "statutory prospectus" to investors and to participate in news media interviews, provided that strict measures are taken to comply with the conditions imposed by the SEC rules. In order to take advantage of these rules, companies must come to an understanding with their underwriters as to the types of communications needed to successfully market the offering and should institute procedures to centralize offering communications so that all communications are reviewed for compliance.

2. Stages of Registration Process

The U.S. federal securities laws effectively divide the registration process into three distinct periods: the pre-filing period; the waiting period; and the post-effective period. Restrictions on publicity differ depending on the stage of the registration process.

Pre-Filing Period

The pre-filing period generally is considered to be the period between the date of the organizational meeting (or such earlier time as the company and the managing underwriter reach an understanding with respect to the offering) and the public filing of the registration statement. During this period, all offers to sell, and all solicitations of offers to buy, the company's securities are prohibited. Companies should not disclose the name of any potential underwriter during this period. What constitutes an offer to sell or a solicitation of an offer to buy largely is subjective, and the SEC and the U.S. courts have taken a broad view of what constitutes an offer. In general, anything that may be viewed as designed to arouse public interest in the company or condition the market in anticipation of the offering may be deemed to constitute an offer. The SEC nonetheless has adopted "safe harbor" rules intended to clarify what will not

constitute "gun jumping," including the regular release of factual business information and certain communications more than 30 days before public filing of the registration statement. See **Appendix J**: Publicity Restrictions in Securities Offerings: Safe Harbors and Permissible Offers for a summary of those rules.

Waiting Period

The waiting period commences upon public filing of the registration statement with the SEC and continues until the registration statement is declared effective by the SEC. During the waiting period, a company may, subject to certain limitations, make oral offers, but written offers of its securities may be made only by means of a preliminary prospectus meeting the requirements of Section 10 of the Securities Act (a so-called "statutory prospectus"), subject to a few specific exceptions, which in an IPO context are limited. In IPOs, the statutory prospectus must contain on the cover page a bona fide estimate of the range of the maximum offering price. Any supplemental sales literature (referred to as "free writing prospectuses") must be filed with the SEC in most circumstances and as a result can result in the risk of additional liability for the issuer under the U.S. federal securities laws. Accordingly, a company may wish to avoid the use of free writing prospectuses during the waiting period. This means, for example, that no cover letters, notes or other materials should accompany preliminary prospectuses sent to prospective investors, and care should be taken to avoid emails, electronic postings or "blast" voicemails, including offering-related communications, to employees, all of which could be construed as impermissible written offers. See **Appendix J**: Publicity Restrictions in Securities Offerings: Safe Harbors and Permissible Offers for a more detailed discussion of free writing prospectuses.

Post-Effective Period

The post-effective period begins upon the declaration by the SEC of the effectiveness of the registration statement and continues for a period of 25 days from the date of the final prospectus. During this period, the company may consummate sales of its securities to its underwriters and is not legally prohibited from using supplemental sales literature if it is accompanied or preceded by the final statutory prospectus. Generally, however, for liability reasons, companies should refrain from using any substantive supplemental sales literature, particularly without the prior approval of counsel.

Testing the Waters Communications for Emerging Growth Companies

See, however, "Testing the Waters Communications" at Part IV.C.3. (page 24) of this publication regarding an emerging growth company's ability to make "test the waters" communications, which, once the company is in registration, should be undertaken only after consultation with counsel and the company's underwriters.

3. Additional Practical Considerations

Control the Flow of Information

In order to control the flow of information disseminated during the registration process, it is important that management be aware of and screen each oral or written communication by the company that may be construed as an offer to sell securities. Companies may institute the following procedures in order to help minimize problems in this area:

- the company should follow a strict "no comment" policy with regard to any inquiries about plans for an IPO;
- one or two officers should be designated as the persons at the company to whom all proposed public statements, outside inquiries and other similar questions should be directed, and those officers should confer with counsel, where appropriate;
- no person should discuss the proposed public offering, either before or after the filing of the registration statement, unless the proposed discussion is first cleared by the persons designated above;
- all public statements made by the company during the entire period in which it is in registration should be pre-approved by the persons designated above and reviewed by counsel—this not only includes any press release, but also includes speeches to groups of any kind, marketing literature distributed to newspapers, magazines and industry groups, announcements of new products in development, any changes in the frequency or type of advertising, information posted on the company's web site and other developments within the company;
- the company should be particularly cautious to ensure that any statements made or any literature distributed near the time the offering commences and the registration statement is declared effective comply with the securities offering communication regime, since the SEC will be particularly sensitive to any statements made or literature distributed at that time; and
- responses to outside inquiries from financial analysts, media reporters and others who may relay information to the public regarding the company and the proposed offering should be deferred until consultation with counsel—in no event may the company prepare or pay for any media coverage.

Avoid Issuing Forecasts, Projections or Valuations

The SEC has stated that companies in registration should avoid issuing forecasts, projections or predictions relating to financial statement items such as revenues, income and earnings per share and should avoid publishing opinions concerning values.

Continue Activities that would not Constitute Offers

The distinction between permitted and prohibited disclosure is often far from clear. Companies often will find it difficult to know with certainty whether or not a proposed communication will be construed as improperly "priming the market" for a securities offering. As discussed in more detail in **Appendix J**: Publicity Restrictions in Securities Offerings: Safe Harbors and Permissible Offers, the SEC has adopted safe harbors for regularly released factual business information. Generally speaking, companies can have a relatively high degree of confidence that they qualify for this safe harbor if they:

- limit communications to those primarily addressed to industry participants and partners;
- advertise in accordance with existing programs and keep records of the timing of planned expansions of those programs;
- show particular care in instituting a new advertising campaign, especially one in a new advertising medium (i.e., first television advertising campaign) or one that could be seen as aimed at a new audience;
- continue regular communications to securityholders as required (i.e., regular reports to banks required by relevant loan documentation and reports to stockholders required by private placement agreements);
- avoid initiating general press coverage;
- review participation in industry meetings and the like on a case-by-case basis with counsel with a view toward removing the focus from (and eliminating any reference to) any proposed public offering; and
- keep counsel apprised of significant developments in the company's public communications.

Ensure Communications do not Contain Information that may be Misleading

Although certain offers may be permitted during the waiting period and the post-effective period, all communications remain subject to anti-fraud provisions of the U.S. federal securities laws. Accordingly, all public press releases, advertisements and statements should be carefully reviewed prior to dissemination to ensure that the communications do not contain materially misleading or false information.

4. Specific Situations and Issues

Advertising

A company can continue to advertise, so long as its advertisements are consistent with the company's customary advertising efforts. Initiation of any new advertising campaigns should be delayed until after completion of the offering unless it is clear that the new campaign will not significantly broaden the coverage of the company's

publicity. Further, the company's existing advertising should be reviewed for content to ensure that the advertisements focus on products and product developments and could not be interpreted as a veiled attempt to generate interest in the company's securities or to indicate the company's intention to conduct an offering.

Articles and Product Development

A company may continue to publish articles in industry journals and to issue standard releases directed primarily toward industry participants. Press releases relating to product development and product development results, partnering agreements and the like should be issued in accordance with the company's customary press release efforts and should contain standard factual information regarding the company's business and business developments; however, there is a risk that press releases regarding new events may be considered to be conditioning the market, and they should be reviewed by counsel.

Interviews and Speeches

Interviews and speeches by a company must be tested against the same guidelines with respect to advertising, press releases and general communications. As a general rule, interviews with media outlets and speeches to special groups (and, in particular, groups that include potential investors) should not be conducted during the period in which the company is in registration without prior consultation with counsel. In general, the company may continue to conduct interviews and press appearances and to make factual statements about the company and its product pipeline and general business and financial developments that are consistent with the company's normal course of business. Interviews that are not within the company's normal course of business generally should be avoided.

The company should be careful to prevent the discussion of the offering during any interviews or press appearances (a strict "no comment" policy is recommended). Further, statements regarding the company's financial condition, results of operations and projections should be avoided completely. Companies are often asked to present at investor conferences and, once a public offering has been commenced, requests are often made to interview company officers. No such appearance may be made during the pre-filing period, and no such appearance should be made following filing without first consulting with counsel.

Employee and Shareholder Inquiries About the Offering

Employee and shareholder inquiries should be treated the same as inquiries from the media. At some point it may become necessary to advise employees of the pending offering. Any such announcement should be carefully reviewed with counsel prior to dissemination. In addition, employees should be reminded that all non-routine inquiries should be referred to the designated publicity person(s), and employees should be instructed not to discuss the pending IPO outside the company.

Web Site

The company should continue to host its web site; however, consistent with the suggestions above, care should be taken to avoid placement of information on the web site that is not customary in the company's normal course of business. Therefore, the company should avoid launching extensive new advertising campaigns on the web site without consulting with counsel to determine the applicable treatment of the communication under the securities offering communication regime. Additionally, the company should avoid posting financial projections, forecasts or predictions relating to financial items on its web site. Furthermore, the company should avoid placing hyperlinks on its web site to any third party materials that might tend to condition the market for the proposed offering. By making third party information accessible through a hyperlink on the company's web site, the company risks the implication that it has adopted the material or has disseminated the material itself. As a general rule, any new content for the company's web site should be pre-cleared by counsel prior to posting.

E. Miscellaneous Considerations

1. Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A")

Companies will want to make sure they have reviewed the MD&A disclosure requirements with their auditors and securities counsel to make sure that they can cover all of the areas of particular interest to the SEC staff.

What are some principal MD&A disclosure items that a company should review with its auditor and securities counsel?

- *Off-Balance Sheet Transactions or Contingent Liabilities — SEC rules require the company's MD&A to contain a separately captioned section describing and explaining all "off-balance sheet arrangements," including contingent obligations under certain guarantees and indemnification obligations.*
- *Contractual Obligations — SEC rules require the company's MD&A to include a tabular summary of payment obligations due within specified groupings of years under various categories of contractual obligations, such as long-term debt, capital leases and operating leases.*
- *Critical Accounting Policies — SEC rules require the company to disclose in a separately captioned section the critical accounting estimates made by the company in applying accounting policies and the adoption by the company of an accounting policy that has a material impact on its financial presentation.*

In general, private companies considering going public should consult with their auditors and audit committee to identify the company's most important accounting policies, disclose the company's most difficult judgment estimates and, where appropriate, provide a numerical sensitivity analysis so investors can more clearly understand how the company's policies and estimates affect the reported financial results.

2. Equity Compensation Plans

Employee ownership of company stock can be an effective tool to align employee interests with those of outside investors. Stock option plans or other equity compensation arrangements are commonplace among start-up companies as an effective way to recruit and retain highly qualified employees. Private companies contemplating going public in the foreseeable future should evaluate whether it is desirable to amend their equity incentive plans prior to the commencement of the IPO.

3. Coordination with SEC

When a foreign company plans to list or offer securities publicly in the United States, management may contact the SEC's Office of International Corporate Finance to discuss questions about the required financial statements or unusual accounting and financial reporting issues. A company may be asked to submit pre-filing questions of a complex or sensitive nature in writing.

V. Continuous Disclosure Obligations

An issuer (whether U.S. or foreign) becomes a reporting company in the United States, and thus is subject to the so-called continuous disclosure system of the Exchange Act, as a result of an action or condition that requires either of the following: (i) the registration of a class of equity securities under the Exchange Act; or (ii) the registration of an offering of securities pursuant to the Securities Act.

A. Continuous Disclosure Obligations

A foreign private issuer becomes subject to continuous disclosure obligations under the Exchange Act if:

(i) its registration statement in connection with a public offering becomes effective under the Securities Act (see Section 15(d) of the Exchange Act);

(ii) it lists its securities on a U.S. national securities exchange (e.g. New York Stock Exchange (NYSE) or Nasdaq) pursuant to Section 12(b) of the Exchange Act; or

(iii) its equity securities are widely held and it has significant assets, in each case in excess of the thresholds established by Section 12(g) of the Exchange Act.

1. Registration of Securities in connection with a Public Offering: Section 15(d)

When a foreign private issuer's registration statement under the Securities Act becomes effective, Section 15(d) of the Exchange Act requires the issuer to file the reports required by Section 13 of the Exchange Act with respect to each class of securities covered by the registration statement.

2. Registration of Listed Securities: Section 12(b)

Pursuant to Section 12(b) of the Exchange Act, a foreign private issuer that has a class of securities listed on a U.S. national securities exchange must first register such class of securities under the Exchange Act using Form 20-F regardless of whether or not there has been a registered offering of such securities in the United States and regardless of the number of persons residing in the United States who hold the securities.

3. Registration of Widely Held Equity Securities: Section 12(g)

A foreign private issuer may be required to register a class of equity securities under Section 12(g) of the Exchange Act using Form 20-F even if it is not seeking to list its securities on a U.S. national securities exchange or have its registration statement declared effective under the Securities Act in connection with a public offering. For issuers other than a bank, savings and loan holding company (as defined in the U.S. Home Owners' Loan Act) or bank holding company (as defined in the U.S. Bank Holding Company Act of 1956), registration under the Exchange Act is required if the issuer has both (i) $10 million or more in assets on the last day of its most recent fiscal year and (ii) a class of equity securities held of record by 2,000 or more persons worldwide (or 500 or more persons worldwide who are not accredited investors), and (pursuant to Rule 12g3-2 under the Exchange Act) the number of its U.S. resident holders is 300 or more. (Rule 501 under the Securities Act defines who qualifies as an accredited investor.) In the case of a bank, savings and loan holding company or bank holding company, there is no separate threshold related to non-accredited investors. Any of these issuers must file a registration statement within 120 days after the end of the fiscal year in which they exceeded the total asset and shareholder thresholds. When calculating the number of holders of record for this purpose, issuers may exclude persons who received the securities pursuant to an employee compensation plan in transactions exempted from the registration requirements of Section 5 of the Securities Act. See **Appendix F**: Counting Holders for a more detailed discussion of the rules for counting U.S. resident holders.

B. Exemptions from Continuous Disclosure Obligations

1. 300-Holder Exemption under Rule 12g3-2(a)

A foreign private issuer is exempt from the registration requirement of Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(a) under the Exchange Act if the foreign private issuer has fewer than 300 U.S. resident holders, even if it has 2,000 or more shareholders worldwide. This exemption continues to be available until the end of the fiscal year in which the foreign private issuer exceeds the U.S. resident holder threshold.

For purposes of determining whether a foreign private issuer is subject to Section 12(g) of the Exchange Act, securities are deemed to be "held of record," pursuant to Rule 12g5-1 under the Exchange Act, by each person identified as the owner of such securities on records of security holders maintained by or on behalf of the issuer. In jurisdictions where the likelihood of finding U.S. resident holders is small, issuers need only examine voting securities held of record in three jurisdictions: the United States, the issuer's home jurisdiction and the primary trading market for the issuer's voting securities (if different from the issuer's home jurisdiction). If the securities are held of record by brokers, dealers or banks, or nominees for any of them, the issuer must inquire of such intermediaries as to the ownership of such securities. Securities that are held for the accounts of U.S. resident persons are counted as held in the United States by the number of separate accounts for which the securities are held pursuant to Rule 12g3-2 under the Exchange Act. An issuer may rely in good faith on information supplied by the intermediary record holder as to the number of such separate accounts. If the issuer is not able to obtain information about the record holders' accounts after reasonable inquiry, the issuer may rely upon the presumption that such accounts are held in the broker's, dealer's, bank's or nominee's principal place of business.[2] Issuers should take into account securities beneficially owned by U.S. residents as reported in publicly filed information, e.g. Schedule 13D and Schedule 13G reports. Rule 12g5-1(b)(3) under the Exchange Act requires beneficial owners to be counted as record owners if the issuer knows or has reason to know that the form of holding securities of record is used primarily to circumvent the provisions of Section 12(g) or Section 15(d) of the Exchange Act. See **Appendix F**: Counting Holders for a more detailed discussion of the rules for counting U.S. resident holders.

A foreign private issuer using the exemption provided by Rule 12g3-2(a) under the Exchange Act must reassess the number of its U.S. resident holders at the end of each fiscal year to ensure the applicability of the exemption for the ensuing year. The

2 See Accessing the U.S. Capital Markets — A Brief Overview for Foreign Private Issuers (Feb. 13, 2013), available at http://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml

number of U.S. resident holders of a foreign private issuer may change from time to time, independent of any action taken by the issuer.

2. Rule 12g3-2(b) Exemption

A foreign private issuer is exempt from the registration requirement of Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(b) under the Exchange Act if the issuer:

- does not have reporting obligations under Section 13(a) or Section 15(d) of the Exchange Act;
- maintains a listing of the subject class of securities on one or more exchanges in a non-U.S. jurisdiction that, either singly or together with the trading of the same class of the issuer's securities in another non-U.S. jurisdiction, constitutes the "**primary trading market**" (defined as not more than two non-U.S. jurisdictions where at least 55% of the trading in the subject class of securities takes place, except that if the issuer uses two non-U.S. jurisdictions as its primary trading market, then the trading in at least one of the two non-U.S. jurisdictions must be larger than the trading in the United States) for those securities; and
- publishes (starting at the beginning of its most recent fiscal year) an English version of information that is material to an investment decision regarding the subject securities that, since the first day of its most recently completed fiscal year, (i) it has made public or been required to make public pursuant to the laws of the jurisdiction of its incorporation, organization or domicile, (ii) it has filed with the principal stock exchange in its primary trading market on which its securities are traded and that has been made public by that exchange or (iii) it has distributed or been required to distribute to its security holders, in each case, promptly on its web site or through an electronic information delivery system generally available to the public in its primary trading market.

In contrast to the 300-holder exemption pursuant to Rule 12g3-2(a) under the Exchange Act, this exemption pursuant to Rule 12g3-2(b) under the Exchange Act is based not on the number of U.S. resident holders but on the availability of certain material information regarding the foreign private issuer to U.S. resident holders.

C. Beneficial Ownership Disclosure Obligations for Foreign Private Issuers

While significant shareholders, directors and officers of foreign private issuers are exempt from beneficial ownership reporting under Section 16(a) of the Exchange Act, all investors in a foreign private issuer with a class of securities registered under the Exchange Act are subject to the beneficial ownership reporting requirements pursuant to Section 13(d) and Section 13(g) of the Exchange Act and Regulation 13D-G under the Exchange Act. Beneficial ownership is defined in Rule 13d-3 under the Exchange

Act as the direct or indirect voting power or investment power in respect of the subject securities. Generally, shareholders who acquire beneficial ownership of more than 5% of a class of equity securities registered under the Exchange Act must file with the SEC (and send a copy to the issuer) a statement on Schedule 13D or, if eligible, on the shorter Schedule 13G. **Appendix G**: Beneficial Ownership Reporting Requirements (Schedule 13D and Schedule 13G) discusses the requirements of Schedule 13D and Schedule 13G.

D. Terminating Continuous Disclosure Obligations

The process whereby a foreign company can delist from a U.S. national securities exchange and deregister under the Exchange Act is complex.

1. Delisting of Listed Securities

A security listed on a U.S. national securities exchange may be withdrawn from listing only in accordance with the rules of such exchange and, as provided pursuant to Rule 12d2-2 under the Exchange Act, upon such terms as the SEC may deem necessary for the protection of investors. However, the SEC usually does not impose additional requirements on issuers that comply with the delisting requirements of the exchanges where their securities are listed. A summary of the delisting requirements of the major U.S. national securities exchanges is provided below.

NYSE

Delisting of a foreign company from the NYSE is governed by Section 806.02 of the NYSE Listed Company Manual, which requires:

- approval by the issuer's board of directors;
- furnishing the NYSE with a copy of the board resolution authorizing such delisting certified by the secretary of the issuer;
- filing of a Form 25 with the SEC to withdraw the security from the listing on the NYSE and/or registration made pursuant to the Exchange Act;
- delivery of a copy of the Form 25 to the NYSE simultaneously with the filing of such Form 25 with the SEC;
- pursuant to Rule 12d2-2(c) under the Exchange Act, written notice to the NYSE of its determination to withdraw the class of securities from listing and/or registration on the NYSE no fewer than 10 days before the issuer files the aforementioned Form 25; and
- pursuant to Rule 12d2-2(c) under the Exchange Act, issuance of a press release (and posting of the same on the issuer's web site) providing notice of its intent to withdraw such class of securities from listing and/or registration contemporaneous with the provision of the aforementioned written notice to the NYSE.

Nasdaq

Delisting of a foreign company from Nasdaq is governed by Section 5840(j)(1) of the Nasdaq Stock Market Rules, which requires:

- filing of a Form 25 with the SEC;
- delivery of a copy of the Form 25 to Nasdaq simultaneously with the filing of such Form 25 with the SEC;
- pursuant to Rule 12d2-2(c) under the Exchange Act, written notice to Nasdaq of its determination to withdraw the class of securities from listing and/or registration on Nasdaq no fewer than 10 days before the issuer files the aforementioned Form 25; and
- pursuant to Rule 12d2-2(c) under the Exchange Act, issuance of a press release (and posting of the same on the issuer's web site) providing notice of its intent to withdraw such class of securities from listing and/or registration contemporaneous with the provision of the aforementioned written notice to Nasdaq.

NYSE MKT

Delisting of securities listed on the NYSE MKT (formerly known as NYSE Amex) is governed by Section 1010 of NYSE MKT Company Guide. The steps to delist follow the requirements set forth in Rule 12d2-2 under the Exchange Act and are substantially the same as those required by Nasdaq.

General

A Form 25 to delist a security becomes effective 10 days after filing with the SEC pursuant to Rule 12d2-2(d)(1) under the Exchange Act, and a Form 25 filed to deregister a security becomes effective 90 days after filing with the SEC (unless the SEC provides for a shorter period) pursuant to Rule 12d2-2(d)(2) under the Exchange Act.

Issuers should also be cognizant of any requirements set forth in their organizational documents in connection with the delisting process.

2. Termination of Registration under Section 12(g) and Section 15(d)

Foreign issuers may choose one of two methods to deregister under Section 12(g) and Section 15(d) of the Exchange Act.

The first method of deregistration is provided pursuant to Rule 12g-4 (with respect to Section 12(g)) and Rule 12h-3 (with respect to Section 15(d)) under the Exchange Act, which are applicable to both U.S. and foreign companies. Under those rules, a company's ability to deregister depends on its having less than 300 (or, in the case of a bank, savings and loan holding company or bank holding company, 1,200) holders of record of the relevant class of securities (or less than 500 holders of record if the company's total assets have not exceeded $10 million on the last day of each of the three most recent fiscal years). In computing the number of holders of record, a

company may use the counting method set forth in Rule 12g5-1 under the Exchange Act, which does not look through the holdings of brokers, dealers, banks or other nominees to beneficial owners. As a result, a company may have much more than 300 (or 1,200) beneficial owners of its securities but still be deemed to have less than 300 (or 1,200) holders of record. In addition, Rule 12h-3 under the Exchange Act requires that the company be current in all SEC filing obligations for the three most recent fiscal years and the portion of the current year preceding deregistration and that the company did not have a registration statement declared effective or required to be updated pursuant to Section 10(a)(3) of the Securities Act during the applicable fiscal year. Such updating can occur automatically by means of the incorporation by reference of an annual report on Form 20-F into a company's registration statement. Thus, to be eligible to use Rule 12h-3 under the Exchange Act in a given fiscal year, the company must either not yet have filed its Form 20-F for the prior fiscal year or must have terminated any registration statements that would incorporate such filing by reference prior to filing such Form 20-F.

The second method of deregistration, which is only available to foreign private issuers, is set forth in Rule 12h-6 under the Exchange Act. Pursuant to Rule 12h-6 under the Exchange Act, the foreign private issuer must:

- have been registered with the SEC for at least one year, have filed at least one annual report (Form 20-F) and have filed or furnished all other required reports during the preceding 12 months;
- have a primary trading market outside the United States that constituted at least 55% of its trading during the prior 12 months; and
- not have sold any of its securities (with limited exceptions) in a registered offering during the preceding 12 months.

In addition, Rule 12h-6 under the Exchange Act requires that either:

- the average daily trading volume of the subject class of securities in the United States for a recent 12-month period must have been no greater than 5% of the average daily trading volume of that class of securities on a worldwide basis for the same period; or
- on a date within 120 days before the filing date of the Form 15F (described below), the subject class of equity securities must have been held of record by less than 300 persons either on a worldwide basis or resident in the United States.

A foreign private issuer may deregister and terminate its reporting obligations for debt securities registered under the Exchange Act if two conditions are met, as provided in Rule 12h-6(c) under the Exchange Act. First, the foreign private issuer must have filed or furnished all reports required under the Exchange Act, including at least one annual report. Second, on any date within 120 days before filing for deregistration, the class of debt securities must have been held of record by less than 300 persons either on a worldwide basis or resident in the United States.

If a company is eligible to use either method described above, it may be preferable to use Rule 12h-6 under the Exchange Act, which actually terminates (rather than suspends) reporting obligations pursuant to Section 15(d) of the Exchange Act, as described below.

To deregister pursuant to Rule 12g-4 and Rule 12h-3 under the Exchange Act, the company must file a Form 15 with the SEC. A Form 15 filed pursuant to Rule 12h-3 under the Exchange Act becomes effective upon filing, but a Form 15 filed pursuant to Rule 12g-4 under the Exchange Act becomes effective 90 days after filing (or such shorter period determined by the SEC). During this 90-day window, a foreign private issuer is not required to file any reports pursuant to Section 13(a) of the Exchange Act (i.e. Form 20-F or Form 6-K), but will continue to be subject to other applicable requirements of the Exchange Act during that window of time (such as beneficial ownership reporting rules, tender offer rules, proxy rules and short-swing profit rules). However, if any Form 15 is denied by the SEC, the foreign private issuer must catch up on such reports within 60 days from the date of denial.

To deregister pursuant to Rule 12h-6 under the Exchange Act, a company must file a Form 15F with the SEC. A Form 15F becomes effective within the same time period and conveys the same interim suspension of filing obligations as a Form 15. Either before or at the time the Form 15F is filed, the company must provide public notice that it intends to deregister. Such notice must be published "through a means reasonably designed to provide broad dissemination of the information to the public in the United States," such as a press release. The company must also submit a copy of the notice to the SEC, either as a Form 6-K filing or as an exhibit to the Form 15F when it is filed.

VI. Exemptions from Securities Act Registration

A. Introduction and Background

The registration requirements under Section 5 of the Securities Act are designed to cover public distributions of securities. Exemptions from the registration requirements of Section 5 of the Securities Act for certain types of transactions are set forth in Section 4 of the Securities Act. Section 4(a)(1) of the Securities Act exempts transactions "by any person other than an issuer, underwriter, or dealer." Section 4(a)(2) of the Securities Act exempts transactions "by an issuer not involving any public offering." Finally, Section 4(a)(3) of the Securities Act exempts transactions by a dealer not acting as an underwriter.

The term "underwriter," which is essential for an interpretation of the exemptions set forth in Section 4 of the Securities Act, is broadly defined in Section 2(a)(11) of the Securities Act to include "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking . . . ." Anyone who could be deemed an underwriter would not be exempt under Section 4 of the Securities Act. Because of the broad definition of who is an underwriter, it is extremely important for would-be issuers to consult with experienced legal advisors before issuing unregistered securities. Rule 144 under the Securities Act provides a set of objective criteria as to who is deemed not to be engaged in a distribution and therefore not an underwriter and provides a safe harbor for limited sales of unregistered securities. See "Resales of Restricted Securities" at Part VI.D. (page 50) of this publication and ***Appendix H****: Permissible Resales pursuant to Rule 144 under the Securities Act for a detailed explanation of the safe harbor provided by Rule 144 under the Securities Act. Section 4(a)(2) of the Securities Act and the specific safe harbors provided by Regulation D under the Securities Act, more fully described below, are by far the exemptions of choice for private offerings of securities by issuers.*

B. Private Offering Exemptions

1. Private Offerings in General: Section 4(a)(2)

A transaction by an issuer not involving any public offering is generally referred to as a private offering or private placement, and the exemption is sometimes called a "private offering exemption." A key requirement for the availability of this exemption is that the transaction not involve a "public offering." The interpretation of the term "public offering" has been subject to significant discussion since the adoption of the Securities Act. One clarification came in 1953, when the U.S. Supreme Court held in *SEC v. Ralston Purina Co.*, 346 U.S. 119, 125 (1953), that the private offering exemption is available for an offering made exclusively to persons "able to fend for themselves." According to the SEC and various legal precedent, including *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 903 (5th Cir. 1977), the ability to fend for oneself depends on factors such as access to the same kind of information that would be included in a registration statement and sophistication of the offerees.

To ensure the availability of the private offering exemption, private offerings are usually structured to have all or some of the following characteristics:

- limited number of offerees;
- securities are denominated, offered and sold in large amounts;

- securities contain restrictive legends, if in physical form, and are subject to transfer restrictions;
- the offering is not made by means of general solicitation or general advertising (except that Rule 506(c) of Regulation D under the Securities Act permits general solicitation and general advertising in transactions where all purchasers are accredited investors); and
- the purchasers of the securities typically execute and deliver to the issuer a so-called investment letter or non-distribution letter, in which such purchasers acknowledge and certify that (i) the securities to be issued have not been registered under the Securities Act, (ii) the purchasers are sophisticated investors and have received all of the information they requested from the seller about the securities, (iii) the purchasers are not purchasing the securities to be issued with a view to distribution in the United States and (iv) in the absence of an effective registration statement, resales of the securities will only be permitted if a legal opinion is provided as to the availability of an exemption from registration.

2. Regulation D Offering Exemptions

Regulation D under the Securities Act establishes four exemptions from the registration requirements of the Securities Act. These exemptions are contained in Rule 504, Rule 505, Rule 506(b) and Rule 506(c) of Regulation D under the Securities Act. Rule 503 of Regulation D under the Securities Act requires an issuer using such an exemption to file a Form D with the SEC no later than 15 calendar days after the first sale of the subject securities. (The first sale can occur once an investor is contractually committed to invest, which could be the date that a subscription agreement is signed.) Form D is a form of notice that contains certain information about the issuer and the directors and officers of the issuer. (In July 10, 2013, the SEC in Release No. 33-9416 proposed changes to Rule 503 of Regulation D under the Securities Act that would require an issuer to file an Advance Form D at least 15 days before engaging in general solicitation or general advertising in connection with a private offering pursuant to Rule 506(c) under the Securities Act, but this proposed rule is still under consideration and is not yet effective.) Although not required to be registered, transactions effected pursuant to Regulation D under the Securities Act are subject to the anti-fraud provisions of the U.S. federal securities laws, which require that information provided to investors be free of any untrue statement of a material fact or omissions to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Rule 504 Exemption

Rule 504 under the Securities Act provides an exemption for the offer and sale of up to $1 million of securities in any 12-month period if:

- the issuer is not subject to Exchange Act reporting requirements;
- the issuer is not an "investment company," defined by the SEC in the U.S. Investment Company Act of 1940 generally as a company that engages primarily in the business of investing, reinvesting or trading in securities;
- the issuer is not a development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person; and
- neither the issuer nor any person acting on its behalf offers or sells the securities by any form of general solicitation or general advertising.

Purchasers in this type of transaction receive "restricted securities," which means that the securities may not be resold without registration or an exemption therefrom. However, the subject securities will be freely tradable (and the general solicitation and general advertising prohibitions will not apply) if the offers and sales of the subject securities are made:

- exclusively in one or more states that provide for the registration of the securities, and require the public filing and delivery of a substantive disclosure document before sale, and are made in accordance with those state provisions;
- in one or more states that have no provision for the registration of the securities or the public filing or delivery of a disclosure document before sale, if the securities have been registered in at least one state that provides for such registration, public filing and delivery before sale, offers and sales are made in that state in accordance with such provisions, and the disclosure document is delivered before sale to all purchasers (including those in the states that have no such procedure); or
- exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to accredited investors.

Rule 505 Exemption

Rule 505 under the Securities Act provides an exemption for the offer and sale of up to $5 million of securities in any 12-month period if:

- the issuer is not an investment company;
- neither the issuer nor any person acting on its behalf offers or sells the securities by any form of general solicitation or general advertising;
- the securities issued are restricted securities; and
- the issuer sells the subject securities only to accredited investors and up to 35 other persons.

Rule 505 under the Securities Act allows the issuer to decide what information to provide to accredited investors, but the issuer must provide non-accredited investors with disclosure documents that are substantially the same as those required for registered offerings and any other information provided to accredited investors. Except in certain limited circumstances, any financial statements provided to prospective purchasers must be certified by an independent public accountant. The issuer must also make itself available to answer questions of prospective purchasers.

An issuer using Rule 505 under the Securities Act must exercise "reasonable care" to assure that prospective purchasers are not underwriters, which may be demonstrated by:

- reasonable inquiry to determine if the purchaser is acquiring the securities for itself or for other persons;
- written disclosure to each purchaser prior to sale that the securities have not been registered under the Securities Act and, therefore, cannot be resold unless they are registered under the Securities Act or unless an exemption from registration is available; and
- placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Securities Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, they are not the exclusive methods to demonstrate such care.

Rule 506(b) Exemption

Rule 506(b) under the Securities Act is the exemption historically used most often by issuers in private placements. It is a "safe harbor" for private offering exemptions generally, and it allows an issuer to offer and sell an unlimited amount of securities if the following conditions are satisfied:

- neither the issuer nor any person acting on its behalf offers or sells the securities by any form of general solicitation or general advertising;
- the securities issued are restricted securities; and
- the issuer sells the subject securities only to accredited investors and up to 35 other persons, provided that, unlike Rule 505 under the Securities Act, all such other persons must be "sophisticated" (i.e. such person alone or with such person's purchaser representative(s) has such knowledge and experience in financial and business matters that such person is capable of evaluating the merits and risks of the prospective investment or the issuer reasonably believes immediately prior to making any sale that such person comes within this description).

The provisions discussed above in respect of Rule 505 under the Securities Act relating to information provided to non-accredited investors and prospective purchaser questions and the exercise of reasonable care apply equally to the exemption provided by Rule 506(b) under the Securities Act.

Rule 506(c) Exemption

Rule 506(c) under the Securities Act is a "safe harbor" for private offering exemptions generally that, unlike Rule 506(b) under the Securities Act, permits general solicitation and general advertising, and it allows an issuer to offer and sell an unlimited amount of securities if the following conditions are satisfied:

- the securities issued are restricted securities;
- the issuer sells the subject securities only to accredited investors; and
- the issuer takes reasonable steps to verify that each purchaser is an accredited investor.

To allay concerns about compliance with the "reasonable steps to verify" requirement, Rule 506(c)(2)(ii) under the Securities Act provides the following four non-exclusive and non-mandatory methods for what constitutes reasonable efforts to verify a purchaser's accredited investor status:

- **Income Test:** Reviewing any U.S. Internal Revenue Service form that reports the purchaser's income for the two most recent years (including Form W-2, Form 1099, Schedule K-1 to Form 1065 and Form 1040) and obtaining a written representation from the purchaser that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year.
- **Net Worth Test:** Reviewing bank statements, brokerage statements or other statements of securities holdings, certificates of deposit, tax assessments, appraisal reports issued by independent third parties and a consumer report from at least one of the nationwide consumer reporting agencies, each dated within the prior three months, that confirms the assets and liabilities of the purchaser and obtaining a written representation from the purchaser that all liabilities necessary to make a determination of net worth have been disclosed.
- **Professional Verification:** Obtaining a written confirmation from a registered broker-dealer, an investment adviser registered with the SEC, a licensed attorney or a certified public accountant that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor.
- **Grandfathering:** In regard to any purchaser who purchased securities in an issuer's Rule 506(b) offering as an accredited investor prior to September 23, 2013 and continues to hold such securities, for the same issuer's Rule 506(c) offering, obtaining a certification by such person at the time of sale that he or she qualifies as an accredited investor.

The provisions discussed above in respect of Rule 505 under the Securities Act relating to the exercise of reasonable care apply equally to the exemption provided by Rule 506(c) under the Securities Act.

C. Other Private Placement Considerations

1. Publicity

As referenced above, Rule 502(c) of Regulation D under the Securities Act prohibits general solicitation or general advertising with respect to most offerings of securities conducted pursuant to Regulation D under the Securities Act. This prohibition applies to an issuer and any person acting on the issuer's behalf. The prohibited actions include cold calls, press releases, advertisements, articles, notices or other communications published in any newspaper, magazine or similar media or broadcast over television or radio and any seminars or meetings whose attendees have been invited by any general solicitation or general advertising.

The SEC advised in a no-action letter to E.F. Hutton & Co., Inc. dated December 3, 1985 that general solicitation or general advertising is typically not found when there is a pre-existing, substantive relationship between an issuer (or its broker-dealer) and an offeree.

Safe Harbor for Press Releases in the United States

Rule 135c under the Securities Act provides a safe harbor that allows a foreign private issuer that is exempt from registration pursuant to Rule 12g3-2(b) under the Exchange Act to give notice that it proposes to make, is making or has made an offering of securities not registered or required to be registered under the Securities Act if the following requirements are met:

- such notice is not used for the purposes of conditioning the market in the United States for any of the securities offered;
- such notice states that the securities offered will not be or have not been registered under the Securities Act and may not be offered or sold in the United States absent registration or an applicable exemption from registration requirements; and
- such notice contains no more than:
  - the name of the issuer;
  - the title, amount and basic terms of the securities offered, the amount of the offering, if any, made by selling security holders, the time of the offering and a brief statement of the manner and purpose of the offering without naming the underwriters;

- any statement or legend required by U.S. state law, foreign law or administrative authority; and
- certain other information in the case of rights offerings, exchange offers and offers to employees.

The notice must be furnished by a foreign private issuer to the SEC under Form 6-K or otherwise pursuant to Rule 12g3-2(b) under the Exchange Act.

Offshore Press Conferences

Publicity issues for a foreign private issuer may also arise when U.S. journalists are provided with access to:

- the issuer's press conferences held outside the United States;
- meetings with the issuer or selling security holder representatives conducted outside the United States; or
- written press-related materials released outside the United States,

in each case at or in which a present or proposed offering of securities is discussed. Rule 135e under the Securities Act provides that these activities are permissible if the following requirements are met:

- the issuer in question is a foreign private issuer, a foreign government issuer, a selling security holder of securities of a foreign private issuer or a foreign government issuer or a representative of any of the foregoing;
- the present or proposed offering is not being, or to be, conducted solely in the United States (meaning that there must be an intent to make a bona fide offering outside the United States);
- access is provided to both U.S. and foreign journalists; and
- any written press-related materials pertaining to transactions in which any of the securities will or are being offered in the United States must:
  - state that the written press-related materials are not an offer of securities for sale in the United States, that securities may not be offered or sold in the United States absent registration or an exemption from registration and that any public offering of securities to be made in the United States will be made by means of a prospectus that may be obtained from the issuer or selling security holder and that will contain detailed information about the company and management, as well as financial statements;
  - if the issuer or selling security holder intends to register any part of the present or proposed offering in the United States, include a statement regarding this intention; and
  - not include any purchase order, or coupon that could be returned indicating interest in the offering, as part of, or attached to, the written press-related materials.

2. Integration of Private and Public Offerings

The SEC's integration doctrine concerns the question as to whether two or more purportedly discrete offerings of securities are really part of the same offering (i.e. "integrated") in a manner designed to circumvent the registration requirements of the Securities Act. Integration issues may arise, for example, if an issuer immediately follows a private offering with a registered public offering or vice versa. If the two offerings are deemed integrated as a single offering, the integrated offering would have violated Section 5 of the Securities Act because the general solicitation and general advertising involved in the public offering portion of the integrated offering means that the private offering exemption would not be available (other than in the case of private placements utilizing general solicitation and general advertising properly effectuated pursuant to Rule 506(c) under the Securities Act). In addition, so-called "gun jumping" issues (i.e. prohibitions against actions and communications that have the effect of conditioning the market before an offering) would be raised by the offers and sales in a private offering that precedes a public offering.

The note to Rule 502(a) under the Securities Act sets forth a five-factor test that the SEC uses to determine whether purportedly separate offerings should be integrated for purposes of the exemptions pursuant to Regulation D under the Securities Act. These five factors are:

- whether the sales are part of a single plan of financing;
- whether the sales involve issuance of the same class of securities;
- whether the sales have been made at or about the same time;
- whether the same type of consideration is being received; and
- whether the sales are made for the same general purpose.

It is important to note that the five-factor test does not preclude an issuer from conducting concurrent private and public offerings.

The SEC has provided guidance in Release No. 33-7943 (Integration of Abandoned Offerings, Jan. 26, 2001) and Release No. 33-8828 (Revisions of Limited Offering Exemptions in Regulation D, Aug. 3, 2007) regarding the framework for analyzing potential integration issues in the specific situation of concurrent private and public offerings. Specifically, the guidance provides that the filing of a registration statement does not eliminate an issuer's ability to conduct a concurrent private offering, whether it is commenced before or after the filing of the registration statement. The analysis focuses on the manner in which the investors in the private offering are solicited. If the investors in the private offering became interested in the private offering by means of the registration statement used for the public offering, then the registration statement will have served as a general solicitation for the securities being offered in the private offering, the exemption provided by Section 4(a)(2) of the Securities Act would not be available for the private offering, and the private offering would be integrated with

the public offering. On the other hand, if the investors in the private offering became interested in the private offering through some means other than the registration statement used for the public offering, then the registration statement would not have served as a general solicitation for the securities being offered in the private offering, the exemption provided by Section 4(a)(2) of the Securities Act would be available, and the private offering would not be integrated with the public offering.

Relief from the integration doctrine is provided in certain situations, including the following:

(a) Pursuant to Rule 502(a) under the Securities Act, offers and sales of securities that are made more than six months before the start of a Regulation D offering or are made more than six months after the completion of a Regulation D offering will not be considered part of the Regulation D offering, so long as during those six-month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold in the Regulation D offering.

(b) Pursuant to Rule 152 under the Securities Act, a transaction not involving any public offering at the time of such transaction is within the private offering exemption of Section 4(a)(2) of the Securities Act, and therefore an exempt transaction, even if subsequently thereto the issuer decides to make a public offering and/or files a registration statement. However, under the SEC guidance referenced above, the private offering must be completed prior to the filing of a registration statement for relief to be available pursuant to Rule 152 under the Securities Act.

(c) Rule 155 under the Securities Act provides a safe harbor from the integration doctrine for a registered offering following an abandoned private offering and for a private offering following an abandoned registered offering, as follows:

  (i) Pursuant to Rule 155(b) under the Securities Act, an abandoned private offering of securities will not be integrated with a later registered offering if the following conditions are met:

    (1) no securities were sold in the private offering;

    (2) the issuer and any person(s) acting on its behalf terminate all offering activity in the private offering before the issuer files the registration statement for the registered offering;

    (3) any prospectus used in the registered offering discloses information about the abandoned private offering, including (i) the size and nature of the private offering, (ii) the date on which the issuer abandoned the private offering, (iii) that any offers to buy or indications of interest given in the private offering were rejected or otherwise not accepted and (iv) that the prospectus delivered in the registered offering supersedes any offering materials used in the private offering; and

(4) the issuer does not file the registration statement for the registered offering until at least 30 calendar days after termination of all offering activity in the private offering, unless the issuer and any person acting on its behalf offered securities in the private offering only to persons who were (or who the issuer reasonably believes were) accredited investors or sophisticated investors.

(ii) Pursuant to Rule 155(c) under the Securities Act, an abandoned registered offering of securities will not be integrated with a later private offering if the following conditions are met:

(1) no securities were sold in the registered offering;

(2) the issuer withdraws the registration statement for the registered offering;

(3) neither the issuer nor any person acting on its behalf commences the private offering earlier than 30 calendar days after the effective date of withdrawal of the registration statement;

(4) the issuer notifies each offeree in the private offering that (i) the offering is not registered under the Securities Act, (ii) the securities will be restricted securities and may not be resold unless they are registered under the Securities Act or an exemption from registration is available, (iii) purchasers in the private offering do not have the protection of Section 11 of the Securities Act (which provides for the right to bring a civil action against the issuer and other applicable parties for untrue statements or omissions in the registration statement) and (iv) a registration statement for the abandoned offering was filed and withdrawn, specifying the effective date of the withdrawal; and

(5) any disclosure document used in the private offering discloses any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering.

(d) Pursuant to the SEC guidance referenced above, offshore transactions made in compliance with Regulation S under the Securities Act are not integrated with registered domestic offerings or domestic offerings that satisfy the requirements for an exemption from registration under the Securities Act, even if undertaken contemporaneously.

(e) Rule 701(f) under the Securities Act provides that private offerings made pursuant to written compensatory benefit plans for employees of an issuer are not subject to integration with other public offerings or private offerings.

3. Due Diligence

In connection with disclosures made in a private offering, liability under U.S. federal securities laws may arise if such disclosure contains any untrue statement of a material fact or omissions to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. The purpose of a due diligence investigation with regard to the issuer is to avoid any such defective disclosure and the concomitant liabilities. See **Appendix C**: Outline of Liabilities under the U.S. Federal Securities Laws for more information on liabilities under the U.S. federal securities laws.

The scope of due diligence in private offerings depends on the type of issuer, the securities being offered and the nature of the offering. Participants in private offerings in the United States often follow extensive diligence and verification procedures that are similar to those used in the context of public offerings. See **Appendix I**: Legal Due Diligence for more information regarding the scope and nature of due diligence.

D. Resales of Restricted Securities

"Restricted securities," which are defined in Rule 144(a)(3) under the Securities Act, are securities acquired in unregistered offerings, such as private placements pursuant to Regulation D under the Securities Act or compensatory benefit plans for employees pursuant to Rule 701 under the Securities Act, from the issuer or its affiliates. "Control securities" are securities held by affiliates of the issuer. Neither restricted securities nor control securities can be resold unless they are registered or exempt from registration. To dispose of restricted securities and control securities without registration, prospective sellers can take advantage of the exemption provided by Section 4(a)(1) of the Securities Act, which allows for resale transactions "by any person other than an issuer, underwriter, or dealer."

While it is relatively easy to determine whether a prospective seller is not the issuer or a dealer, determining whether a prospective seller is an underwriter can be a subjective and complex process. As a result, Rule 144 under the Securities Act provides a safe harbor for the public resale of (i) restricted securities by non-affiliates and affiliates of the issuer and (ii) control securities by affiliates of the issuer, as a way to establish a specific criterion for determining whether a prospective seller is not engaged in the distribution of securities and therefore not an underwriter. See **Appendix H**: Permissible Resales pursuant to Rule 144 under the Securities Act for more information relating to Rule 144 under the Securities Act.

1. Public Resales

Restricted Securities vs. Control Securities

Rule 144 under the Securities Act allows for the sale of restricted securities and control securities. A seller who satisfies the provisions of Rule 144 under the Securities Act shall be deemed not to be an underwriter. Accordingly, the exemption provided by Section 4(a)(1) of the Securities Act would be available for the resale of restricted securities and control securities into the U.S. public markets by a prospective seller who satisfies the requirements of Rule 144 under the Securities Act, provided the seller is neither the issuer nor a dealer.

Rule 144 under the Securities Act distinguishes between prospective sellers affiliated with the issuer and prospective sellers not affiliated with the issuer. An affiliate of an issuer is "a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such issuer." "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. It is generally presumed that holders of at least 10% of the voting equity of an issuer and directors and officers of an issuer are affiliates of the issuer, and any securities of the issuer acquired by them are considered control securities. As described below, Rule 144 under the Securities Act distinguishes between the sale of restricted securities (by non-affiliates or affiliates) and control securities (by affiliates).

Resale of Restricted Securities

The following requirements must be met before restricted securities may be sold in a public transaction pursuant to Rule 144 under the Securities Act:

- **Holding Period**. The required holding period for the restricted securities is six months, except that if the issuer has not been subject to the reporting requirements of the Exchange Act for a period of at least 90 days immediately before the sale, the required holding period for the restricted securities is one year. The relevant holding period begins when the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer. Additional securities purchased do not affect the holding period of previously purchased securities of the same class. The holding period for restricted securities purchased from anyone other than the issuer or an affiliate of the issuer can be tacked to the holding period of the person from whom the restricted securities were purchased. For stock options, the holding period begins on the date of a cashless exercise of such options rather than the date such options were granted.

- **Current Public Information**. If the issuer is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of the Exchange Act, the issuer must have filed all required reports under the Exchange Act during the 12 months preceding such sale (other than Form 8-K reports), except that this requirement does not apply for sales for the account of a person who is not an affiliate of the issuer at the time of sale and has not been an affiliate during the preceding three months, provided a period of one year has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer. If the issuer is not subject to the reporting requirements of the Exchange Act, there must be publicly available certain current information about the issuer (including certain business and financial information) unless the seller is not an affiliate of the issuer.
- **Limitation on Amount of Securities Sold**. If the seller is an affiliate of the issuer, the amount of securities of the same class sold during any three-month period cannot exceed the greater of (i) 1% of the securities of the class outstanding or (ii) the average weekly reported volume of trading during the four calendar weeks preceding the filing of a notice of proposed sale on Form 144. In addition, any such securities that are debt securities may not exceed (taken together with all securities of the same class during the preceding three months) 10% of the principal amount of the class of securities sold.
- **Manner of Sale**. If the seller is an affiliate of the issuer, the sale must be handled as a routine trading transaction, and a broker may not receive more than the usual and customary broker's commission. Neither the seller nor the broker can solicit orders to buy the securities.
- **Notice of Proposed Sale**. If the seller is an affiliate of the issuer, it must file a notice with the SEC on Form 144 if the amount of securities to be sold during any period of three months exceeds 5,000 shares or has an aggregate sale price in excess of $50,000.

Accordingly, six months after purchase, non-affiliates may sell restricted securities of a reporting company with adequate current public information without restrictions and may sell restricted securities of any company one year after issuance. The resale of restricted securities by affiliates, even after the expiration of the one-year holding period, continues to be subject to the various other restrictions set forth above. It should be noted that the acquisition and resale of the securities by the issuer or any of its affiliates will restart the holding period requirement for those securities.

Resale of Control Securities

Rule 144 under the Securities Act also applies to the resale of control securities that are not also restricted securities. To resell control securities that are not also restricted

securities, prospective sellers must comply with the requirements set forth under "Public Resales—Resale of Restricted Securities" at Part VI.D.1. (page 51) of this publication, except that prospective sellers are not required to comply with the holding period requirement.

Even if all of the requirements of Rule 144 under the Securities Act have been met, as a practical matter, restricted securities may not be sold to the public until any legend (typically stating that the securities may not be resold to the public unless they are registered or exempted from registration) is removed from the certificate representing the securities. Only a transfer agent can remove such a restrictive legend, but the transfer agent usually does not have authority to remove such a restrictive legend unless the seller has obtained the consent of the issuer, usually in the form of an opinion letter from the issuer's legal counsel stating that the restrictive legend may be removed.

2. Private Resales

Section "4(a)(1½)" Exemption

Over the years, an approach referred to as the **Section "4(a)(1½)" Exemption** has developed among securities professionals. The Section 4(a)(1½) Exemption, which is not codified anywhere in the U.S. federal securities laws, rules or regulations, allows for limited resales of restricted securities in private transactions without the holding period requirement of Rule 144 under the Securities Act. The Section 4(a)(1½) Exemption rests on the theory that the resale of privately offered securities to an investor to whom the original private sale by the issuer could have been made under Section 4(a)(2) of the Securities Act should not be deemed a distribution and should therefore be exempt from registration if the new investor, who is purchasing the same securities from the original purchaser in a private transaction, will be subject to the same restrictions imposed on the original purchaser. Resales on the basis of the Section 4(a)(1½) Exemption are usually accompanied by (i) a legal opinion to the effect that the resale is exempt from registration and/or (ii) an investment letter or non-distribution letter from the purchaser containing essentially the same representations and agreements as those provided to the issuer by the original purchaser.

Section 4(a)(7) Exemption

Section 4(a)(7) of the Securities Act, which became effective in December 2015, grants a statutory exemption for resale transactions of restricted and control securities to accredited investors, subject to certain conditions. The Section 4(a)(7) exemption applies so long as the following requirements of Section 4(d) of the Securities Act are met:

- each purchaser is an accredited investor (as defined in Rule 501(a) under the Securities Act);

- neither the seller, nor any person acting on the seller's behalf, offers or sells securities by any form of general solicitation or general advertising;
- in the case of a transaction involving the securities of an issuer that is neither subject to Section 13 or 15(d) of the Exchange Act, nor exempt from reporting pursuant to Rule 12g3-2(b) under the Exchange Act, nor a foreign government (as defined in Rule 405 under the Securities Act) eligible to register securities under Schedule B to the Securities Act, the seller and a prospective purchaser designated by the seller obtain from the issuer, upon request of the seller, and the seller in all cases makes available to a prospective purchaser, the following information (which shall be reasonably current in relation to the date of resale):
  - the exact name of the issuer and the issuer's predecessor (if any);
  - the address of the issuer's principal executive offices;
  - the exact title and class of the security;
  - the par or stated value of the security;
  - the number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year;
  - the name and address of the transfer agent, corporate secretary, or other person responsible for transferring shares and stock certificates;
  - a statement of the nature of the business of the issuer and the products and services it offers, which shall be presumed reasonably current if the statement is as of 12 months before the transaction date;
  - the names of the officers and directors of the issuer;
  - the names of any persons registered as a broker, dealer, or agent that shall be paid or given, directly or indirectly, any commission or remuneration for such person's participation in the offer or sale of the securities;
  - the issuer's most recent balance sheet and profit and loss statement and similar financial statements, which shall (i) be for such part of the two preceding fiscal years as the issuer has been in operation, (ii) be prepared in accordance with GAAP or the IFRS issued by the IASB, (iii) be presumed reasonably current if (1) with respect to the balance sheet, the balance sheet is as of a date less than 16 months before the transaction date and (2) with respect to the profit and loss statement, such statement is for the 12 months preceding the date of the issuer's balance sheet, and (iv) if the balance sheet is not as of a date less than six months before the transaction date, be accompanied by additional statements of profit and loss for the period from the date of such balance sheet to a date less than six months before the transaction date; and
  - to the extent that the seller is a control person with respect to the issuer, a brief statement regarding the nature of the affiliation, and a statement certified by such seller that they have no reasonable grounds to believe that the issuer is in violation of the securities laws or regulations;

- the transaction is not for the sale of a security where the seller is an issuer or a subsidiary, either directly or indirectly, of the issuer;
- neither the seller, nor any person that has been or will be paid (directly or indirectly) remuneration or a commission for their participation in the offer or sale of the securities, including solicitation of purchasers for the seller, is subject to an event that would disqualify an issuer or other covered person under Rule 506(d)(1) under the Securities Act or is subject to a statutory disqualification described under Section 3(a)(39) of the Exchange Act;
- the issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that the issuer's primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;
- the transaction is not with respect to a security that constitutes the whole or part of an unsold allotment to, or a subscription or participation by, a broker or dealer as an underwriter of the security or a redistribution; and
- the transaction is with respect to a security of a class that has been authorized and outstanding for at least 90 days prior to the date of the transaction.

With respect to an exempted transaction described under Section 4(a)(7) of the Securities Act:

- securities acquired in such transaction shall be deemed to have been acquired in a transaction not involving any public offering;
- such transaction shall be deemed not to be a distribution for purposes of Section 2(a)(11) of the Securities Act; and
- securities involved in such transaction shall be deemed to be restricted securities within the meaning of Rule 144 under the Securities Act.

Section 4(a)(7) makes clear that it is not the exclusive means for establishing the exemption from the registration requirements of Section 5 of the Securities Act. Accordingly, resale transactions may continue to be undertaken under the Section 4(a)(1½) exemption described above, which may continue to be particularly useful in the case of resales of securities of private companies that lack sufficient financial information.

Private Resales (Rule 144A)

Rule 144A under the Securities Act (not to be confused with Rule 144 under the Securities Act) provides a non-exclusive safe harbor from the registration requirements of the Securities Act for certain reoffers and resales of securities to certain large institutional investors known as "**qualified institutional buyers**" ("**QIBs"**) by persons other than the issuer of the securities. QIBs are defined by Rule 144A(a)

(1) under the Securities Act to include insurance companies, investment companies, business development companies, small business investment companies, employee benefit plans, certain trust funds, investment advisers and other corporate entities that own and invest, on a discretionary basis, at least $100 million in securities of issuers that are not affiliated with the entity. QIBs must be institutions and cannot be individuals, no matter how wealthy. Reoffers and resales pursuant to Rule 144A under the Securities Act may employ general solicitation and general advertising. Compliance with Rule 144A under the Securities Act results in the seller's reoffer and resale of securities to be deemed not to be a distribution and therefore deeming such seller not to be an underwriter of those securities within the meaning of Section 2(a)(11) and Section 4(a)(1) of the Securities Act. See **Appendix B**: Timeline and Responsibility Charts for a timeline of a conventional debt offering conducted pursuant to Rule 144A under the Securities Act.

Resales pursuant to Rule 144A under the Securities Act are permitted if the following requirements are met:

- **Eligible Purchasers**. Pursuant to Rule 144A(d)(1) under the Securities Act, the securities are sold only to a QIB or to a purchaser that the seller and any person acting on behalf of the seller reasonably believe is a QIB. In determining whether a prospective purchaser is a QIB, the seller and any person acting on its behalf shall be entitled to rely upon (i) a certification by an executive officer of the prospective purchaser specifying the amount of securities owned and invested on a discretionary basis by the purchaser, (ii) the purchaser's most recent publicly available financial statements, (iii) the most recent publicly available information appearing in a recognized securities manual or (iv) the most recent publicly available information appearing in documents filed by the prospective purchaser with any governmental agency or self-regulatory organization.
- **Notice**. The seller and any person acting on its behalf must take reasonable steps to ensure that the purchaser is aware that the seller may rely on the exemption from the provisions of Section 5 of the Securities Act provided by Rule 144A under the Securities Act. Reasonable steps could include the placing of a restrictive legend on the certificates representing the securities. Similar statements should also be placed on any offering document used in connection with the reoffer or resale of the subject securities.
- **Eligible Securities**. Pursuant to Rule 144A(d)(3) under the Securities Act, the securities must not have been, when issued, of the same class as securities listed on a U.S. national securities exchange or securities of an open-end investment company, unit investment trust or face-amount certificate company that is or is required to be registered under the U.S. Investment Company Act of 1940.
- **Information Requirement**. Pursuant to Rule 144A(d)(4) under the Securities Act, unless the issuer is (i) a reporting company under Section 13 or Section 15(d) of

the Exchange Act, (ii) a foreign private issuer exempt from reporting obligations pursuant to Rule 12g3-2(b) under the Exchange Act or (iii) a foreign government eligible to register securities under Schedule B of the Securities Act, the issuer must provide certain information to any holder or prospective purchaser that so requests. The information required includes a brief statement of the nature of the business of the issuer and the products and services it offers and the issuer's most recent balance sheet and profit and loss and retained earnings statements and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation. The financial statements should be audited to the extent reasonably available. The information must be "reasonably current" in relation to the date of resale (the required information will be presumed to be reasonably current if it meets the timing requirements of a foreign private issuer's home country or principal trading market).

A/B Exchange Offers

An A/B exchange offer is a financing technique set forth in a series of SEC no-action letters beginning with *Exxon Capital Holdings Corp.*, May 13, 1988. An A/B exchange involves a private offering followed, within a short period after completion of the private offering, by a registered exchange offer for the restricted securities issued in the private offering. In *Exxon* and other similar no-action letters, the SEC took the position that the securities issued in the registered exchange offers are freely transferable by non-affiliates of the issuer without registration of the resales or the requirement that purchasers deliver a prospectus. In accordance with *Exxon Capital Holdings Corp.* and its progeny (including *Brown & Wood LLP*, Feb. 7, 1997), A/B exchange offers are limited to equity securities of non-reporting foreign private issuers, non-convertible debt securities and non-convertible preferred stock.

E. Offerings Outside the United States

Regulation S under the Securities Act exempts from registration certain offers and sales of securities that occur outside the United States.

1. Offerings By Issuers and Distributors

Rule 903 of Regulation S under the Securities Act provides a safe harbor from registration for offers or sales by an issuer, a distributor (e.g. an underwriter), any of their respective affiliates or any person acting on behalf of any of the foregoing if the following requirements are met:

Offshore Transaction

The offer or sale is made in an "**offshore transaction**," which is defined by Rule 902(h) under the Securities Act to exist for this purpose if (i) the offer is not made to a person in the United States and (ii) either (x) at the time the buy order is originated,

the buyer is outside the United States or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States or (y) the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States.

No Directed Selling Efforts

No "**directed selling efforts**" are made in the United States by the issuer, a distributor, any of their respective affiliates or any person acting on behalf of any of the foregoing. Directed selling efforts are defined in Rule 902(c) under the Securities Act as any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on Regulation S under the Securities Act. Such activity includes placing an advertisement in a publication with a general circulation in the United States that refers to the offering of securities being made in reliance upon Regulation S under the Securities Act. Activities not deemed to be directed selling efforts include tombstone advertisements, if certain requirements are met, and placing an advertisement required to be published under law or rules or regulations of a regulatory or self-regulatory authority, provided the advertisement contains no more information that legally required and includes a statement to the effect that the securities have not been registered under the Securities Act and may not be offered or sold in the United States (or to a U.S. person in certain circumstances) absent registration or an applicable exemption from the registration requirements.

Additional Requirements

- **Category 1**. There are no additional requirements for offerings in Category 1, which includes (i) issuances by foreign private issuers or foreign governments where there is no substantial U.S. market interest (as defined in Rule 902(j) under the Securities Act) in the securities being offered or sold, (ii) offerings of securities of foreign private issuers or foreign governments directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country, (iii) securities backed by the full faith and credit of a foreign government and (iv) securities offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States, and customary practices and documentation of such country, subject to certain provisions.
- **Category 2**. Offerings in Category 2 include securities that are not eligible for Category 1 and that are equity securities of a reporting foreign private issuer or foreign government or debt securities of foreign private issuers. Offerings in Category 2 must satisfy the following additional requirements: (i) the offering restrictions described in Rule 902(g) under the Securities Act must be implemented;

(ii) the offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and (iii) each distributor selling securities to a distributor, a dealer or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of a 40-day distribution compliance period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

- **Category 3**. Offerings in Category 3 are those not eligible for Category 1 or Category 2. Offerings in Category 3 must satisfy the following additional requirements:
  - certain offering restrictions are implemented;
  - in the case of debt securities, (i) the offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor), (ii) the securities are represented upon issuance by a temporary global security that is not exchangeable for definitive securities until the expiration of the 40-day distribution compliance period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Securities Act and (iii) each distributor selling securities to a distributor, a dealer or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day distribution compliance period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor; and
  - in the case of equity securities, (i) the offer or sale, if made prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor), (ii) the offer or sale, if made prior to the expiration of such applicable distribution compliance period, is made pursuant to the following conditions: (A) the purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Securities Act or exemption therefrom; (B) the purchaser of the securities agrees to resell such securities only in accordance with the provisions of Regulation S under the Securities Act pursuant to registration under the Securities Act or pursuant to an available exemption from registration and agrees not to engage in hedging transactions with regard to

such securities unless in compliance with the Securities Act; and (C) the issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of Regulation S under the Securities Act, pursuant to registration under the Securities Act or pursuant to an available exemption from registration, provided, however, that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a restrictive legend) are implemented to prevent any transfer of the securities not made in accordance with the provisions of Regulation S under the Securities Act, and (iii) each distributor selling securities to a distributor, a dealer or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a one-year distribution compliance period (or six-month distribution compliance period if the issuer is a reporting issuer), sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

2. Resales by Persons Other than Issuer or Distributor

Rule 904 of Regulation S under the Securities Act provides a safe harbor from registration for reoffers and resales by persons other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position) or any person acting on behalf of any of the foregoing if the following requirements are met:

Offshore Transaction

The reoffer or resale is made in an "**offshore transaction**," which is defined by Rule 902(h) under the Securities Act to exist for this purpose if (i) the offer is not made to a person in the United States and (ii) either (x) at the time the buy order is originated, the buyer is outside the United States or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States or (y) the transaction is executed in, on or through the facilities of a designated offshore securities market described in Rule 902(b) under the Securities Act, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

No Directed Selling Efforts

No directed selling efforts (as discussed above) are made in the United States by the seller, an affiliate or any person acting on their behalf.

Additional Requirements

In the case of an offer or sale of securities prior to the expiration of the distribution compliance period specified in Category 2 or Category 3 by a dealer, as defined in Section 2(a)(12) of the Securities Act, or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold, (i) neither the seller nor any person acting on its behalf knows that the offeree or buyer of the securities is a U.S. person and (ii) if the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, as defined in Section 2(a)(12) of the Securities Act, or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered or sold during the distribution compliance period only in accordance with the provisions of Regulation S under the Securities Act, pursuant to registration of the securities under the Securities Act or pursuant to an available exemption from the registration requirements of the Securities Act.

Resales by Certain Affiliates

In the case of an offer or sale of securities by an officer or director of the issuer or a distributor, who is an affiliate of the issuer or distributor solely by virtue of holding such position, no selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

F. Compensation Benefit Plan Exemption

Rule 701 under the Securities Act exempts from registration under the Securities Act securities offered and sold by an issuer pursuant to certain compensatory benefit plans. A "**compensatory benefit plan**" is defined in Rule 701(c)(2) under the Securities Act as any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension or similar plan. Pursuant to Rule 701(b) under the Securities Act, this exemption is available only to an issuer that is not subject to the reporting requirements of the Exchange Act prior to making any offers pursuant to Rule 701 under the Securities Act and is not an investment company registered or required to be registered under the U.S. Investment Company Act of 1940. Rule 701(c) under the Securities Act provides that, to be eligible for this exemption, the securities must be offered and sold under a written compensatory benefit plan (or written compensation contract) established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parent, for the participation of their employees, directors, general partners, trustees (where the issuer

is a business trust), officers, consultants and advisors, and their family members who acquire such securities from such persons through gifts or domestic relations orders. Pursuant to Rule 701(g)(1) under the Securities Act, securities offered and sold under such plans are deemed to be restricted securities.

To be eligible for an exemption pursuant to Rule 701 under the Securities Act, the transaction must meet the following requirements:

- pursuant to Rule 701(d)(2) under the Securities Act, the aggregate sales price or amount of securities sold in reliance on Rule 701 under the Securities Act during any consecutive 12-month period must not exceed the greatest of (i) $1 million, (ii) 15% of the total assets of the issuer (or of the issuer's parent if the issuer is a wholly-owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees), measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end), or (iii) 15% of the outstanding amount of the class of securities being offered and sold in reliance on Rule 701 under the Securities Act, measured at the issuer's most recent balance sheet date (if no older than its last fiscal year end);
- pursuant to Rule 701(e) under the Securities Act, the issuer must deliver to investors a copy of the compensatory benefit plan or the contract, as applicable; and
- pursuant to Rule 701(e) under the Securities Act, if the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds $5 million, the issuer must deliver the following disclosure to investors a reasonable period of time before the date of sale (or, if the sale involves a stock option or other derivative security, a reasonable period of time before the date of exercise or conversion, or, for deferred compensation or similar plans, a reasonable period of time before the date the irrevocable election to defer is made):
  - if the plan is subject to the U.S. Employee Retirement Income Security Act of 1974, a copy of the summary plan description required by the U.S. Employee Retirement Income Security Act of 1974;
  - if the plan is not subject to the U.S. Employee Retirement Income Security Act of 1974, a summary of the material terms of the plan;
  - information about the risks associated with investment in the securities sold pursuant to the compensatory benefit plan or compensation contract; and
  - certain financial statements as of a date no more than 180 days before the sale of securities in reliance on the exemption provided by Rule 701 under the Securities Act, together with a reconciliation to U.S. GAAP if a foreign private issuer's financial statements are not prepared in accordance with U.S. GAAP or IFRS as issued by the IASB.

G. Rights Offerings, Exchange Offers and Business Combinations

1. Exemption for Rights Offering

Rule 801 under the Securities Act provides an exemption from registration under the Securities Act for "rights offerings" of equity securities of a foreign private issuer. Rule 800(g) under the Securities Act defines "**rights offerings**" as offers and sales for cash of equity securities (excluding, pursuant to Rule 800(b) under the Securities Act, convertible securities, warrants, rights and options) where (i) the issuer grants the existing security holders of a particular class of equity securities (including holders of depositary receipts evidencing those securities) the right to purchase or subscribe for additional securities of that class and (ii) the number of additional shares an existing security holder may purchase initially is in proportion to the number of securities he or she holds of record on the record date for the rights offering (and, if an existing security holder holds depositary receipts, the proportion must be calculated as if the underlying securities were held directly). The exemption provided by Rule 801 under the Securities Act is only available if certain requirements, including the following, are met:

- the issuer is a foreign private issuer on the date the securities are first offered to U.S. holders;
- U.S. holders hold no more than 10% of the outstanding class of securities that is the subject of the rights offering (as determined pursuant to Rule 800(h) under the Securities Act);
- the issuer permits U.S. holders to participate in the rights offering on terms at least as favorable as those offered the other holders of the securities that are the subject of the offer (the issuer need not, however, extend the rights offering to security holders in those states or jurisdictions that require registration or qualification);
- if the bidder is a foreign company, it must file a Form F-X with the SEC at the same time as the submission of Form CB to appoint an agent for service in the United States;
- the securities offered in the rights offering are equity securities of the same class as the securities held by the offerees in the United States directly or through American Depositary Receipts (ADRs);
- the terms of the rights prohibit transfers of the rights by U.S. holders except in accordance with Regulation S under the Securities Act (in other words, the rights, as distinguished from the shares to be issued upon exercise of the rights, can only be sold outside the United States); and

- the legend set forth in Rule 801(b) under the Securities Act or an equivalent statement in clear, plain language, to the extent applicable, appears on the cover page or other prominent portion of any informational document the issuer disseminates to U.S. holders.

No disclosure document need be delivered to U.S. holders in connection with a rights offering pursuant to Rule 801 under the Securities Act. However, if the issuer publishes or otherwise disseminates an informational document to the holders of the securities in connection with the rights offering, (i) the issuer must furnish that informational document, including any amendments thereto, in English, to the SEC on Form CB by the first business day after publication or dissemination, (ii) the issuer must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in its home jurisdiction, and (iii) if the issuer disseminates by publication in its home jurisdiction, the issuer must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

2. Exemptions for Exchange Offers and Business Combinations

Rule 802 under the Securities Act provides an exemption from the registration requirements of the Securities Act for offers and sales in any exchange offer for a class of securities of a foreign private issuer, or in any exchange of securities for the securities of a foreign private issuer in any business combination, if the following conditions are met:

- except in the case of an exchange offer or business combination that is commenced during the pendency of a prior exchange offer or business combination made in reliance on Rule 802 under the Securities Act, U.S. holders of the foreign subject company must hold no more than 10% of the securities that are the subject of the exchange offer or business combination (as determined pursuant to Rule 800(h) under the Securities Act) and, in the case of a business combination in which the securities are to be issued by a successor registrant, U.S. holders may hold no more than 10% of the class of securities of the successor registrant, as if measured immediately after completion of the business combination;
- the offeror must permit U.S. holders to participate in the exchange offer or business combination on terms at least as favorable as those offered any other holder of the subject securities, but the offeror need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the offeror must offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction;
- if the offeror is a foreign company, it must file a Form F-X with the SEC at the same time as the submission of Form CB to appoint an agent for service of process in the United States; and

- the legend set forth in Rule 802(b) under the Securities Act or an equivalent statement in clear, plain language, to the extent applicable, must be included on the cover page or other prominent portion of any informational document the offeror publishes or disseminates to U.S. holders.

No disclosure document need be delivered to U.S. holders in connection with an exchange offer or business combination pursuant to Rule 802 under the Securities Act. However, if the offeror publishes or otherwise disseminates an informational document to the holders of the subject securities in connection with the exchange offer or business combination, (i) the offeror must furnish that informational document, including any amendments thereto, in English, to the SEC on Form CB by the first business day after publication or dissemination, (ii) the offeror must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the foreign subject company's home jurisdiction, and (iii) if the offeror disseminates by publication in its home jurisdiction, the offeror must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

3. Other U.S. Law Considerations

Depending on the facts of the situation, rights offerings, exchange offers and business combinations conducted pursuant to Rule 801 or Rule 802 under the Securities Act may also be subject to the following U.S. laws:

- Regulation M under the Exchange Act, which prohibits issuers, selling security holders, other distribution participants and their respective affiliated purchasers from bidding for or purchasing, or attempting to induce others to bid for or purchase, certain "covered securities" during a restricted period (for example, it may be necessary for an issuer to suspend a share buyback program during the pendency of a rights offering conducted pursuant to Rule 801 under the Securities Act);
- U.S. state securities laws, which may require that certain actions be taken when securities are offered to residents of such U.S. states;
- anti-fraud provisions of the U.S. federal securities laws, which require that information provided to investors be free of any untrue statement of a material fact or omissions to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;
- Section 12(g) of the Exchange Act (discussed above), which requires registration of securities in certain circumstances; and
- U.S. federal anti-trust laws, which prohibit certain business combinations.

VII. Depositary Receipts

A. Introduction, Background and Evolution

Most U.S. holders of securities of foreign companies hold their interests in such securities in the form of depositary receipts, which are securities representing the publicly-traded securities of foreign companies. Depositary receipts were created in 1927 to allow U.S. investors to invest in foreign companies, but they have since become a means by which issuers located in any country can gain access to investors in other countries. There are currently several thousand depositary receipt programs in dozens of countries around the world involving the issuance of billions of dollars of depositary receipts each year.

Depositary receipts evidence interests in underlying securities. Under the Securities Act, depositary receipts are considered securities separate and distinct from the underlying securities, and the registration of depositary receipts does not necessarily entail registration of the underlying securities, or *vice versa*. In the United States, depositary receipts may be registered or sold in a private offering. Depositary receipts that are sold and traded on exchanges or over-the-counter markets in the United States are typically called American Depositary Receipts (or ADRs), and depositary receipts that are sold via a private offering (or a global offering with a component involving Regulation S under the Securities Act) and resold to QIBs are typically called Rule 144A ADRs. ADRs are generally subject to the rules of the U.S. national securities exchanges on which they are traded.

Generally, ADRs are created when a broker who has purchased the publicly-traded securities of a foreign company in the foreign company's home country deposits the securities with a local bank, called a "**custodian bank**," in the foreign country, and a U.S. bank, called the "**depository bank**" or "**depository**," which is the depository of the custodian bank in the United States, issues the ADRs in the United States after receiving instructions from the broker. A number of ADRs corresponding to a given number of the underlying securities is selected so that the trading price of the ADRs falls within the range of prices typical for shares traded on U.S. national securities exchanges.

1. Role of Depositary

Depending on the agreement between the issuer of the ADRs and the depository, the depository:

- issues and cancels ADRs;
- maintains the register of holders of the ADRs;
- processes and makes payments, including dividends, to ADR holders;

- coordinates corporate actions, including delivery of proxy materials to ADR holders; and
- provides various account management services.

2. Benefits of ADRs

Advantages of ADRs to U.S. investors include:

- improved diversification of assets by providing access to securities with little or no dependency on U.S. economic conditions;
- access to liquid capital markets outside the United States;
- trading, settlement and clearing is done under the rules of U.S. national securities exchanges, with which U.S. investors are generally familiar;
- availability of foreign investments quoted in U.S. dollars, which allows for easy comparison of foreign investments to similar U.S. investments;
- ability to receive underlying securities upon the surrender of ADRs to the depository; and
- elimination of global custodial and record keeping charges.

Advantages of ADRs to foreign issuers looking to raise capital in the United States include:

- access to U.S. capital markets, which allows foreign companies to broaden the investor base and tap into the largest capital market in the world;
- potential increase in market value as the investor base increases, thereby increasing the demand for the subject securities;
- foreign companies with U.S.-based employees can readily offer equity-based compensation plans for their U.S. employees; and
- increased liquidity of the securities of foreign companies provides currency for undertaking cross-border mergers and acquisitions.

B. Creation of ADRs

As described in more detail below, ADRs are issued in programs that are either "**sponsored**" or "**unsponsored**" by the issuer of the underlying security, and these programs are categorized as "**Level 1**," "**Level 2**" or "**Level 3**" facilities. See **Appendix B**: Timeline and Responsibility Charts for a sample timeline of an ADR Level 3 program transaction.

1. Unsponsored ADR Program

In an unsponsored ADR program, a depository issues ADRs representing previously-issued securities that the depository has arranged to have deposited with its custodian bank abroad, but the program is not the subject of a formal agreement between

the depository and the foreign issuer. In practice, however, an unsponsored ADR program usually requires at least the cooperation of the foreign issuer with respect to prospective information requirements by the SEC since the issuer must usually agree to make an application to qualify for exemption from registration pursuant to Rule 12g3-2(b) under the Exchange Act and continue to supply information to the SEC pursuant to Rule 12g3-2(b) under the Exchange Act. A foreign issuer is not required to sign a registration statement for registered ADRs issued in an unsponsored ADR program.

ADRs issued in a program in which the issuer is not a reporting company but supplies information to the SEC pursuant to Rule 12g3-2(b) under the Exchange Act may not be traded on U.S. national securities exchanges (or over-the-counter markets). They may, however, trade on the "pink sheets," which is a quotation service as opposed to an exchange.

The fees charged to ADR holders by depositories for collecting dividends and trading ADRs may be somewhat higher in an unsponsored ADR program than in a sponsored ADR program since the depository does not have the benefit of charging the issuer for various administrative costs as it could in a sponsored ADR program.

If an issuer supplies information to the SEC pursuant to Rule 12g3-2(b) under the Exchange Act so that a depository may issue ADRs in an unsponsored ADR program, any other depository could issue additional ADRs under its own program by relying on the same information. Such ADRs would bear the same CUSIP number (which is a unique security identification number) as ADRs previously issued by the original depository. Unsponsored ADR programs, whether single or multiple, may be undesirable from the point of view of an issuer that may wish to provide for a single sponsored ADR program at a later time.

2. Sponsored ADR Program

In a sponsored ADR program, the depository enters into a deposit agreement with the foreign issuer. Under the deposit agreement, holders of the ADRs have the right to receive the underlying shares by surrendering their ADRs and may deposit those underlying shares with the depository in exchange for ADRs. Typically, the foreign issuer pays certain administrative fees to the depository, but the depository will still charge ADR holders for the services it performs in connection with dividend collection and other actions. The depository agrees to make information available to ADR holders at the request of the issuer.

A foreign issuer uses sponsored ADR programs to offer newly-issued securities in the United States or to provide liquidity in the United States to holders of securities that the foreign issuer has already issued outside the United States that may be freely traded in the United States without registration. The issuance of ADRs in a sponsored ADR program for previously-issued securities outside the United States may allow a foreign issuer the opportunity to list its ADRs on a U.S. national securities exchange.

In an initial share issuance in which the underlying shares are registered under the Securities Act or the Exchange Act, the ADRs must separately be registered with the SEC under the Securities Act on Form F-6. Where the securities to be deposited in an ADR program have already been issued and may be purchased by a U.S. holder without registration under the Securities Act, the offering of the underlying shares need not be registered under the Securities Act, but the issuer must comply with applicable reporting requirements under the Exchange Act.

C. Registration of ADRs under the Securities Act

Since ADRs are securities separate and distinct from the underlying securities, ADRs issued to the public (including all ADRs that would be considered issued in Level 1, Level 2 or Level 3 facilities) must be registered with the SEC on Form F-6. To use a Form F-6, (i) the depository must agree to allow ADR holders to acquire the underlying securities upon surrender of the ADRs, (ii) the distribution of the deposited securities must be registered or exempt from registration and (iii) the foreign issuer must be a reporting company under the Exchange Act or exempt from reporting pursuant to Rule 12g3-2(b) under the Exchange Act. In a registered sponsored facility, the foreign issuer must sign the registration statement.

The issuer of ADRs must submit to the SEC the Form F-6 along with the deposit agreement, any material contracts relating to the deposited securities and an opinion of counsel as to the legality of the ADRs. The registration fee is nominal, with the aggregate offering price on which the fee is based being equal to the maximum aggregate fees or charges to be imposed in connection with the issuance of the receipts.

The type of filing and ongoing reporting requirements for ADRs depends on whether the ADRs are categorized as Level 1, Level 2 or Level 3. Issuers of Level 1 ADRs are exempt from SEC reporting requirements (other than Form F-6) pursuant to Rule 12g3-2(b) under the Exchange Act. Issuers of Level 2 ADRs must file, in addition to the Form F-6, a Form 20-F and must comply with Exchange Act disclosure requirements. Issuers of Level 3 ADRs must file, in addition to the Form F-6, a Form F-1 if they wish to raise capital through a public offering of ADRs in the United States.

Comparison of ADR Programs		
	Sponsorship	**Registration Requirements**
Level 1	May be sponsored or unsponsored. Eligible for quotation on pink sheets.	Issuer must qualify and agree to submit materials to the SEC pursuant to Rule 12g3-2(b) under the Exchange Act.
Level 2	Must be sponsored. Not used to raise new capital, but to trade shares already outstanding. Eligible for listing on U.S. national securities exchanges.	Issuer must register the underlying securities under the Exchange Act and register the ADRs under the Securities Act.
Level 3	Must be sponsored. Used in connection with raising new capital in a registered offering in the United States.	Issuer must register the underlying securities under the Securities Act and, if the securities are listed, under the Exchange Act. Issuer becomes subject to reporting requirements under the Exchange Act. Issuer must register the ADRs under the Securities Act.

Appendix A

Initial Public Offering (IPO) Process Overview for Foreign Private Issuers

Key to successful initial public offering (IPO) is cohesive and experienced work team of legal and financial advisors

Appendix B

B-1 Timeline and Responsibility Chart: **Initial Public Offering**

(Foreign Private Issuer including Selling Shareholders)

Parties:
I: Issuer
UW: Underwriters
SS: Selling Shareholders
A: Auditors
IC: Issuer's Counsels (Local and U.S.)
UC: Underwriters' Counsels (Local and U.S.)
SC: Selling Shareholders' Counsel

B-1 Timeline and Responsibility Chart: Initial Public Offering (Foreign Private Issuer including Selling Shareholders)

DATES	ACTION	RESPONSIBLE PARTY
Pre-Filing Period (commences as soon as the underwriters are selected by the issuer)		
	Organizational meeting	Working Group
Weeks 1 & 2	Commence preparation of necessary financial statements	I, A
	Select co-managers	I
	Commence due diligence (documentary diligence request list sent by underwriters' counsel to issuer's counsel; management presentations; auditor due diligence; legal, financial, business and accounting review)	I, IC, UW, UC, A
	Commence preparation of initial draft of Form F-1 registration statement	I, IC, UW, UC
	Discuss procedures for obtaining any required approvals from local regulatory authorities	IC, UC
	Select financial printer	I
	Select registrar and transfer agent	I
	Select securities exchange and reserve (or determine availability of) trading symbol	I, IC
	Determine desirability of pre-filing conferences with SEC, blue sky authorities or FINRA (if necessary)	A, I, IC, UC
	Submit letter to SEC requesting pre-filing conference (if necessary)	A, I, IC
	Draft directors and officers questionnaires	I, IC

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-1 Timeline and Responsibility Chart: Initial Public Offering (Foreign Private Issuer including Selling Shareholders)

DATES	ACTION	RESPONSIBLE PARTY
	Draft selling stockholders' power of attorney (including questionnaire) and custody agreement	SC, UC
	Draft powers of attorney for registration statement and amendments thereto, if needed	I, IC
	Commence negotiations with lenders and other parties concerning consents, waivers and amendments for conditions that would restrict offering or use of proceeds	I, IC
Weeks 3 & 4	Continue and finalize due diligence	IC, UC
	Continue drafting registration statement	I, IC, UW, UC
	Hold meetings to review registration statement	I, IC, UW, UC
	Draft underwriting agreement	UC
	Discuss comfort letter content and procedures	UC, UW, A
	Send directors and officers questionnaires to directors, officers and 10% stockholders	I, IC
	Send letter to stockholders relating to participation in secondary offering (including power of attorney, questionnaire and custody agreement)	I, IC, SC
	Commence preparation of securities exchange listing application	I, IC
	Circulate drafts of financial statements	A
	Determine representative to act as custodian for selling stockholders at time of offering	I, SS, SC
	Send draft registration statement and underwriting agreement to financial printer	IC
	Obtain completed questionnaires and powers of attorney from directors, officers and 10% stockholders and provide copies to underwriters	I, IC
Weeks 5 & 6	Drafting sessions to review and finalize registration statement	I, IC, UW, UC
	Assemble exhibits to registration statement	I, IC
	Circulate proofs of registration statement (including draft financial statements) and underwriting agreement to board of directors	I, IC
	Determine which exhibits, if any, require confidential treatment	I, IC

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-1 Timeline and Responsibility Chart: Initial Public Offering
(Foreign Private Issuer including Selling Shareholders)

DATES	ACTION	RESPONSIBLE PARTY
	Finalize financial statements	I, A
	Circulate draft comfort letter	A
	Prepare Form 8-A for registration under the Exchange Act	IC
	Finalize underwriting agreement	UC, IC
	Provide list of states in which shares are to be offered	UW, UC
	Send draft of registration statement to securities exchange on which the issuer wishes to list stock for confidential review of eligibility (required if listing intention language is to be included in the preliminary prospectus)	I, IC
	Commence preparation of preliminary blue sky survey	UC
	Prepare draft of road show presentation	UW, I
	Draft invitation letter to potential syndicate members	UW
Weeks 7 & 8	Finalize corporate approvals, including board of directors meetings to approve IPO, registration statement, form of underwriting agreement, listing of stock, appointment of transfer agent and registrar, all necessary corporate clean-up matters and pricing committee establishment	I, IC
	Hold stockholders' meeting to approve all corporate clean-up matters (if necessary)	I, IC
	File registration statement with SEC (including exhibits) via EDGAR	IC
	Submit confidential treatment requests to SEC if applicable	IC
	File registration statement and related materials with FINRA using its Public Offering System	UC
	File securities exchange application	I, IC
	Begin selecting syndicate and send out invitation letters	UW
Waiting Period (commences as soon as the registration statement is filed with the SEC)		
Weeks 9-11	Contact The Depository Trust Company (DTC) to discuss offering	I, IC
	Proceed with blue sky qualifications, as designated by underwriters	UC, UW
	Apply for CUSIP number; send copy of registration statement to CUSIP Service Bureau	UW

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-1 Timeline and Responsibility Chart: Initial Public Offering (Foreign Private Issuer including Selling Shareholders)

DATES	ACTION	RESPONSIBLE PARTY
	Commence preparation of any free writing prospectus (FWP)	I, IC, UW, UC
	Continue preparation of road show materials	I, IC, UW, UC
	Commence drafting legal opinions and closing documents	IC, UC
	Complete underwriters' due diligence	UW
	Commence obtaining lock-up agreements	I, IC, UC
Week 12	Receive SEC comment letter and distribute to working group	I, IC
	Supply transfer agent and registrar with all required documents	IC
	Meeting of all parties to discuss SEC comments (if necessary) and begin drafting response letter	Working Group
	Correspond with securities exchange	I, IC
	Finalize arrangements with transfer agent	I, IC
Week 13	File Amendment No. 1 to Form F-1 and response to SEC comments with SEC and send courtesy copies to SEC examiners	IC
	File Amendment No. 1 to Form F-1 and other offering documents with FINRA	UC, UW
	File Amendment No. 1 to Form F-1 with securities exchange	IC
	File Form 8-A with SEC and with securities exchange on which listing is sought	IC
Week 14	Finalize road show presentation	I, IC, UW, UC
	Finalize FWPs	I, IC, UW, UC
	Receive SEC comments on Amendment No. 1 to Form F-1 and distribute to working group	I, IC
	Obtain CUSIP number	UW
Week 15	Finalize valuation and determine price range	I, UW
	File Amendment No. 2 to Form F-1 (including any unfiled exhibits) and response to SEC comments with SEC and send courtesy copies to SEC examiners	IC
	File Amendment No. 2 to Form F-1 with FINRA	UC, UW
	File Amendment No. 2 to Form F-1 with securities exchange	IC
	Finalize comfort letter	UC, A, UW
	Print preliminary prospectus	Working Group

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-1 Timeline and Responsibility Chart: Initial Public Offering
(Foreign Private Issuer including Selling Shareholders)

DATES	ACTION	RESPONSIBLE PARTY
Week 16	Commence road show	I, UW
	Sales force meetings	UW
	Send FWP to accounts electronically (with link to preliminary prospectus)	UW
	File FWP with SEC	IC
	Receive SEC comments on Amendment No. 2 to Form F-1	Working Group
	Clear all outstanding comments with SEC	Working Group
	Draft closing agenda and distribute to working group	UC
	Deadline for receipt of acceptance of invitation to join syndicate	UW
Week 17	File Amendment No. 3 to Form F-1 and response to SEC comments with SEC and send courtesy copies to SEC examiners	IC
	File Amendment No. 3 to Form F-1 with FINRA	UC, UW
	File Amendment No. 3 to Form F-1 with securities exchange	IC
	Obtain FINRA clearance of underwriting arrangements and deliver notification to SEC	UC, UW
	Obtain approval of listing from securities exchange	I, IC
	Continue road show	I, UW
	Determine printing quantities of final prospectuses and label and mailing instructions	UW
Week 18	Hold final underwriters' due diligence meeting, if necessary, with representatives of the underwriting group	Working Group
	File acceleration request for registration statement and Form 8-A with SEC	I, IC
	Obtain letter from securities exchange joining in the issuer's request for acceleration of effectiveness of Form 8-A	IC
	Prepare legal opinions, certificates, DTC letter of representations and other closing documents; order good standing certificates	UC, IC
	Have SEC declare registration statement and Form 8-A "effective" (usually occurs two business days after acceleration request filed)	IC

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-1 Timeline and Responsibility Chart: Initial Public Offering (Foreign Private Issuer including Selling Shareholders)

DATES	ACTION	RESPONSIBLE PARTY
Post-Effective Period (commences upon the SEC declaring the registration statement to be effective)		
Week 18 (continued)	Hold pricing committee meeting to approve pricing, final prospectus and final underwriting agreement	I, IC
	Notify securities exchange and lead underwriters of effectiveness of registration statement and Form 8-A	I, UW
	Determine final offering price of stock and underwriting discounts	I, UW
	Sign underwriting agreement	I, UW
	Deliver comfort letter	A
	Send final changes to prospectus and underwriting agreement to financial printer	Working Group
	Give financial printer labels and mailing instructions for final prospectus	UW
	Advise blue sky commissions of final terms of offering where required and complete and distribute final blue sky survey	UC
	File final prospectus with SEC (file within two days of the earlier of the date the final prospectus is first used or the date the offering price is determined)	IC
	Print final prospectuses in quantity determined by underwriters	I
	Notify syndicate of closing date and give instructions concerning payment; determine how selling stockholders wish to receive funds	UW, I, SS
	Deliver copy of final prospectus to FINRA, DTC, securities exchange and blue sky authorities	UC, IC
Closing (T+3 or T+4)		
Week 19	Listing ceremony at stock exchange	I
	Provide names and denominations to issuer and transfer agent for stock certificates	UW
	Execute and deliver to DTC the issuer's letter of representations	I, IC
	Provide participant allocations to DTC	UW
	Deliver issuer counsel's opinion and instructions for certificates to transfer agent	I, IC

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-1 Timeline and Responsibility Chart: Initial Public Offering
(Foreign Private Issuer including Selling Shareholders)

DATES	ACTION	RESPONSIBLE PARTY
	Bring-down due diligence call	Working Group
	Close and settle IPO (includes the delivery of all closing documents pursuant to the closing agenda)	Working Group
Week 20	Send CD of closing documents to all parties	UC
Post-Closing		
90 days after Effective Date	Earliest date on which to file Form S-8 to register stock issuable pursuant to employee benefit plans	I, IC

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-2 Timeline and Responsibility Chart:
Private Offering of Debt

(Foreign Private Issuer Rule 144A / Regulation S Offering)

Parties:

I: Issuer
IP: Initial Purchasers
A: Auditors
RA: Rating Agencies
IC: Issuer's Counsels (Local and U.S.)
IPC: Initial Purchasers' Counsels (Local and U.S.)
T: Trustee
TC: Trustee's Counsel

DATES	ACTION	RESPONSIBLE PARTY
	Organizational meeting	Working Group
Weeks 1 & 2	Commence preparation of necessary financial statements	I, A
	Select initial purchasers	I
	Commence due diligence (documentary diligence request list sent by initial purchasers' counsel to issuer's counsel; management presentations; auditor due diligence; legal, financial, business and accounting review)	I, IC, IP, IPC, A
	Commence preparation of initial draft of preliminary offering memorandum	I, IC, IP, IPC
	Discuss procedures for obtaining any required approvals from local regulatory authorities	IC, IPC
	Select financial printer	I
	Select trustee	I
	Commence drafting rating agency presentations and set up appointments with rating agencies	I, IP
	Board of directors meeting or consent action to approve offering and appoint pricing committee that will approve the pricing of the offering	I, IC
	Commence negotiations with lenders and other parties concerning consents, waivers and amendments for conditions that would restrict offering or use of proceeds	I, IC
Weeks 3 & 4	Continue and finalize due diligence	IC, IPC
	Continue drafting preliminary offering memorandum	I, IC, IP, IPC, A
	Hold meetings to review preliminary offering memorandum	I, IC, IP, IPC, A
	Draft note purchase agreement	IPC
	Discuss comfort letter content and procedures	IC, IPC, A
	Circulate drafts of financial statements	A

Note: Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-2 Timeline and Responsibility Chart: Private Offering of Debt
(Foreign Private Issuer Rule 144A / Regulation S Offering)

DATES	ACTION	RESPONSIBLE PARTY
	Finalize rating agency presentations, rehearse presentations, send presentations to rating agencies and conduct rating agency presentation meetings with rating agencies	I, IP, RA
Weeks 5 & 6	Drafting sessions to review and finalize preliminary offering memorandum	I, IC, IP, IPC, A
	Finalize financial statements	I, A
	Circulate draft comfort letter	A
	Finalize note purchase agreement	IPC, IC
	Provide list of states in which shares are to be offered	IP, IPC
	Commence preparation of preliminary blue sky survey	IPC
	Prepare draft of road show presentation and rehearse road show presentation	IP, I
	Draft invitation letter to potential syndicate members	IP
	Rating agency analysts prepare internal analyses and provide indicative ratings	RA
Weeks 7 & 8	Draft indenture and form of notes based on the description in the preliminary offering memorandum and circulate to working group	IPC
	Finalize preliminary offering memorandum with financial printer and initial purchasers circulate preliminary offering memorandum to potential investors (typically via email)	I, IC, IP, IPC, A
	Send preliminary offering memorandum to The Depository Trust Company (DTC)	IC
	Proceed with blue sky qualifications, as designated by initial purchasers	IPC, IP
	Apply for CUSIP number; send copy of preliminary offering memorandum to CUSIP Service Bureau	IP
	Finalize road show materials	I, IC, IP, IPC
	Commence drafting legal opinions and closing documents	IC, IPC
	Complete initial purchasers' due diligence	IP
	Supply trustee with all required documents	IC, IPC
	Finalize arrangements with trustee	I, IC, T, TC
	Obtain CUSIP number	IP
	Finalize comfort letter	IPC, A, IP

Note: Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-2 Timeline and Responsibility Chart: Private Offering of Debt
(Foreign Private Issuer Rule 144A / Regulation S Offering)

DATES	ACTION	RESPONSIBLE PARTY
	Commence road show	I, IP
	Sales force meetings	IP
Week 9	Draft closing agenda and distribute to working group	IPC
	Determine printing quantities of final offering memorandum and label and mailing instructions	IP
	Hold final initial purchasers' due diligence meeting, if necessary, with representatives of the initial purchaser group	Working Group
	Prepare legal opinions, certificates, DTC letter of representations and other closing documents; order good standing certificates	IPC, IC
	Hold pricing committee meeting to approve pricing, final offering memorandum, final note purchase agreement, form of indenture, form of note and appointment of trustee	I, IC
	Determine final offering price of notes and initial purchaser discounts	I, IP
	Sign note purchase agreement	I, IP
	Deliver comfort letter	A
	Send final changes to offering memorandum to financial printer	Working Group
	Give financial printer labels and mailing instructions for final offering memorandum	IP
	Advise blue sky commissions of final terms of offering where required and complete and distribute final blue sky survey	IPC
	Print final offering memorandum in quantity determined by initial purchasers	I
	Deliver copy of final offering memorandum to DTC, rating agencies and blue sky authorities	IPC, IC
	Obtain final ratings	I, RA
Week 10	Provide names and denominations to issuer and trustee for notes	IP
	Execute and deliver to DTC the issuer's letter of representations	I, IC
	Provide participant allocations to DTC	IP
	Bring-down due diligence call	Working Group
	Close and settle offering (includes the delivery of all closing documents pursuant to the closing agenda)	Working Group

Note: Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-2 Timeline and Responsibility Chart: Private Offering of Debt
(Foreign Private Issuer Rule 144A / Regulation S Offering)

DATES	ACTION	RESPONSIBLE PARTY
Week 11	Send CD of closing documents to all parties	IPC

Note: Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-3 Timeline and Responsibility Chart: **Level 3 ADR IPO**

Parties:

I: Issuer	IC: Issuer's U.S. Counsel
UW: U.S. Underwriters and Non-U.S. Managers	ILC: Issuer's Local Counsel
A: Auditors	UC: Underwriters'/Managers' U.S. Counsel
Dep.: Depositary	ULC: Underwriters'/Managers' Local Counsel
SE: U.S. National Stock Exchange	Dep.C.: Depositary's Counsel

DATES	ACTION	RESPONSIBLE PARTY
Prior to Week 1	Engagement letter with underwriters signed	I, IC, ILC, UW, UC, ULC
	Commence preparation of necessary financial statements in U.S. GAAP or, if applicable, local GAAP with a reconciliation to U.S. GAAP and otherwise discuss financial statement requirements	I, A
	Analyze any tax and investment company issues, including confirmation that the issuer is not a "passive foreign investment company" under U.S. federal income tax regulations or an "investment company" for U.S. Investment Company Act of 1940 purposes	I, IC
	Organizational meeting	Working Group
Weeks 1 & 2	Select managers	I
	Commence due diligence (documentary diligence request list sent by underwriters'/managers' counsel to issuer's counsel; management presentations; auditor due diligence; legal, financial, business and accounting review)	I, IC, ILC, UW, UC, ULC, A
	Commence preparation of initial draft of Form F-1 registration statement and Form 8-A registration statement	I, IC, ILC, UW, UC
	Commence preparation of initial draft of Form F-6 registration statement	Dep.C.
	Discuss procedures for obtaining any required approvals from local regulatory authorities	IC, ILC, UC, ULC
	Select financial printer	I
	Select securities exchange and reserve (or determine availability of) trading symbol	I, IC

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-3 Timeline and Responsibility Chart: Level 3 ADR IPO

DATES	ACTION	RESPONSIBLE PARTY
	Determine desirability of pre-filing conferences or submissions with SEC (if necessary)	A, I, IC, UC
	Draft directors and officers questionnaires	I, IC
	Draft powers of attorney for registration statement and amendments thereto, if needed	I, IC
	Prepare for and hold any board of directors or stockholder meetings (or consent actions in lieu thereof) necessary to authorize the offering	I, IC, ILC
	Commence negotiations with lenders and other parties concerning consents, waivers and amendments for conditions that would restrict offering or use of proceeds	I, IC
Weeks 3 & 4	Continue and finalize due diligence	IC, ILC, UC, ULC
	Continue drafting registration statements on Form F-1, Form 8-A and Form F-6	I, IC, ILC, UW, UC, Dep.C.
	Hold meetings to review registration statements (including consideration of whether there will be different forms for U.S. and non-U.S. prospectuses)	Working Group
	Draft underwriting agreement	UC
	Draft deposit agreement	Dep., Dep.C.
	Discuss comfort letter content and procedures	UC, UW, A
	Send directors and officers questionnaires to directors, officers and 10% stockholders	I, IC
	Commence preparation of securities exchange listing application	I, IC
	Circulate drafts of financial statements	A
	Obtain completed questionnaires and powers of attorney from directors, officers and 10% stockholders and provide copies to underwriters/managers	I, IC
Weeks 5 & 6	Drafting sessions to review and finalize registration statements on Form F-1, Form 8-A and Form F-6	Working Group
	Assemble exhibits to registration statements (including English translations of documents originally written in foreign languages)	I, IC, ILC

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-3 Timeline and Responsibility Chart: Level 3 ADR IPO

DATES	ACTION	RESPONSIBLE PARTY
	Circulate proofs of registration statements (including draft financial statements) and underwriting agreement to board of directors	I, IC
	Determine which exhibits, if any, require confidential treatment	I, IC, ILC
	Finalize financial statements	I, A
	Circulate draft comfort letter	A
	Finalize underwriting agreement	UC, IC
	Finalize deposit agreement	Dep.C.
	Provide list of states in which shares are to be offered	UW, UC
	Commence preparation of preliminary blue sky survey	UC
	Prepare draft of road show presentation	UW, I
Weeks 7 & 8	Finalize corporate approvals, including board of directors meetings to approve offering, registration statements, form of underwriting agreement, form of deposit agreement, appointment of depositary, all necessary corporate clean-up matters and pricing committee establishment	I, IC, ILC
	Hold stockholders' meeting to approve all corporate clean-up matters (if necessary)	I, IC, ILC
	File registration statements with SEC (including exhibits) via EDGAR	IC
	Submit confidential treatment requests to SEC if applicable	IC
	File registration statements and related materials with FINRA using its Public Offering System	UC
	File securities exchange application	I, IC
	Issue press release announcing filing of registration statements	I, IC, ILC, UW, UC, ULC
Weeks 9-11	Prepare applications to The Depository Trust Company (DTC) and Clearstream and Euroclear, if necessary	Dep.C.
	Proceed with blue sky qualifications, as designated by underwriters	UC, UW
	Apply for CUSIP number; send copy of registration statements to CUSIP Service Bureau	UW
	Continue preparation of road show materials	I, IC, ILC, UW, UC, ULC

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-3 Timeline and Responsibility Chart: Level 3 ADR IPO

DATES	ACTION	RESPONSIBLE PARTY
	Commence drafting legal opinions and closing documents	IC, ILC, UC, ULC
	Complete underwriters'/managers' due diligence	UW
	Establish arrangements for flow of funds at closing	I, UW
Week 12	Receive SEC comment letter and distribute to working group	I, IC
	Meeting of all parties to discuss SEC comments (if necessary) and begin drafting response letter	Working Group
	Correspond with securities exchange	I, IC
Week 13	File Amendment No. 1 to registration statement and response to SEC comments with SEC and send courtesy copies to SEC examiners	IC
	File Amendment No. 1 to registration statement and other offering documents with FINRA	UC, UW
	File Amendment No. 1 to registration statement with securities exchange	IC
Week 14	Finalize road show presentation	I, IC, ILC, UW, UC, ULC
	Receive SEC comments on Amendment No. 1 to registration statement and distribute to working group	I, IC
	Obtain CUSIP number	UW
	Prepare proof of ADR, clear with working group and send to banknote printer	Dep., Dep.C.
Week 15	File Amendment No. 2 to registration statement (including any unfiled exhibits) and response to SEC comments with SEC and send courtesy copies to SEC examiners	IC
	File Amendment No. 2 to registration statement with FINRA	UC, UW
	File Amendment No. 2 to registration statement with securities exchange	IC
	Finalize comfort letter	UC, A, UW
	Print preliminary prospectus	Working Group
Week 16	Commence road show	I, UW
	Sales force meetings	UW
	Receive SEC comments on Amendment No. 2 to registration statement	Working Group

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-3 Timeline and Responsibility Chart: Level 3 ADR IPO

DATES	ACTION	RESPONSIBLE PARTY
	Clear all outstanding comments with SEC	Working Group
	Draft closing agenda and distribute to working group	UC
Week 17	File Amendment No. 3 to registration statement and response to SEC comments with SEC and send courtesy copies to SEC examiners	IC
	File Amendment No. 3 to registration statement with FINRA	UC, UW
	File Amendment No. 3 to registration statement with securities exchange	IC
	Obtain FINRA clearance of underwriting arrangements and deliver notification to SEC	UC, UW
	Obtain approval of listing from securities exchange	I, IC
	Continue road show	I, UW
	Determine printing quantities of final prospectuses and label and mailing instructions	UW
Week 18	Hold final underwriters'/managers' due diligence meeting, if necessary, with representatives of the underwriting group	Working Group
	File acceleration request for registration statements with SEC	I, IC
	Prepare legal opinions, certificates, DTC letter of representations, form of ADR and other closing documents; order good standing certificates	UC, ULC, IC, ILC
	Have SEC declare registration statements "effective" (usually occurs two business days after acceleration request filed)	IC
	Hold pricing committee meeting to approve pricing, final prospectus, final underwriting agreement and final deposit agreement	I, IC
	Notify securities exchange and lead underwriters of effectiveness of registration statements	I, UW
	Determine final offering price and underwriting discounts	I, UW
	Sign underwriting agreement	I, UW
	Deliver comfort letter	A
	Send final changes to prospectus and underwriting agreement to financial printer	Working Group

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

B-3 Timeline and Responsibility Chart: Level 3 ADR IPO

DATES	ACTION	RESPONSIBLE PARTY
	Give financial printer labels and mailing instructions for final prospectus	UW
	Advise blue sky commissions of final terms of offering where required and complete and distribute final blue sky survey	UC
	File final prospectus with SEC (file within two days of the earlier of the date the final prospectus is first used or the date the offering price is determined)	IC
	Print final prospectuses in quantity determined by underwriters	I
	Deliver copy of final prospectus to FINRA, DTC, securities exchange and blue sky authorities	UC, IC
	Execute any foreign exchange contracts in connection with conversion of dollars on closing date	I
	Issue press release as to pricing terms	I, IC, ILC, UW, UC, ULC
	Prepare "tombstone" advertisement	UW, UC
Week 19	Listing ceremony at stock exchange	I
	Provide names and denominations to issuer and depositary for ADRs	UW
	Execute and deliver to DTC the issuer's letter of representations	I, IC
	Provide participant allocations to DTC	UW
	Bring-down due diligence call	Working Group
	Sign deposit agreement	I, Dep.
	Close and settle offering (includes the delivery of all closing documents pursuant to the closing agenda)	Working Group
Week 20	Send CD of closing documents to all parties	UC

Note: Timeline assumes approximately 2 months for drafting registration statement and approximately 2.5 months to clear SEC review process. Compliance with non-U.S. laws and regulations (including local ones) may lengthen the time required to complete the offering and are not covered by this timeline.

Appendix C

Outline of Liabilities under the U.S. Federal Securities Laws

The following discussion addresses the primary sources of liability under the Securities Act, the Exchange Act and related rules and regulations of the SEC. The liability provisions of the Securities Act and the Exchange Act overlap, and most actions under the U.S. federal securities laws are brought under more than one provision. This appendix does not address less important sources of potential liability under the U.S. federal securities laws, nor does it address other potential sources of liability and sanctions, such as the U.S. federal mail and wire fraud statutes, U.S. state fraud statutes and common law remedies, the U.S. Racketeer Influenced and Corrupt Organizations Act (RICO) and the SEC's disciplinary powers.

I. Section 11 of the Securities Act

Strict Liability of Offering Participants, with Due Diligence Defense Available to Anyone other than Issuer

- **Claim Basis**. Unless it is proved that at the time of such acquisition that the person acquiring a security knew of an untruth or omission, that person may recover damages from, among others, the issuer, each director of the issuer, each officer of the issuer that signed the registration statement and each underwriter if any part of the registration statement, when such part became effective:
  - contained an 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.
- **Claim Elements**. The plaintiff must prove the following:
  - **Untrue Statement or Omission**: as described above;
  - **Materiality**: there is substantial likelihood that a reasonable investor would consider the information important in making an investment decision;
  - **Reliance**: required if security acquired after the issuer has made generally available to its security holders an earning statement covering a period of at least 12 months beginning after the effective date of the registration statement; and
  - **Scienter (i.e. Intent)**: not required.

- **Claim Defense**. Any defendant other than the issuer may raise a due diligence defense:
  - **Expertized**: for portions of the registration statement purporting to be made on the authority of another expert (such as audited financial statements), the defendant 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 of or extract from the report or valuation of the expert;
  - **Non-Expertized**: for portions of the registration statement not purporting to be made on the authority of another expert (such as MD&A), the defendant had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and
  - **Reasonable Investigation and Belief**: the standard of reasonableness that constitutes reasonable investigation and reasonable ground for belief is that required of a prudent man in the management of his own property.
- **Damages**. Several options based on the decline in value of the security:
  - difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought;
  - difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the price at which such security shall have been disposed of in the market before suit; or
  - difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought.
  - But cannot recover any portion of such damages proven by the defendant that do not represent depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

II. Section 12 of the Securities Act

Liability of Seller Based on Scienter (i.e. Intent)

- **Claim Basis**. Any person purchasing a security from a person who (i) offers or sells a security in violation of the registration requirements of the Securities Act or (ii) offers or sells a security by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), may sue either at law or in equity in any court of competent jurisdiction.
- **Claim Elements**. The plaintiff must prove the following:
  - **Untrue Statement or Omission**: as described above;
  - **Materiality**: there is substantial likelihood that a reasonable investor would consider the information important in making an investment decision;
  - **Reliance**: not required; and
  - **Scienter (i.e. Intent)**: required.
- **Claim Defense**. Defendant may prove that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.
- **Damages**. Rescission, i.e. recovery of the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.
  - But cannot recover any portion of such damages proven by the defendant that do not represent depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading.

III. Section 15 of the Securities Act

Control Person Liability

- **Claim Basis**. Any person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under Section 11 or Section 12 of the Securities Act.
- **Claim Elements**. The plaintiff must prove primary liability of the controlled person and the existence of control.

- **Claim Defense**. Defendant may prove that it had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.
- **Damages**. Liable jointly and severally with and to the same extent as the controlled person to any person to whom such controlled person is liable.

IV. Section 17 of the Securities Act

General Anti-Fraud Provisions

- **Claim Basis**. Any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly, that:
  - employs any device, scheme or artifice to defraud;
  - obtains money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
  - engages in any transaction, practice or course of business that operates or would operate as a fraud or deceit upon the purchaser.

(In addition, it is unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service or communication that, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.)

- **Claim Elements**. The plaintiff must prove the following:
  - **Untrue Statement or Omission**: as described above;
  - **Materiality**: there is substantial likelihood that a reasonable investor would consider the information important in making an investment decision;
  - **Reliance**: required; and
  - **Scienter (i.e. Intent)**: required.

V. Section 10(b) of the Exchange Act and Rule 10b-5 under the Exchange Act

General Anti-Fraud Provisions

- **Claim Basis**. Any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange, that uses or employs, in connection with the purchase

or sale of any security, any manipulative or deceptive device or contrivance in contravention of the SEC's rules and regulations, including, in connection with the purchase or sale of any security:

- employing any device, scheme or artifice to defraud;
- making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
- engaging in any act, practice or course of business that operates or would operate as a fraud or deceit upon any person.

- **Claim Elements**. The plaintiff must prove the following:
  - **Untrue Statement or Omission**: as described above;
  - **Materiality**: there is substantial likelihood that a reasonable investor would consider the information important in making an investment decision;
  - **Reliance**: required; and
  - **Scienter (i.e. Intent)**: required.

VI. Section 18 of the Exchange Act

Liability for False Statements

- **Claim Basis**. Any person who shall make or cause to be made any statement in any application, report or document filed pursuant to the Exchange Act or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in Section 15(d) of the Exchange Act, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price that was affected by such statement.
- **Claim Elements**. As stated above, plus a claim must be brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.
- **Claim Defense**. Defendant may prove that he acted in good faith and had no knowledge that the applicable statement was false or misleading.
- **Damages**. Those caused by the reliance. In addition, a court may, in its discretion, require an undertaking for the payment of the costs of the suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

VII. Section 20 of the Exchange Act

Control Person Liability

- **Claim Basis**. Any person who, directly or indirectly, controls any person liable under any provision of the Exchange Act or of any rule or regulation thereunder.
- **Claim Elements**. The plaintiff must prove primary liability of the controlled person and the existence of control.
- **Claim Defense**. Defendant may prove that the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.
- **Damages**. Liable jointly and severally with and to the same extent as the controlled person to any person to whom such controlled person is liable.

VIII. Key Takeaways for Offering Participants (Including Outside Directors)

- Carefully read all disclosure materials, paying particular attention to risk factors, MD&A and any other areas of particular concern.
- Raise with appropriate personnel (issuer's management or directors) any questions or concerns relating to the quality of disclosure, and pursue answers until comfortable with the resolution of any disclosure issues.
- Be comfortable that the opportunity to provide comments on the disclosure materials and, if necessary, to participate in disclosure decisions has been provided.
- Be confident that disclosure controls and procedures mandated by the U.S. Sarbanes-Oxley Act of 2002 have been established by the chief executive officer and chief financial officer and have been followed.
- Be kept informed about lapses in internal controls, failures of disclosure controls and procedures and concerns raised in management letters by the issuer's outside auditors.
- Confirm that legal counsel retained by the issuer to assist in the offering has been provided the opportunity to conduct a "due diligence" investigation and that such counsel is delivering an appropriate negative assurance letter as to such disclosure.
- In sum, take such steps believed to be necessary to develop reasonable confidence that the disclosure documents are fair and complete and do not contain any material omissions or misstatements.

Appendix D

Financial Statement Requirements in U.S. Securities Offerings for Foreign Private Issuers

Annual Audited Financial Statements

Rule 3-01(h) and Rule 3-02(d) of the SEC's Regulation S-X provide that foreign private issuers may file the financial statements required by Item 8.A. of Form 20-F in lieu of the financial statements required to be filed by other companies.

Item 8.A. of Form 20-F requires audited consolidated financial statements comparing the latest three financial years comprised of:

- balance sheet;
- income statement;
- statement showing either (i) changes in equity other than those arising from capital transactions with owners and distributions to owners or (ii) all changes in equity (including a subtotal of all non-owner items recognized directly in equity);
- cash flow statement;
- related notes and schedules required by the comprehensive body of accounting standards pursuant to which the financial statements are prepared; and
- if not included in the primary financial statements, a note analyzing the changes in each caption of shareholders' equity presented in the balance sheet.

However, Instruction 1 to Item 8.A.2. of Form 20-F provides that no balance sheet is required for the earliest of the three-year periods if that balance sheet is not required by a jurisdiction outside the United States.

Rule 3-12(f) of the SEC's Regulation S-X specifically provides that any foreign private issuer may file financial statements whose age is specified in Item 8.A. of Form 20-F.

The requisite audit report must be audited in accordance with a comprehensive body of auditing standards and must cover each of the periods for which these international disclosure standards require audited financial statements.

The last year of audited financial statements may not be older than 15 months at the time of the offering or listing; provided, however, that in the case of the company's initial public offering, the audited financial statements also shall be as of a date not older than 12 months at the time the document is filed. In such cases, the audited financial statements may cover a period of less than a full year.

Interim Unaudited Financial Statements

If the offering document is dated more than nine months after the end of the last audited financial year, it should contain consolidated interim financial statements, which may be unaudited (in which case that fact should be stated), covering at least the first six months of the financial year.

The interim financial statements should include a balance sheet, an income statement, a cash flow statement and a statement showing either (i) changes in equity other than those arising from capital transactions with owners and distributions to owners or (ii) all changes in equity (including a subtotal of all non-owner items recognized directly in equity).

Each of these statements may be in condensed form as long as it contains the major line items from the latest audited financial statements and includes the major components of assets, liabilities and equity (in the case of the balance sheet), income and expenses (in the case of the income statement) and the major subtotals of cash flows (in the case of the cash flow statement).

The interim financial statements should include comparative statements for the same period in the prior financial year, except that the requirement for comparative balance sheet information may be satisfied by presenting the year-end balance sheet.

The interim financial statements should include selected note disclosures that will provide an explanation of events and changes that are significant to an understanding of the changes in financial position and performance of the enterprise since the last annual reporting date.

If, at the date of the offering document, the company has published interim financial information that covers a more current period than those otherwise required by this standard, the more current interim financial information must be included in the offering document.

Companies are encouraged, but not required, to have any interim financial statements in the offering document reviewed by an independent auditor. If such a review has been performed and is referred to in the offering document, a copy of the auditor's interim review report must be provided in the offering document.

Selected Financial Information

Item 3.A. of Form 20-F requires selected historical financial data for the five most recent financial years (or such shorter period that the company has been in operation), in the same currency as the financial statements. Selected financial data for either or both of the earliest two years of the five-year period may be omitted, however, if the company represents to the host country regulator that such information cannot be provided, or cannot be provided on a restated basis, without unreasonable effort or expense.

If interim period financial statements are included, the selected financial data should be updated for that interim period, which may be unaudited, provided that fact is stated. If selected financial data for interim periods is provided, comparative data from the same period in the prior financial year shall also be provided, except that the requirement for comparative balance sheet data is satisfied by presenting the year-end balance sheet information.

The selected financial data presented shall include items generally corresponding to the following, except that the specific line items presented should be expressed in the same manner as the corresponding line items in the company's financial statements:

- net sales or operating revenues;
- income (loss) from operations;
- income (loss) from continuing operations;
- net income (loss);
- net income (loss) from operations per share;
- income (loss) from continuing operations per share;
- total assets;
- net assets;
- capital stock (excluding long term debt and redeemable preferred stock);
- number of shares as adjusted to reflect changes in capital;
- dividends declared per share in both the currency of the financial statements and the host country currency, including the formula used for any adjustments to dividends declared; and
- diluted net income per share.

Statement of Capitalization and Indebtedness

Item 3.B. of Form 20-F requires a statement of capitalization and indebtedness (distinguishing between guaranteed and unguaranteed, and secured and unsecured, indebtedness) as of a date no earlier than 60 days prior to the date of the offering document showing the company's capitalization on an actual basis and, if applicable, as adjusted to reflect the sale of new securities being issued and the intended application of the net proceeds therefrom.

Relief for Emerging Growth Companies

In order to qualify as an emerging growth company pursuant to Section 2(a)(19) of the Securities Act, a company must have annual gross revenues during its most recently completed fiscal year of less than $1 billion. After the initial determination of emerging growth company status, a company will remain an emerging growth company until the earliest of:

- the last day of any fiscal year in which the company had annual gross revenues of $1 billion or more;
- the last day of the fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act;
- the date on which the company has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or
- the date on which the company is deemed to be a "large accelerated filer" (i.e. at least $700 million in equity held by non-affiliates).

Pursuant to Section 7(a)(2) of the Securities Act, an emerging growth company may present only two years (rather than three years) of audited financial statements in the offering document for its initial public offering and may present as few as two years (rather than five years) of selected financial data.

Accounting Principles

Rule 4-01(a)(2) of the SEC's Regulation S-X provides that, in all filings of foreign private issuers, except as stated otherwise in the applicable form, the financial statements may be prepared according to:

- U.S. GAAP;
- IFRS as issued by the IASB; or
- a comprehensive set of accounting principles, other than those generally accepted in the United States or IFRS as issued by the IASB, if a reconciliation to U.S. GAAP and the provisions of the SEC's Regulation S-X of the type specified in Item 18 of Form 20-F is also filed as part of the financial statements.

Item 18 of Form 20-F requires all other information required by U.S. GAAP and the SEC's Regulation S-X to be provided unless such requirements specifically do not apply to the registrant as a foreign issuer. However, information may be omitted for any period in which net income has not been presented on a basis reconciled to U.S. GAAP.

Disclosure of Non-GAAP Financial Measures

The SEC has promulgated special rules for when companies disclose financial information using non-GAAP financial measures, as follows.

The SEC's Regulation G and Item 10(e) of the SEC's Regulation S-K define "**GAAP**" as generally accepted accounting principles in the United States, except that:

- in the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. GAAP, GAAP refers to the principles under which those primary financial statements are prepared; and

- in the case of foreign private issuers that include a non-GAAP financial measure derived from a measure calculated in accordance with U.S. GAAP, GAAP refers to U.S. GAAP for purposes of the application of the requirements of the SEC's Regulation G and Item 10(e) of the SEC's Regulation S-K to the disclosure of that measure.

A "**non-GAAP financial measure**" is a numerical measure of a foreign private issuer's historical or future financial performance, financial position or cash flows that:

- excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or
- includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

A non-GAAP financial measure does not include:

- operating and other financial measures and ratios or statistical measures calculated using exclusively one or both of (i) financial measures calculated in accordance with GAAP and (ii) operating measures or other measures that are not non-GAAP financial measures; or
- financial measures required to be disclosed by GAAP, SEC rules or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the foreign private issuer.

EBITDA is perhaps the best-known (and most widely-used) non-GAAP financial measure.

Pursuant to the SEC's Regulation G and Item 10(e) of the SEC's Regulation S-K, whenever non-GAAP financial measures are disclosed, that disclosure must be accompanied by:

- a presentation, with equal or greater prominence, of the most directly comparable financial measure calculated and presented in accordance with GAAP;
- a reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most comparable financial measure or measures calculated and presented in accordance with GAAP identified in the prior bullet point;
- a statement disclosing the reasons why the foreign private issuer's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the issuer's financial condition and results of operations; and

- to the extent material, a statement disclosing the additional purposes, if any, for which the issuer's management uses the non-GAAP financial measure that are not disclosed pursuant to the prior bullet point.

However, the SEC's Regulation G provides that this disclosure requirement does not apply to a foreign private issuer if:

- the securities are listed or quoted on a securities exchange outside the United States;
- the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with U.S. GAAP; and
- 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.

This exception to the disclosure requirement applies even if:

- a written communication is released in the United States as well as outside the United States, so long as the communication is released in the United States contemporaneously with or after the release outside the United States and is not otherwise targeted at persons located in the United States;
- foreign journalists, U.S. journalists or other third parties have access to the information;
- the information appears on one or more web sites maintained by the foreign private issuer, so long as the web sites, taken together, are not available exclusively to, or targeted at, persons located in the United States; or
- following the disclosure or release of the information outside the United States, the information is included in a submission by the foreign private issuer to the SEC made under cover of a Form 6-K.

Item 10(e) of the SEC's Regulation S-K provides that a foreign private issuer must not:

- exclude charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures, other than the measures earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation and amortization (EBITDA);
- adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years;
- present non-GAAP financial measures on the face of the issuer's financial statements prepared in accordance with GAAP or in the accompanying notes; or

- use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

However, these prohibitions to not apply to a foreign private issuer if:

- the non-GAAP financial measure relates to the GAAP used in the foreign private issuer's primary financial statements included in its filing with the SEC;
- the non-GAAP financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and
- the non-GAAP financial measure is included in the annual report prepared by the foreign private issuer for use in the jurisdiction in which it is domiciled, incorporated or organized or for distribution to its security holders.

A foreign private issuer may not make public a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of that measure, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading.

Currency

Rule 3-20 of the SEC's Regulation S-X provides that a foreign private issuer shall state amounts in its primary financial statements in the currency that it deems appropriate.

The currency in which amounts in the financial statements are stated must be disclosed prominently on the face of the financial statements. If there are material exchange restrictions or controls relating to the issuer's reporting currency, the currency of the issuer's domicile or the currency in which the issuer will pay dividends, prominent disclosure of this fact must be made in the financial statements. If the reporting currency is not the U.S. dollar, dollar-equivalent financial statements or convenience translations may not be presented, except a translation may be presented of the most recent fiscal year and any subsequent interim period presented using the exchange rate as of the most recent balance sheet included in the filing, except that a rate as of the most recent practicable date shall be used if materially different.

If the financial statements of a foreign private issuer are stated in a currency of a country that has experienced cumulative inflationary effects exceeding a total of 100% over the most recent three year period, and have not been recast or otherwise supplemented to include information on a historical cost/constant currency or current cost basis prescribed or permitted by appropriate authoritative standards, the issuer must present supplementary information to quantify the effects of changing prices upon its financial position and results of operations.

The issuer must state its primary financial statements in the same currency for all periods for which financial information is presented.

135-Day Rule

While not prescribed by any U.S. federal securities law, rule or regulation, an issuer's independent auditor generally will provide full comfort (including negative assurance) in the comfort letter typically furnished to (and expected and required by) underwriters if the most recent financial statements presented (whether audited or unaudited) are less than 135 days old. (See e.g. paragraph .47 of AU Section 634.)

Appendix E

Corporate Governance and Audit Matters

The U.S. Sarbanes-Oxley Act of 2002 imposed upon issuers of securities various requirements relating to corporate governance, audits and related matters, which have been implemented via U.S. federal law, SEC rulemaking and the rules of U.S. national securities exchanges such as NYSE and Nasdaq, including the following principal requirements:

I. CEO and CFO Certifications

Instruction 12 and Instruction 13 to Form 20-F require the filing of two separate certifications by each of the chief executive officer and chief financial officer of an issuer pursuant to Rule 13a-14 or Rule 15d-14 under the Exchange Act to the effect that:

- such officer has reviewed the annual report;
- based on such officer's knowledge, (i) the annual report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading, and (ii) the financial statements and other financial information included in the annual report fairly present in all material respects the financial condition, results of operations and cash flows of the issuer;
- such officer (i) is responsible for establishing and maintaining, and has evaluated the effectiveness of, disclosure controls and procedures and (ii) is responsible for establishing and maintaining internal controls over financial reporting and has disclosed any change in such internal controls over financial reporting that has materially affected, or is reasonably likely to materially affect, the issuer's internal controls over financial reporting;
- the annual report fully complies with Section 13(a) and Section 15(d) of the Exchange Act; and
- the information contained in the annual report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

These certifications are not required in a Form 6-K.

II. Controls and Procedures

Item 15 of Form 20-F requires the following to be provided in annual reports:

- the conclusions of the issuer's principal executive and principal financial officers, or persons performing similar functions, regarding the effectiveness of the issuer's

disclosure controls and procedures as of the end of the period covered by the annual report;

- a report of management on the issuer's internal control over financial reporting that contains:
  - 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 the issuer's internal control over financial reporting;
  - management's assessment of the effectiveness of the issuer's internal control over financial reporting as of the end of the issuer's most recent fiscal year, including a statement as to whether or not internal control over financial reporting is effective (and including disclosure of any material weakness in the issuer's internal control over financial reporting, which if existing precludes a conclusion of effectiveness); and
  - for certain issuers, a statement that the registered public accounting firm that audited the financial statements included in the annual report containing such disclosure has issued an attestation report on management's assessment of the issuer's internal control over financial reporting;
- for certain issuers, the registered public accounting firm's attestation report on management's assessment of the issuer's internal control over financial reporting; and
- any change in the issuer's internal control over financial reporting that occurred during the period covered by the annual report that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.

III. Prohibition on Personal Loans to Executives

Section 13(k)(1) of the Exchange Act provides that it is unlawful for any issuer, directly or indirectly, or through any subsidiary, to extend or maintain credit, to arrange for the extension of credit or to renew an extension of credit in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer.

IV. Forfeiture of Bonuses and Profits

15 U.S.C. 7243(a) provides that if an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the U.S. federal securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for:

- any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the SEC (whichever first occurs) of the financial document embodying such financial reporting requirement; and
- any profits realized from the sale of securities of the issuer during that 12-month period.

V. Auditor Independence

Section 10A(l) of the Exchange Act provides that it is unlawful for a registered public accounting firm to perform for an issuer any audit service required by the Exchange Act if a chief executive officer, controller, chief financial officer, chief accounting officer or any person serving in an equivalent position for the issuer was employed by that registered independent public accounting firm and participated in any capacity in the audit of that issuer during the one-year period preceding the date of the initiation of the audit.

VI. Audit Partner Rotation

Section 10A(j) of the Exchange Act provides that it is unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner (having primary responsibility for the audit), or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the five previous fiscal years of that issuer.

VII. Interference with Audits

15 U.S.C. 7242(a) provides that it is unlawful for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence, coerce, manipulate or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that issuer for the purpose of rendering such financial statements materially misleading.

VIII. Record Retention

18 U.S.C. 1520(a)(1) requires any accountant who conducts an audit of an issuer to maintain all audit or review workpapers for a period of five years from the end of the fiscal period in which the audit or review was concluded.

IX. Reports to Audit Committees

Section 10A(k) of the Exchange Act requires each registered public accounting firm that performs for any issuer any audit required by the Exchange Act to timely report to the audit committee of the issuer:

- all critical accounting policies and practices to be used;
- all alternative treatments of financial information within GAAP that have been discussed with management officials of the issuer, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the registered public accounting firm; and
- other material written communications between the registered public accounting firm and the management of the issuer, such as any management letter or schedule of unadjusted differences.

X. Audit Committee Financial Expert

Item 16A of Form 20-F requires the issuer to disclose in its annual report whether or not its board of directors has determined that its audit committee has an "audit committee financial expert."

XI. Code of Ethics

Item 16B of Form 20-F requires an issuer to disclose in its annual report whether it has adopted a code of ethics that applies to its principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions. If the issuer has not adopted such a code of ethics, it must explain why it has not done so. If the issuer has adopted such a code of ethics, it must file a copy of its code of ethics with the SEC and post its code of ethics to its web site. If the issuer has granted a waiver from a provision of its code of ethics to certain persons, it must briefly describe the nature of the waiver, the name of the person to whom the waiver was granted and the date of the waiver.

XII. Whistleblower Protection

18 U.S.C. 1514A(a) provides that no company subject to Section 12 or Section 15(d) of the Exchange Act (or any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company) may discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee:

- to provide information, cause information to be provided or otherwise assist in an investigation regarding any conduct that the employee reasonably believes constitutes a violation of certain provisions of U.S. federal securities laws, rules and regulations when the information or assistance is provided to or the investigation is conducted by:
  - a U.S. federal regulatory or law enforcement agency;
  - any member of the U.S. Congress or any committee of the U.S. Congress; or

- a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover or terminate misconduct); or
- to file, cause to be filed, testify, participate in or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of certain provisions of U.S. federal securities laws, rules and regulations.

XIII. Listing Standards

(a) Exchange Act Generally

Rule 10A-3 under the Exchange Act prohibits the listing of any security on a U.S. national securities exchange that does not require (i) an audit committee satisfying certain independence standards, (ii) record-retention requirements for accounting-related complaints and (iii) the authority of the audit committee to engage independent counsel. However, the following exemptions from these standards apply to foreign private issuers:

- Rule 10A-3(c)(3) under the Exchange Act provides that a foreign private issuer that meets the following requirements is not subject to any of these standards (except that the standards referenced in clause (ii) and clause (iii) above apply to the extent permitted by law):
  - the foreign private issuer has a board of auditors (or similar body), or has statutory auditors, established and selected pursuant to home country legal or listing provisions expressly requiring or permitting such a board or similar body;
  - the board or body, or statutory auditors, is required under home country legal or listing requirements to be either (i) separate from the board of directors or (ii) composed of one or more members of the board of directors and one or more members that are not also members of the board of directors;
  - the board or body, or statutory auditors, are not elected by management of such issuer, and no executive officer of the foreign private issuer is a member of such board or body or statutory auditors;
  - home country legal or listing provisions set forth or provide for standards for the independence of such board or body, or statutory auditors, from the foreign private issuer or the management of such issuer; and
  - such board or body, or statutory auditors, in accordance with any applicable home country legal or listing requirements or the issuer's governing documents, are responsible, to the extent permitted by law, for the appointment, retention and oversight of the work of any registered public accounting firm engaged (including, to the extent permitted by law, the resolution of disagreements between management and the auditor regarding financial reporting) for the

purpose of preparing or issuing an audit report or performing other audit, review or attest services for the issuer;

- Rule 10A-3(c)(6)(iii) under the Exchange Act provides that a foreign government is not subject to any of these standards;
- Rule 10A-3(b)(1)(iv)(C) under the Exchange Act provides that an employee of a foreign private issuer who is not an executive officer of the foreign private issuer is exempt from certain of the independence standards if the employee is elected or named to the board of directors or audit committee of the foreign private issuer pursuant to the issuer's governing law or documents, an employee collective bargaining or similar agreement or other home country legal or listing requirements;
- Rule 10A-3(b)(1)(iv)(D) under the Exchange Act provides that an audit committee member of a foreign private issuer is exempt from certain of the independence standards if (i) that member is an affiliate of the foreign private issuer or a representative of such an affiliate, (ii) that member has only observer status on, and is not a voting member or the chair of, the audit committee and (iii) neither that member nor that affiliate is an executive officer of the foreign private issuer; and
- Rule 10A-3(b)(1)(iv)(E) under the Exchange Act provides that an audit committee member of a foreign private issuer is exempt from certain of the independence standards if that member (i) is a representative or designee of a foreign government or foreign governmental entity that is an affiliate of the foreign private issuer and (ii) that member is not an executive officer of the foreign private issuer.

(b) NYSE Listing Standards

Subject to certain exceptions for foreign private issuers discussed below, the NYSE's listing standards include the following for companies listed on the NYSE:

- the board of directors must have a majority of independent directors pursuant to Section 303A.01 of the NYSE Listed Company Manual;
- non-management directors must meet at regularly scheduled executive sessions without management pursuant to Section 303A.03 of the NYSE Listed Company Manual;
- there must be a nominating/corporate governance committee composed entirely of independent directors with a written charter addressing certain responsibilities and providing for an annual performance evaluation of the committee, pursuant to Section 303A.04 of the NYSE Listed Company Manual;
- there must be a compensation committee composed entirely of independent directors with a written charter addressing certain responsibilities and providing for an annual performance evaluation of the committee, pursuant to Section 303A.05 of the NYSE Listed Company Manual;

- there must be an audit committee that (i) satisfies the requirements of Rule 10A-3 under the Exchange Act, (ii) has a minimum of three members, all of whom must be independent, and (iii) has a written charter addressing certain responsibilities and providing for an annual performance evaluation of the committee, pursuant to Section 303A.06 and Section 303A.07 of the NYSE Listed Company Manual;
- the company must have an internal audit function pursuant to Section 303A.07(c) of the NYSE Listed Company Manual;
- the company must adopt and disclose corporate governance guidelines pursuant to Section 303A.09 of the NYSE Listed Company Manual; and
- the company must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers, pursuant to Section 303A.10 of the NYSE Listed Company Manual.

Notwithstanding the foregoing, Section 303A.00 of the NYSE Listed Company Manual provides that foreign private issuers are permitted to follow home country practice in lieu of the provisions noted above, except:

- the company nonetheless is subject to the requirement that there must be an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act;
- the chief executive officer must promptly notify the NYSE in writing after any executive officer becomes aware of any non-compliance with any applicable provisions noted above;
- the company must submit an executed written affirmation annually to the NYSE; and
- as provided in the following paragraph.

Pursuant to Section 303A.11 of the NYSE Listed Company Manual, foreign private issuers must disclose any significant ways in which their corporate governance practices differ from those followed by U.S. companies under NYSE listing standards. A foreign private issuer that is required to file an annual report on Form 20-F with the SEC must include the statement of significant differences in that annual report, which is provided for by Item 16G of Form 20-F. All other foreign private issuers may either (i) include the statement of significant differences in an annual report filed with the SEC or (ii) make the statement of significant differences available on or through the listed company's web site. If the statement of significant differences is made available on or through the listed company's web site, the listed company must disclose that fact in its annual report filed with the SEC and provide the web site address.

(C) Nasdaq Listing Standards

Subject to certain exceptions for foreign private issuers discussed below, Nasdaq's listing standards include the following for companies listed on Nasdaq:

- a majority of the board of directors must be comprised of independent directors pursuant to Section 5605(b)(1) of the Nasdaq Stock Market Rules;
- independent directors must have regularly scheduled meetings at which only independent directors are present pursuant to Section 5605(b)(2) of the Nasdaq Stock Market Rules;
- the company must certify that it has adopted a formal written audit committee charter and that the audit committee will review and reassess the adequacy of the formal written charter on an annual basis, the charter must make certain provisions, and the audit committee must be composed of at least three members, each of whom must be independent directors, including meeting the criteria for independence set forth in Rule 10A-3(b)(1) under the Exchange Act (subject to certain exceptions for one such director), all pursuant to Section 5605(c) of the Nasdaq Stock Market Rules;
- the company must certify that it has adopted a formal written compensation committee charter and that the compensation committee will review and reassess the adequacy of the formal written charter on an annual basis, the charter must make certain provisions, and the compensation committee must be composed of at least two members, each of whom must be independent directors (subject to certain exceptions for one such director), all pursuant to Section 5605(d) of the Nasdaq Stock Market Rules;
- director nominees must either be selected, or recommended for the board of directors' selection, either by (i) independent directors constituting a majority of the board of directors' independent directors in a vote in which only independent directors participate or (ii) a nominations committee comprised solely of independent directors (subject to certain exceptions for one such director), and the company must certify that it has adopted a formal written charter or board resolution, as applicable, addressing the nominations process and such related matters as may be required under the U.S. federal securities laws, all pursuant to Section 5605(e) of the Nasdaq Stock Market Rules;
- compensation of the executive officers of the company must be determined, or recommended to the board of directors for determination, either by (i) independent directors constituting a majority of the board of directors' independent directors in a vote in which only independent directors participate or (ii) a compensation committee comprised solely of independent directors (subject to certain exceptions for one such director), with the chief executive officer not present during voting or deliberations for his or her own compensation, all pursuant to Section 5605A(d) of the Nasdaq Stock Market Rules;
- the company shall adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available, with any waivers of the code for directors or executive officers approved by the board of directors and disclosed

either by distributing a press release or including disclosure in a Form 6-K or in the next Form 20-F (or on the company's web site in a prescribed manner), pursuant to Section 5610 of the Nasdaq Stock Market Rules; and

- the company shall conduct an appropriate review and oversight of all related party transactions for potential conflict of interest situations on an ongoing basis by the company's audit committee or another independent body of the board of directors pursuant to Section 5630 of the Nasdaq Stock Market Rules.

Notwithstanding the foregoing, Section 5615(a)(3) of the Nasdaq Stock Market Rules provides that a foreign private issuer may follow its home country practice in lieu of the provisions noted above, except:

- the company nonetheless is subject to the requirement that there must be an audit committee composed of members that meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Exchange Act;
- the company must provide Nasdaq with prompt notification after an executive officer of the company becomes aware of any noncompliance by the company with the provisions noted above; and
- as provided in the following paragraph.

A foreign private issuer that follows a home country practice in lieu of one or more of the provisions noted above shall disclose in its annual reports filed with the SEC each requirement that it does not follow and describe the home country practice followed by the company in lieu of such requirements. Alternatively, a foreign private issuer that is not required to file its annual report with the SEC on Form 20-F may make this disclosure only on its web site. A foreign private issuer that follows a home country practice in lieu of the requirement to have an independent compensation committee must disclose in its annual reports filed with the SEC the reasons why it does not have such an independent committee. A foreign private issuer making its initial public offering or first U.S. listing on Nasdaq shall disclose in its registration statement or on its web site each requirement that it does not follow and describe the home country practice followed by the company in lieu of such requirements.

Appendix F

Counting Holders

I. Counting Holders of Record pursuant to Rule 12g5-1 under the Exchange Act

Rule 12g5-1 under the Exchange Act defines "held of record" for purposes of Section 12(g) and Section 15(d) of the Exchange Act. Rule 12g5-1(a)(3) under the Exchange Act provides a special counting method for securities held by fiduciaries. Specifically, securities identified as held of record by one or more persons as trustees, executors, guardians, custodians or in other fiduciary capacities with respect to a single trust, estate or account shall be included as held of record by one person. Accordingly, for these purposes, institutional depositaries such as Cede & Co. (which is the nominee typically used by The Depository Trust Company (DTC), the principal depositary in the United States) are not holders of record, but each of a depositary's accounts for which securities are held is a single record holder. Therefore, as a general matter, in counting record holders, the issuer need only count the number of registered holders on its shareholder list and, if depositaries are listed, the number of holders for which the depositaries hold securities. For a typical foreign private issuer with securities that settle through DTC, this means counting the registered holders on its shareholder list and adding the number of participants listed in the security position listing of DTC. In addition, Rule 12g5-1 under the Exchange Act provides for the following special rules:

- **Insufficient Records**. Pursuant to Rule 12g5-1(a)(1) under the Exchange Act, in any case where the records of security holders have not been maintained in accordance with accepted practice, any additional person who would be identified as such an owner on such records if they had been maintained in accordance with accepted practice shall be included as a holder of record.
- **Entities**. Pursuant to Rule 12g5-1(a)(2) under the Exchange Act, securities identified as held of record by a corporation, a partnership, a trust (whether or not the trustees are named) or another organization shall be included as so held by one person.
- **Joint Ownership**. Pursuant to Rule 12g5-1(a)(4) under the Exchange Act, securities held by two or more persons as co-owners shall be included as held by one person.
- **Duplicate Names**. Pursuant to Rule 12g5-1(a)(6) under the Exchange Act, securities registered in substantially similar names where the issuer has reason to believe because of the address or other indications that such names represent the same person may be included as held of record by one person.
- **Employee Compensation Plans**. Pursuant to Rule 12g5-1(a)(8) under the Exchange Act, for purposes of determining whether an issuer is required to

register a class of equity securities with the SEC pursuant to Section 12(g)(1) of the Exchange Act, an issuer may exclude securities (A) held by persons who received the securities pursuant to an employee compensation plan in transactions exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act and (B) held by persons who received the securities in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act from the issuer, a predecessor of the issuer or an acquired company in substitution or exchange for excludable securities under clause (A) above, as long as the persons were eligible to receive securities pursuant to Rule 701(c) under the Securities Act at the time the excludable securities were originally issued to them. As a non-exclusive safe harbor under this provision, (i) an issuer may deem a person to have received the securities pursuant to an employee compensation plan if such plan and the person who received the securities pursuant to the plan met the plan and participant conditions of Rule 701(c) under the Securities Act and (ii) an issuer may, solely for purposes of Section 12(g) of the Exchange Act, deem the securities to have been issued in a transaction exempt from, or not subject to, the registration requirements of Section 5 of the Securities Act if the issuer had a reasonable belief at the time of the issuance that the securities were issued in such a transaction.

- **Known Voting Trusts**. Pursuant to Rule 12g5-1(b)(1) under the Exchange Act, securities held, to the knowledge of the issuer, subject to a voting trust, deposit agreement or similar arrangement shall be included as held of record by the record holders of the voting trust certificates, certificates of deposit, receipts, or similar evidences of interest in such securities; provided, however, that the issuer may rely in good faith on such information as is received in response to its request from a non-affiliated issuer of the certificates or evidences of interest.
- **Holding to Circumvent Registration**. Pursuant to Rule 12g5-1(b)(3) under the Exchange Act, if the issuer knows or has reason to know that the form of holding securities of record is used primarily to circumvent the provisions of Section 12(g) or Section 15(d) of the Exchange Act, the beneficial owners of such securities shall be deemed to be the record owners thereof.

II. Counting 300 U.S. Resident Holders pursuant to Rule 12g3-2(a) under the Exchange Act

Rule 12g3-2(a) under the Exchange Act exempts from the registration requirements of Section 12(g) of the Exchange Act securities of any class issued by a foreign private issuer if the class has fewer than 300 holders resident in the United States. The counting method pursuant to Rule 12g3-2(a) under the Exchange Act is the same as the counting method pursuant to Rule 12g5-1 under the Exchange Act (discussed above), except that securities held of record by a broker, dealer or bank or nominee for any of them for the accounts of customers resident in the United States shall be counted as

held in the United States by the number of separate accounts for which the securities are held. The issuer may rely in good faith on information as to the number of such separate accounts supplied by all owners of the class of its securities that are brokers, dealers or banks or a nominee for any of them.

Issuers should take into account securities beneficially owned by U.S. residents as reported in publicly filed information, e.g. Schedule 13D and Schedule 13G reports.

III. Counting U.S. Resident Holders pursuant to Rule 12h-6 under the Exchange Act

As provided by Rule 12h-6(e) under the Exchange Act, the counting method pursuant to Rule 12h-6 under the Exchange Act (but not Rule 12g-4 under the Exchange Act) is the same as the counting method pursuant to Rule 12g3-2(a) under the Exchange Act, except that:

- the issuer may limit its inquiry regarding the amount of securities represented by accounts of customers resident in the United States to brokers, dealers, banks and other nominees located in the United States, the issuer's jurisdiction of incorporation, legal organization or establishment and the foreign private issuer's primary trading market, if different from the issuer's jurisdiction of incorporation, legal organization or establishment;
- if, after a reasonable inquiry, the issuer is unable without reasonable effort to obtain information about the amount of securities represented by accounts of customers resident in the United States, the issuer may assume that the customers are the residents of the jurisdiction in which the nominee has its principal place of business;
- the issuer must count securities as owned by United States holders where publicly filed reports of beneficial ownership or other reliable information that is provided to it indicates that the securities are held by United States residents; and
- the issuer may rely in good faith on the assistance of an independent information services provider that in the regular course of its business assists issuers in determining the number of, and collecting other information concerning, their security holders.

Appendix G

Beneficial Ownership Reporting Requirements (Schedule 13D and Schedule 13G)

Section 13 of the Exchange Act imposes certain disclosure obligations on persons beneficially owning more than 5% of a class of equity securities registered pursuant to Section 12 of the Exchange Act.

Rule 13d-1(d) under the Exchange Act requires any person who has become directly or indirectly the beneficial owner of more than 5% of any class of equity securities registered pursuant to Section 12 of the Exchange Act, and who has not otherwise been required to file a Schedule 13D, to file a Schedule 13G with the SEC within 45 days after the end of the calendar year in which the person became obligated to so report. This provision is typically implicated for directors and officers in initial public offerings.

For companies that are already public, Rule 13d-1(a) under the Exchange Act requires any person who has become directly or indirectly the beneficial owner of more than 5% of any class of equity securities registered pursuant to Section 12 of the Exchange Act to file a Schedule 13D with the SEC within 10 days after the acquisition.

Rule 13d-2(a) under the Exchange Act requires such a person to promptly file with the SEC an amendment to its Schedule 13D if there is any material increase or decrease in the percentage of the class it beneficially owns. An acquisition or disposition of beneficial ownership of securities in an amount equal to 1% or more of the class of securities is deemed material for this purpose.

Certain passive investors are permitted by Rule 13d-1(c) under the Exchange Act to file a short-form Schedule 13G instead of the longer-form Schedule 13D. To qualify, the investor must, among other things, (i) not have acquired the securities with the purpose or with the effect of changing or influencing the control of the issuer and (ii) not directly or indirectly be the beneficial owner of 20% or more of the class of securities. Pursuant to Rule 13d-2(d) under the Exchange Act, if the passive investor subsequently acquires greater than 10% of the class of securities, it must file an amendment to the Schedule 13G promptly upon such acquisition. Thereafter, it must file an amendment on Schedule 13G promptly upon increasing or decreasing its ownership by more than 5% of the class of securities. Pursuant to Rule 13d-1(e) under the Exchange Act, any such person whose investment intent changes must file, within 10 days after such change, a Schedule 13D to reflect that change.

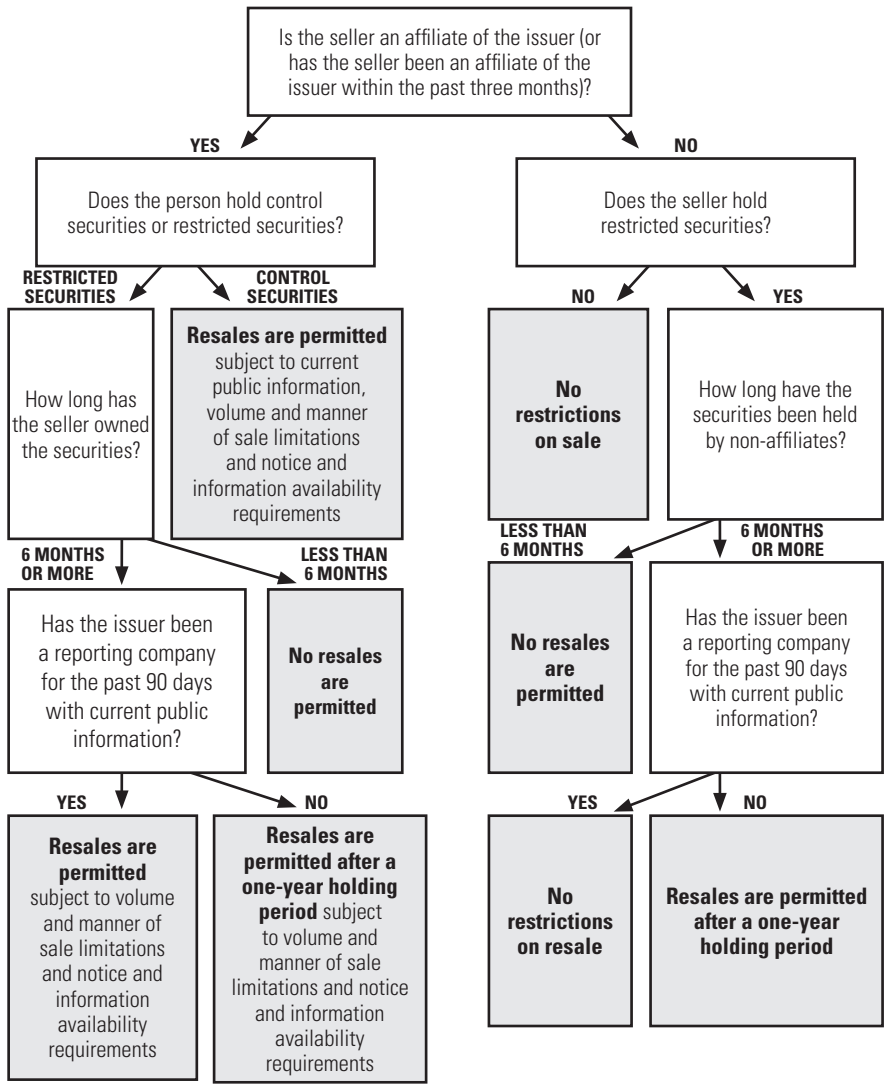
Both Schedule 13D and Schedule 13G require disclosure of certain information concerning the beneficial owner of the securities with respect to which the report is being filed and the nature and extent of the ownership of such securities. However,

Schedule 13D requires significantly more disclosure than Schedule 13G, including disclosure regarding (i) the source and amount of funds or other consideration used to purchase the securities, (ii) the purpose of the acquisition of the securities and (iii) any contracts, arrangements, understandings or relationships among the reporting person and any other person with respect to the issuer's securities (such as voting agreements).

Appendix H

Permissible Resales pursuant to Rule 144 under the Securities Act (for sellers that are not the issuer or a dealer)

Decision Tree



Permissible Resales pursuant to Rule 144 under the Securities Act

Status of Seller	First Six Months	Between Six Months and One Year	After One Year
Non-Affiliate of Reporting Issuer	Resales not permitted	Resales permitted subject only to current public information requirement	Resales freely permitted
Affiliate of Reporting Issuer	Resales not permitted	Resales permitted subject to all Rule 144 requirements (i.e. current public information, volume limitations, manner of sale and notice of sale)	Resales permitted subject to all Rule 144 requirements (i.e. current public information, volume limitations, manner of sale and notice of sale)
Non-Affiliate of Non-Reporting Issuer	Resales not permitted	Resales not permitted	Resales freely permitted
Affiliate of Non-Reporting Issuer	Resales not permitted	Resales not permitted	Resales permitted subject to all Rule 144 requirements (i.e. current public information, volume limitations, manner of sale and notice of sale)

Appendix I

Legal Due Diligence

One of the best tools to manage the documentary due diligence process is to create a "virtual data room" or "data site" as a repository for electronic copies of all legal documents that will need to be reviewed that can be accessed electronically by the members of the working group responsible for carrying out the review. This allows for significant savings in time, travel expenses and control of the documentation. Virtual data rooms and data sites are part of service offerings provided by financial printers, who can best guide a company with the establishment and maintenance of the virtual data room or data site.

The scope of the legal due diligence review will vary depending on the nature of the issuer and the type of transaction. Set forth below are general issues that should guide the scope of the due diligence review for a securities offering.

Organizational Documents (e.g. charter, bylaws)

- What approvals will be required for the transaction? For example, for an equity offering, is a sufficient amount of common stock or preferred stock authorized under the organizational documents?
- Are there any unusual provisions? The reviewer will need to be familiar with "plain vanilla" organizational documents to make this assessment. Examples of unusual provisions would be preemptive rights or special voting rights held by one or more classes of stock.
- Certain provisions of the organizational documents are required disclosure items for the registration statement. See e.g. Item 10 of Form 20-F.
- The document review will support opinions such as those addressing due organization, authority and authorization of the transaction.
- Review company records and related material contracts to determine whether there are:
  - obligations for the issuance of company shares (e.g. preemptive rights, warrants, options, convertible securities);
  - ongoing capital commitments;
  - special voting or governance rights (such as board structure, veto rights and deadlock provisions);
  - transfer restrictions such as rights of first refusal and tag-along/drag-along rights;
  - minimum conversion triggers in preferred stock;

- registration rights agreements or undertakings to enter into lock-up agreements; and
- ongoing obligations such as non-competes, non-solicitations, allocations of opportunity and indemnification.

Board and Committee Minutes

- A primary purpose of the review of minutes is to determine whether there are any material omissions or inconsistencies between the minutes and the disclosure in the offering document or discussions with management. Focus should be on important business issues or other matters that appear to be material, particularly if they are not generally known to the working group. Examples might include:
  - accounting issues;
  - mergers, acquisitions or divestitures;
  - litigation or regulatory investigations;
  - material contracts;
  - company risk analysis;
  - entering or exiting a line of business;
  - strategic reviews;
  - termination of executives and employment-related issues; and
  - contingent liabilities.
- Important information may be presented in board or committee briefing books rather than in the minutes themselves. Accordingly, it will be important to follow up on missing attachments and to inquire about matters of apparent interest to the board that are mentioned in the minutes but not described in detail.
- Are the company's minute books complete? Are material transactions duly authorized?
- Review of the minutes is also relevant to due authorization of the transaction.

Debt Instruments

- Credit facilities and debt instruments may contain provisions that affect or may contravene the offering, particularly debt offerings. Among the points to consider are:
  - any restrictions on issuing the type of securities that will be the subject of the offering (note that guarantees generally constitute indebtedness);
  - prepayment provisions in debt instruments, and whether the use of proceeds from the offering is precluded; and
  - credit agreements may require that a portion of an equity offering be used to prepay outstanding loans (often called an "equity clawback").

- If it appears that a waiver, consent or amendment may be necessary to complete the offering, review the provisions regarding procedures for obtaining waivers and consents.
- Material terms of credit facilities and debt instruments should be disclosed in the "Liquidity" section of the MD&A. Among the key points to focus on are:
  - Borrowing conditions under credit facilities. If the company must meet certain financial ratios or satisfy ratings conditions, what is the risk that conditions will not be satisfied?
  - What events could cause the outstanding debt to become due and payable prior to its stated maturity? Financial ratios, ratings triggers and similar events should be noted.
  - How will the offering affect financial ratios in the credit instruments?
  - Do the instruments provide for increases in interest rates under certain conditions?
  - Are the facilities secured or unsecured?
  - Are there material payment (and prepayment) obligations?
  - Are there covenants that would restrict the company's freedom to operate its business? For example, restrictions on capital expenditures or on making investments may be inconsistent with the use of proceeds in the offering document.
  - Are there limitations on the payment of dividends?
- Review compliance certificates and correspondence with lenders.

Material Contracts

- Review all contracts described in the offering document to assess the accuracy and completeness of the disclosure.
- The focus of the review should be on the parties, subject matter, term, payment terms, material obligations, termination rights, burdensome covenants and the like.
  - For contracts that provide for significant revenues or otherwise secure important benefits for the company, review closely factors that could result in loss of the contract such as expiration dates, renewal terms, conditions to the contract and a counterparty's right to terminate early.
  - For contracts that represent important expense liabilities or evidence long-term obligations of the company, consider whether the contract will limit the company's long-term flexibility to operate. Can the company amend or terminate the contract?
  - Note provisions that could lead to claims against the company, such as material indemnification or warranty provisions.

  - Are there any non-compete, exclusivity, "most favored nation" or similar obligations?
  - Are there any change of control provisions?
- Where the disclosure highlights certain customer or supplier relationships, review evidence of the relationship, whether the cited customer or supplier contract is among the more significant customers or suppliers and whether the contract has customary terms for the company. Avoid "cherry picking" in naming specific customers or suppliers.
- Make sure that all of the material contracts reviewed are disclosed and filed as exhibits if required. See Item 19 of Form 20-F.
- The review should focus on identifying any restrictions that would prohibit or restrict the company's ability to enter into and perform its obligations in connection with a securities offering.

Company Disclosure

- Review SEC filings (if applicable) and SEC correspondence, including unresolved SEC comments.
- Review the company's web site, Q&A on investor calls and presentations to third parties such as investors, lenders and ratings agencies.

Director & Officer Questionnaires

- Review information provided by directors and officers for consistency with the offering document disclosure.
- Follow up on any matters disclosed in the questionnaire.

Accounting Matters

- Conduct Q&A session with auditors to identify issues that may require following up.
- Review accountants' letters to management and responses. Look for discussions of material weaknesses or reportable conditions, persistent issues, failure to resolve comments, revenue recognition issues and issues with expenses or reserves. Highlight any indications of disagreements between the accountants and the company and independence issues.
- Does the company use off-balance sheet financing?

Litigation/Regulatory

- Search court proceedings to identify new or otherwise undisclosed litigation.
- Review auditors' letters (i.e. letters from law firms discussing loss contingencies) and the company's internal litigation schedule.
- For any material litigation, review key pleadings. Determine whether the amount of exposure can be quantified and, if so, if reserves have been established.
- Follow-up calls with in-house or outside counsel may be warranted.
- If applicable, review reports of any regulatory examination or correspondence with regulators (including the SEC and the Financial Industry Regulatory Authority, Inc. (FINRA)).

Employee Matters

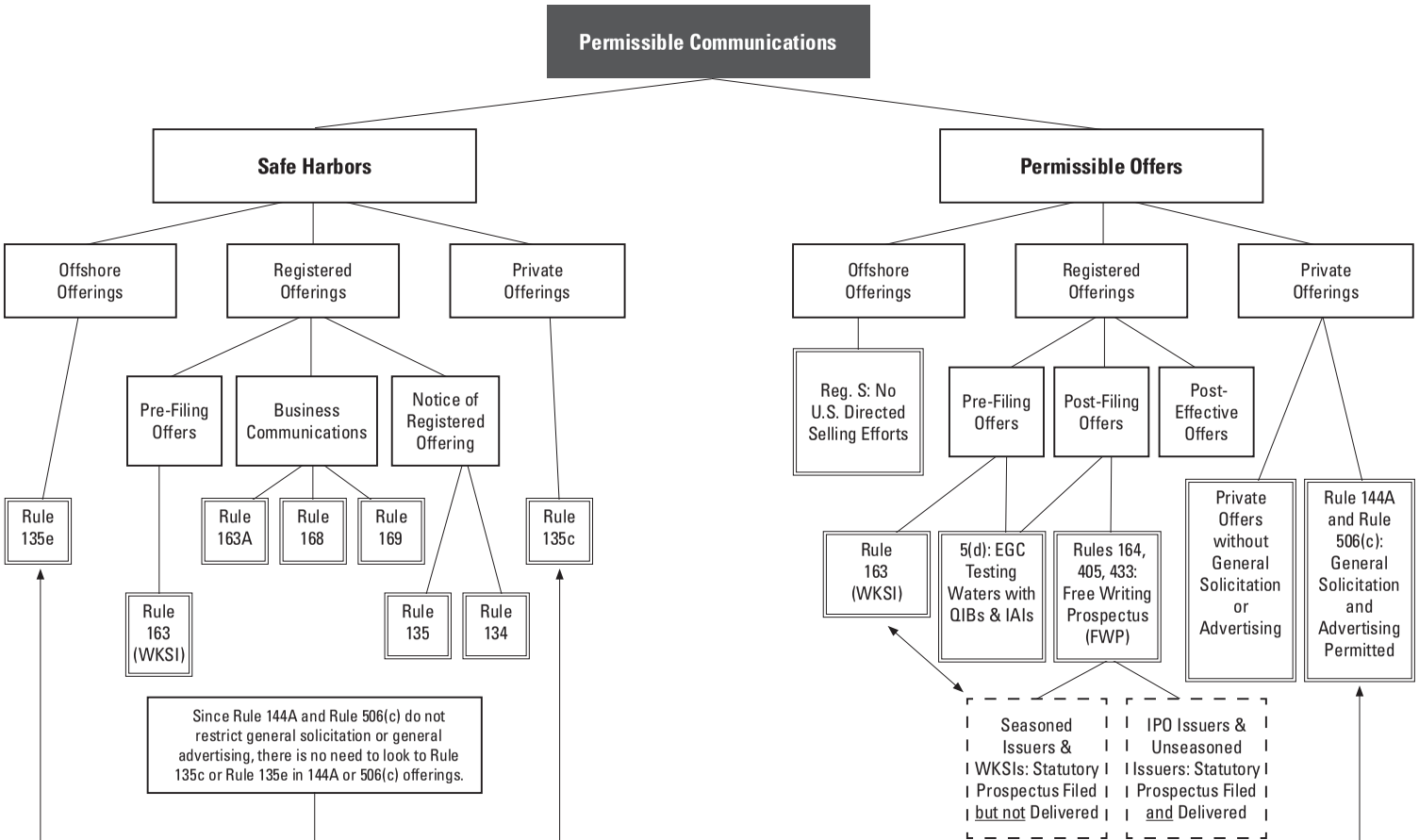
- Review whistleblower hot line reports.
- Review collective bargaining agreements.
- Evaluate the accuracy and completeness of disclosure concerning stock option plans and employment agreements.

Appendix J

Publicity Restrictions in Securities Offerings: Safe Harbors and Permissible Offers

The U.S. federal securities laws define the concept of offer under Section 2(a)(3) of the Securities Act broadly as "*every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value*." Section 5 of the Securities Act establishes prohibitions on the making of offers and sales of securities prior to the filing and effectiveness of a registration statement. Absent exceptions in the U.S. federal securities laws and rules thereunder, Section 5 of the Securities Act generally prohibits (i) any oral or written communications prior to filing a registration statement and (ii) any written offers prior to effectiveness of a registration statement except pursuant to a prospectus meeting the statutory requirements of the Securities Act (a so-called "statutory prospectus"), which for IPOs must contain on the cover page a bona fide estimate of the range of the maximum offering price. The statutory prospectus must be delivered at or prior to the final sale of a security. Written offers can be made by virtually any form of communication, including radio, television, electronic media, emails, Internet web sites and blast voicemail messages. Violation of these requirements can expose the issuer to a right of rescission by purchasers of the securities (i.e. refund of their purchase price). Accordingly, companies and underwriters need to be vigilant in how they handle publicity in connection with a securities offering.

Below is a chart that depicts the regulatory framework governing offers in connection with a securities offering, followed by a more detailed description, ordered in accordance with this chart, summarizing the framework of safe harbors and permissible offers that are available to companies and certain other offering participants in registered securities offerings, as well as certain related considerations in unregistered securities offerings.


Permissible Communications
Safe Harbors
Permissible Offers
Offshore Offerings
Registered Offerings
Private Offerings
Offshore Offerings
Registered Offerings
Private Offerings
Pre-Filing Offers
Business Communications
Notice of Registered Offering
Reg. S: No U.S. Directed Selling Efforts
Pre-Filing Offers
Post-Filing Offers
Post-Effective Offers
Rule 135e
Rule 163A
Rule 168
Rule 169
Rule 135c
Rule 163 (WKSI)
Rule 135
Rule 134
Rule 163 (WKSI)
5(d): EGC Testing Waters with QIBs & IAIs
Rules 164, 405, 433: Free Writing Prospectus (FWP)
Private Offers without General Solicitation or Advertising
Rule 144A and Rule 506(c): General Solicitation and Advertising Permitted
Since Rule 144A and Rule 506(c) do not restrict general solicitation or general advertising, there is no need to look to Rule 135c or Rule 135e in 144A or 506(c) offerings.
Seasoned Issuers & WKSIs: Statutory Prospectus Filed but not Delivered
IPO Issuers & Unseasoned Issuers: Statutory Prospectus Filed and Delivered

Safe Harbors

I. Rule 135e: Offshore Activity by Foreign Private Issuers

Rule 135e under the Securities Act permits a foreign private issuer or foreign government issuer to provide journalists in connection with offerings not conducted solely in the United States with access to (i) press conferences held outside of the United States, (ii) meetings with issuer (or selling security holder) representatives conducted outside of the United States and (iii) written press-related materials released outside the United States concerning the issuer's intention to undertake an offering. The remainder of this section describes the detailed requirements of Rule 135e under the Securities Act.

For the purposes only of Section 5 of the Securities Act, an issuer that is a foreign private issuer (as defined in Rule 405 under the Securities Act) or a foreign government issuer, a selling security holder of the securities of such issuers, or their representatives will not be deemed to offer any security for sale by virtue of providing any journalist with access to its press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if:

- the present or proposed offering is not being, or to be, conducted solely in the United States (an offering will be considered not to be made solely in the United States for this purpose if there is an intent to make a bona fide offering offshore);
- access is provided to both U.S. and foreign journalists; and
- any written press-related materials pertaining to transactions in which any of the securities will be or are being offered in the United States satisfy the requirements of the following paragraph.

Any written press-related materials specified in the prior paragraph must:

- state that the written press-related materials are not an offer of securities for sale in the United States, that securities may not be offered or sold in the United States absent registration or an exemption from registration, and that any public offering of securities to be made in the United States will be made by means of a prospectus that may be obtained from the issuer or the selling security holder that will contain detailed information about the company and management, as well as financial statements;
- if the issuer or selling security holder intends to register any part of the present or proposed offering in the United States, include a statement regarding this intention; and

- not include any purchase order, or coupon that could be returned indicating interest in the offering, as part of, or attached to, the written press-related materials.

For purposes of this rule, United States means the United States of America, its territories and possessions, any state of the United States, and the District of Columbia.

II. Rule 163: Well-Known Seasoned Issuer (WKSI) Communications

Rule 163 under the Securities Act permits certain pre-filing offers to be made by or on behalf of a well-known seasoned issuer (but not by underwriters) if certain conditions are met, including legend and filing requirements. A well-known seasoned issuer is defined in Rule 405 under the Securities Act to generally be a reporting company that has filed all periodic reports in a timely manner and either (i) has a market capitalization of at least $700 million or (ii) has issued $1 billion in registered non-convertible debt offerings over the past three years. The remainder of this section describes the detailed requirements of Rule 163 under the Securities Act.

In an offering by or on behalf of a well-known seasoned issuer, as defined in Rule 405 under the Securities Act, that will be or is at the time intended to be registered under the Securities Act, an offer by or on behalf of such issuer is exempt from the prohibitions in Section 5(c) of the Securities Act on offers to sell, offers for sale, or offers to buy its securities before a registration statement has been filed, provided that:

- any written communication that is an offer made in reliance on this exemption will be a free writing prospectus as defined in Rule 405 under the Securities Act and a prospectus under Section 2(a)(10) of the Securities Act relating to a public offering of securities to be covered by the registration statement to be filed; and
- the exemption from Section 5(c) of the Securities Act provided in this rule for such written communication that is an offer shall be conditioned on satisfying the conditions in the following paragraph.

This rule imposes the following conditions:

- every written communication that is an offer made in reliance on this exemption shall contain substantially the following legend: "The issuer may file a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at www.sec.gov. Alternatively, the company will arrange to send you the prospectus after filing if you request it by calling toll-free 1-8[xx-xxx-xxxx].";

- the legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's web site, and provide the Internet address and the particular location of the documents on the web site;
- an immaterial or unintentional failure to include the specified legend in a free writing prospectus required by this rule will not result in a violation of Section 5(c) of the Securities Act or the loss of the ability to rely on this rule so long as:
  - a good faith and reasonable effort was made to comply with the specified legend condition;
  - the free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend; and
  - if the free writing prospectus has been transmitted without the specified legend, the free writing prospectus is retransmitted with the legend by substantially the same means as, and directed to substantially the same prospective purchasers to whom, the free writing prospectus was originally transmitted;
- subject to the following bullet point, every written communication that is an offer made in reliance on this exemption shall be filed by the issuer with the SEC promptly upon the filing of the registration statement, if one is filed, or an amendment, if one is filed, covering the securities that have been offered in reliance on this exemption;
- the condition that an issuer shall file a free writing prospectus with the SEC under this rule shall not apply in respect of any communication that has previously been filed with, or furnished to, the SEC or that the issuer would not be required to file with the SEC pursuant to the conditions of Rule 433 under the Securities Act if the communication was a free writing prospectus used after the filing of the registration statement;
- the condition that the issuer shall file a free writing prospectus with the SEC under this rule shall be satisfied if the issuer satisfies the filing conditions (other than timing of filing which is provided in this rule) that would apply under Rule 433 under the Securities Act if the communication was a free writing prospectus used after the filing of the registration statement; and
- an immaterial or unintentional failure to file or delay in filing a free writing prospectus to the extent provided in this rule will not result in a violation of Section 5(c) of the Securities Act or the loss of the ability to rely on this rule so long as:
  - a good faith and reasonable effort was made to comply with the filing condition; and
  - the free writing prospectus is filed as soon as practicable after discovery of the failure to file.

The exemption above shall not be available to:

- communications relating to business combination transactions that are subject to Rule 165 under the Securities Act or Rule 166 under the Securities Act;
- communications by an issuer that is an investment company registered under the U.S. Investment Company Act of 1940; or
- communications by an issuer that is a business development company as defined in Section 2(a)(48) of the U.S. Investment Company Act of 1940.

For purposes of this rule, a communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made.

For purposes of this rule, a communication for which disclosure would be required under Section 17(b) of the Securities Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer is deemed to be an offer by the issuer and, if a written communication, is deemed to be a free writing prospectus of the issuer.

III. Rule 163A: Information More Than 30 Days Old

Rule 163A under the Securities Act resolves some of the uncertainty surrounding pre-IPO communications by providing a bright-line test for certain communications for most issuers by providing that any communication made more than 30 days before the filing of a registration statement will not be considered a prohibited offer as long as the communication is made by or on behalf of the issuer, the communication does not reference a securities offering that is or will be the subject of a registration statement and the issuer takes reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing of the registration statement. The remainder of this section describes the detailed requirements of Rule 163A under the Securities Act.

Except as excluded below, in all registered offerings by issuers, any communication made by or on behalf of an issuer more than 30 days before the date of the filing of the registration statement that does not reference a securities offering that is or will be the subject of a registration statement shall not constitute an offer to sell, offer for sale, or offer to buy the securities being offered under the registration statement for purposes of Section 5(c) of the Securities Act, provided that the issuer takes reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement.

The exemption in the prior paragraph shall not be available with respect to the following communications:

- communications relating to business combination transactions that are subject to Rule 165 under the Securities Act or Rule 166 under the Securities Act;
- communications made in connection with offerings registered on Form S-8, other than by well-known seasoned issuers;
- communications in offerings of securities of an issuer that is, or during the past three years was (or any of whose predecessors during the last three years was), (i) a blank check company as defined in Rule 419(a)(2) under the Securities Act, (ii) a shell company, other than a business combination related shell company, each as defined in Rule 405 under the Securities Act, or (iii) an issuer for an offering of penny stock as defined in Rule 3a51-1 of the Exchange Act; or
- communications made by an issuer that is (i) an investment company registered under the U.S. Investment Company Act of 1940 or (ii) a business development company as defined in Section 2(a)(48) of the U.S. Investment Company Act of 1940.

A communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made.

IV. Rule 168: Regular Release of Factual Business Information and Forward-Looking Information for Existing Reporting Companies

Rule 168 under the Securities Act permits the regular release of factual business information and forward-looking information by or on behalf of certain reporting companies. Rule 168 under the Securities Act covers more types of communications than Rule 169 under the Securities Act (described below), but applies to less companies. The remainder of this section describes the detailed requirements of Rule 168 under the Securities Act.

For purposes of Section 2(a)(10) of the Securities Act and Section 5(c) of the Securities Act, the regular release or dissemination by or on behalf of an issuer of communications containing factual business information or forward-looking information shall be deemed not to constitute an offer to sell or offer for sale of a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this rule are satisfied by any of the following:

- an issuer that is required to file reports pursuant to Section 13 or 15(d) of the Exchange Act; or

- a foreign private issuer that (i) meets all of the registrant requirements of Form F-3 other than the reporting history provisions of General Instructions I.A.1. and I.A.2.(a) of Form F-3, (ii) either (A) satisfies the public float threshold in General Instruction I.B.1. of Form F-3 or (B) is issuing non-convertible securities, other than common equity, and meets the provisions of General Instruction I.B.2. of Form F-3 and (iii) either (A) has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) under the Securities Act and has had them so traded for at least 12 months or (B) has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more.

Factual business information means some or all of the following information that is released or disseminated under the conditions described below, including, without limitation, such factual business information contained in reports or other materials filed with, furnished to, or submitted to the SEC pursuant to the Exchange Act:

- factual information about the issuer, its business or financial developments, or other aspects of its business;
- advertisements of, or other information about, the issuer's products or services; and
- dividend notices.

Forward-looking information means some or all of the following information that is released or disseminated under the conditions described below, including, without limitation, such forward-looking information contained in reports or other materials filed with, furnished to, or submitted to the SEC pursuant to the Exchange Act:

- projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;
- statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;
- statements about the issuer's future economic performance, including statements of the type contemplated by the operating and financial review and prospects described in Item 5 of Form 20-F; and
- assumptions underlying or relating to any of the information described in the prior three bullet points.

The release or dissemination of a communication is by or on behalf of the issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

A communication containing information about the registered offering or released or disseminated as part of the offering activities in the registered offering is excluded from the exemption of this rule.

The following conditions must be satisfied for this rule to apply:

- the issuer has previously released or disseminated information of the type described in this rule in the ordinary course of its business;
- the timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations; and
- the issuer is not an investment company registered under the U.S. Investment Company Act of 1940 or a business development company as defined in Section 2(a)(48) of the U.S. Investment Company Act of 1940.

V. Rule 169: Regular Release of Factual Business Information

Rule 169 under the Securities Act permits the regular release of factual business information by most companies to persons other than investors or potential investors (such as customers and suppliers). This rule does not protect forward-looking information (such as projections), but applies to more companies than Rule 168 under the Securities Act (described above). The remainder of this section describes the detailed requirements of Rule 169 under the Securities Act.

For purposes of Section 2(a)(10) of the Securities Act and Section 5(c) of the Securities Act, the regular release or dissemination by or on behalf of an issuer of communications containing factual business information shall be deemed not to constitute an offer to sell or offer for sale of a security by an issuer which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this rule are satisfied.

Factual business information means some or all of the following information that is released or disseminated under the conditions described below:

- factual information about the issuer, its business or financial developments, or other aspects of its business; and
- advertisements of, or other information about, the issuer's products or services.

The release or dissemination of a communication is by or on behalf of the issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

A communication containing information about the registered offering or released or disseminated as part of the offering activities in the registered offering is excluded from the exemption of this rule.

The following conditions must be satisfied for this rule to apply:

- the issuer has previously released or disseminated information of the type described in this rule in the ordinary course of its business;
- the timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations;
- the information is released or disseminated for intended use by persons, such as customers and suppliers, other than in their capacities as investors or potential investors in the issuer's securities, by the issuer's employees or agents who historically have provided such information; and
- the issuer is not an investment company registered under the U.S. Investment Company Act of 1940 or a business development company as defined in Section 2(a)(48) of the U.S. Investment Company Act of 1940.

VI. Rule 135: Notice of Proposed Offering

Rule 135 under the Securities Act provides that public notice of a proposed registered offering is permitted if the notice states that it does not constitute an offering and is limited to certain information, including the name of the issuer (but not the underwriters) and the title, amount and basic terms of the securities offered. There is no legal requirement that a company contemplating an IPO issue a pre-filing press release, and generally such press releases are not issued, but many companies will choose to issue a press release once the registration statement has been filed. The remainder of this section describes the detailed requirements of Rule 135 under the Securities Act.

For purposes of Section 5 of the Securities Act only, an issuer or a selling security holder (and any person acting on behalf of either of them) that publishes through any medium a notice of a proposed offering to be registered under the Securities Act will not be deemed to offer its securities for sale through that notice if:

- the notice includes a statement to the effect that it does not constitute an offer of any securities for sale; and
- the notice otherwise includes no more than the following information:
  - the name of the issuer;
  - the title, amount and basic terms of the securities offered;
  - the amount of the offering, if any, to be made by selling security holders;
  - the anticipated timing of the offering;
  - a brief statement of the manner and the purpose of the offering, without naming the underwriters;
  - whether the issuer is directing its offering to only a particular class of purchasers;

- any statements or legends required by the laws of any state or foreign country or administrative authority; and
- certain additional information in the case of rights offerings, offerings to employees, exchange offers and offerings pursuant to Rule 145(a) under the Securities Act (i.e. business combinations).

A person that publishes a notice in reliance on this rule may issue a notice that contains no more information than is necessary to correct inaccuracies published about the proposed offering.

VII. Rule 134: Communications After Registration Statement Filed

Rule 134 under the Securities Act provides that public notices made after the filing of a registration statement are permitted if limited to certain information about the company, its business and the offering, including the names of the underwriters, the securities being offered, the underwriters' marketing activities (including road shows) and certain administrative information (such as how to open accounts or participate in directed share plans). A press release is eligible for coverage under this rule if issued (i) immediately after the initial filing of the registration statement or (ii) once the number of shares being offered and proposed price range have been established. The remainder of this section describes the detailed requirements of Rule 134 under the Securities Act.

Except as provided below, the terms "prospectus" as defined in Section 2(a)(10) of the Securities Act and "free writing prospectus" as defined in Rule 405 under the Securities Act shall not include a communication limited to the statements required or permitted by this rule, provided that the communication is published or transmitted to any person only after a registration statement relating to the offering that includes a statutory prospectus (except as otherwise permitted in the following paragraph) has been filed.

Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph, provided that, except as to the fourth, fifth and sixth bullet points below, the prospectus included in the filed registration statement does not have to include a price range otherwise required by rule:

- factual information about the legal identity and business location of the issuer limited to the name of the issuer of the security, the address, phone number, and e-mail address of the issuer's principal offices and contact for investors, the issuer's country of organization, and the geographic areas in which it conducts business;
- the title of the security or securities and the amount or amounts being offered, which title may include a designation as to whether the securities are convertible, exercisable, or exchangeable, and as to the ranking of the securities;

- a brief indication of the general type of business of the issuer, limited to the following:
  - in the case of a manufacturing company, the general type of manufacturing, the principal products or classes of products manufactured, and the segments in which the company conducts business;
  - in the case of a public utility company, the general type of services rendered, a brief indication of the area served, and the segments in which the company conducts business; and
  - in the case of any other type of company, a corresponding statement;
- the price of the security, or if the price is not known, the method of its determination or the bona fide estimate of the price range as specified by the issuer or the managing underwriter or underwriters;
- in the case of a fixed income security, the final maturity and interest rate provisions or, if the final maturity or interest rate provisions are not known, the probable final maturity or interest rate provisions, as specified by the issuer or the managing underwriter or underwriters;
- in the case of a fixed income security with a fixed (non-contingent) interest rate provision, the yield or, if the yield is not known, the probable yield range, as specified by the issuer or the managing underwriter or underwriters and the yield of fixed income securities with comparable maturity and security rating;
- a brief description of the intended use of proceeds of the offering, if then disclosed in the prospectus that is part of the filed registration statement;
- the name, address, phone number, and e-mail address of the sender of the communication and the fact that it is participating, or expects to participate, in the distribution of the security;
- the type of underwriting, if then included in the disclosure in the prospectus that is part of the filed registration statement;
- the names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;
- the anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them);
- a description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with the issuer or an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy), and procedures regarding directed share plans and other participation in offerings by officers, directors, and employees of the issuer;

- whether, in the opinion of counsel, the security is a legal investment for savings banks, fiduciaries, insurance companies, or similar investors under the laws of any state or territory or the District of Columbia, and the permissibility or status of the investment under the U.S. Employee Retirement Income Security Act of 1974;
- whether, in the opinion of counsel, the security is exempt from specified taxes, or the extent to which the issuer has agreed to pay any tax with respect to the security or measured by the income therefrom;
- whether the security is being offered through rights issued to security holders, and, if so, the class of securities the holders of which will be entitled to subscribe, the subscription ratio, the actual or proposed record date, the date upon which the rights were issued or are expected to be issued, the actual or anticipated date upon which they will expire, and the approximate subscription price, or any of the foregoing;
- any statement or legend required by any state law or administrative authority;
- the names of selling security holders, if then disclosed in the prospectus that is part of the filed registration statement;
- the names of securities exchanges or other securities markets where any class of the issuer's securities are, or will be, listed;
- the ticker symbols, or proposed ticker symbols, of the issuer's securities;
- the CUSIP number as defined in Rule 17Ad-19(a)(5) under the Exchange Act assigned to the securities being offered; and
- information disclosed in order to correct inaccuracies previously contained in a communication permissibly made pursuant to this rule.

Except as provided in the following paragraph, every communication used pursuant to this rule shall contain the following:

- if the registration statement has not yet become effective, the following statement: "A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective."; and
- the name and address of a person or persons from whom a statutory prospectus for the offering (other than a free writing prospectus as defined in Rule 405 under the Securities Act), including as to the identified paragraphs above a price range where required by rule, may be obtained.

Any of the statements or information specified in the prior paragraph may, but need not, be contained in a communication which:

- does no more than state from whom and include the uniform resource locator (URL) where a statutory prospectus (other than a free writing prospectus as defined in Rule 405 under the Securities Act) may be obtained, identify the security, state the price thereof and state by whom orders will be executed; or
- is accompanied or preceded by a prospectus or a summary prospectus, other than a free writing prospectus as defined in Rule 405 under the Securities Act, which is a statutory prospectus, including a price range where required by rule, at the date of such preliminary communication.

A communication sent or delivered to any person pursuant to this rule which is accompanied or preceded by a statutory prospectus (other than a free writing prospectus as defined in Rule 405 under the Securities Act), including a price range where required by rule, at the date of such communication, may solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate whether he or she might be interested in the security, if the communication contains substantially the following statement (but such statement need not be included in such a communication to a dealer): "No offer to buy the securities can be accepted and no part of the purchase price can be received until the registration statement has become effective, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time prior to notice of its acceptance given after the effective date."

A statutory prospectus included in any communication pursuant to this rule shall remain a prospectus for all purposes under the Securities Act.

The provision above that a statutory prospectus precede or accompany a communication will be satisfied if such communication is an electronic communication containing an active hyperlink to such prospectus.

This rule does not apply to a communication relating to an investment company registered under the U.S. Investment Company Act of 1940 or a business development company as defined in Section 2(a)(48) of the U.S. Investment Company Act of 1940.

VIII. Rule 135c: Communications After Registration Statement Filed

Rule 135c under the Securities Act provides a safe harbor for public notices by certain foreign private issuers about proposed, ongoing or completed unregistered offerings. The notice must state that the securities offered will not be or have not been registered under the Securities Act and may not be offered or sold in the United States absent registration or an applicable exemption from registration requirements. The notice must be limited to the name of the issuer (but not the underwriters), the title, amount and basic terms of the securities offered, the amount of the offering, if any, being made by selling security holders, the time of the offering and a brief statement of the manner and purpose of the offering. Foreign private issuers must furnish a copy of the notice to the SEC on Form 6-K (or otherwise pursuant to Rule 12g3-2(b) under the Exchange Act). The remainder of this section describes the detailed requirements of Rule 135c under the Securities Act.

Rule 135c under the Securities Act provides a safe harbor that allows a foreign private issuer (with limited exceptions) to give notice that it proposes to make, is making or has made an offering of securities not registered or required to be registered under the Securities Act if the following requirements are met:

- such notice is not used for the purposes of conditioning the market in the United States for any of the securities offered;
- such notice states that the securities offered will not be or have not been registered under the Securities Act and may not be offered or sold in the United States absent registration or an applicable exemption from registration requirements; and
- such notice contains no more than:
  - the name of the issuer;
  - the title, amount and basic terms of the securities offered, the amount of the offering, if any, made by selling security holders, the time of the offering and a brief statement of the manner and purpose of the offering without naming the underwriters;
  - any statement or legend required by U.S. state law, foreign law or administrative authority; and
  - certain other information in the case of rights offerings, exchange offers and offers to employees.

The notice must be furnished by a foreign private issuer to the SEC under Form 6-K or otherwise pursuant to Rule 12g3-2(b) under the Exchange Act.

Permissible Offers

IX. Regulation S: No U.S. Directed Selling Efforts

Regulation S under the Securities Act permits communications in connection with certain securities offerings that occur outside the United States, including where no U.S. directed selling efforts are involved. For a more detailed discussion of Regulation S under the Securities Act, see "Offerings Outside the United States" at Part VI.E. (page 57) of this publication.

X. Registered Offerings Generally

See "Stages of Registration Process" at Part IV.D.2. (page 26) of this publication for a general description of offers permitted in a public offering (i) prior to filing a registration statement, (ii) after filing a registration statement but before effectiveness of the registration statement and (iii) after effectiveness of a registration statement.

XI. Rule 163: Well-Known Seasoned Issuer (WKSI) Communications

Rule 163 under the Securities Act permits certain communications in connection with offerings made by a well-known seasoned issuer. For a more detailed discussion of Rule 163 under the Securities Act, see "Rule 163: Well-Known Seasoned Issuer (WKSI) Communications" in Part II of this appendix.

XII. Section 5(d): Emerging Growth Company Communications

Section 5(d) of the Securities Act allows emerging growth companies and their authorized persons (which, unlike Rule 163 under the Securities Act described above, could include underwriters) to meet with QIBs and institutional accredited investors before or after confidentially submitting or publicly filing a registration statement to determine interest in a planned offering. Great care should be taken at controlling communications at these "testing the waters" meetings, as the registration statement is likely to be subject to change and the anti-fraud provisions of the securities laws continue to apply. The SEC routinely issues comments in connection with the review of registration statements requesting submission of materials used in "testing the waters" meetings. As a result, issuers will want to verify that any written information presented at such meetings is not left behind and that such information is consistent with the expected offering document disclosures.

Book-building and the formal solicitation of orders are not likely to occur during these meetings due to Rule 15c2-8(e) under the Exchange Act, which requires broker-dealers to make a preliminary prospectus available before the solicitation of customer orders.

Section 5(d) of the Securities Act provides that, notwithstanding any other provision of Section 5 of the Securities Act, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors that are QIBs or institutions that are accredited investors, as such terms are respectively defined in Rule 144A under the Securities Act and Rule 501(a) under the Securities Act, or any successor thereto, to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement with respect to such securities with the SEC, subject to the requirement of Section 5(b)(2) of the Securities Act.

XIII. Rules 164, 405 and 433: Free Writing Prospectuses

Various rules under the Securities Act permit most issuers, subject to various conditions, to engage in "free writing" through the use of "free writing prospectuses", which generally are any written communications that constitute an offer to sell or a solicitation of an offer to buy securities in a registered offering used after (or, for well-known seasoned issuers, before or after) the filing of a registration statement but that do not constitute statutory prospectuses. Free writing prospectuses are not required to meet the more onerous form and content requirements of statutory prospectuses. An issuer that is not yet a reporting company may use a free writing prospectus only if a statutory prospectus accompanies or precedes the free writing prospectus (which may be accomplished via an active hyperlink rather than delivery of a physical copy). Free writing prospectuses are subject in most cases to legend and filing requirements and may not conflict with information in the registration statement. The remainder of this section describes the detailed requirements relating to free writing prospectuses found in Rules 164, 405 and 433 under the Securities Act.

(a) Rule 405

Rule 405 under the Securities Act defines a free writing prospectus, except as otherwise specifically provided or the context otherwise requires, as any written communication as defined in Rule 405 under the Securities Act that constitutes an offer to sell or a solicitation of an offer to buy the securities relating to a registered offering that is used after the registration statement in respect of the offering is filed (or, in the case of a well-known seasoned issuer, whether or not such registration statement is filed) and is made by means other than:

- a prospectus satisfying the requirements of Section 10(a) of the Securities Act, Rule 430 under the Securities Act, Rule 430A under the Securities Act, Rule 430B under the Securities Act, Rule 430C under the Securities Act, Rule 430D under the Securities Act or Rule 431 under the Securities Act (i.e. a statutory prospectus);
- a written communication used in reliance on Rule 167 under the Securities Act and Rule 426 under the Securities Act; or
- a written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in Section 2(a)(10)(a) of the Securities Act.

(b) Rule 433

Rule 433 under the Securities Act applies to any free writing prospectus with respect to securities of any issuer (except as set forth in Rule 164 under the Securities Act) that are the subject of a registration statement that has been filed under the Securities Act. Such a free writing prospectus that satisfies the conditions of Rule 433 under the Securities Act may include information the substance of which is not included in the registration statement. Such a free writing prospectus that satisfies the conditions of Rule 433 under the Securities Act will be a prospectus permitted under Section 10(b) of the Securities Act for purposes of Sections 2(a)(10), 5(b)(1), and 5(b)(2) of the Securities Act and will, for purposes of considering it a prospectus, be deemed to be public, without regard to its method of use or distribution, because it is related to the public offering of securities that are the subject of a filed registration statement.

Subject to the conditions of the following paragraphs, a free writing prospectus may be used under Rule 433 under the Securities Act and Rule 164 under the Securities Act in connection with a registered offering of securities.

Subject to the provisions of Rules 164(e), 164(f), and 164(g) under the Securities Act, the issuer or any other offering participant may use a free writing prospectus in the following offerings after a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of Rule 433 under the Securities Act or Rule 431 under the Securities Act, satisfies the requirements of Section 10 of the Securities Act:

- offerings of securities registered on Form F-3 pursuant to General Instruction I.A.5, I.B.1, I.B.2, or I.C. thereof;
- any other offering not excluded from reliance on Rule 433 under the Securities Act and Rule 164 under the Securities Act of securities of a well-known seasoned issuer;
- any other offering not excluded from reliance on Rule 433 under the Securities Act and Rule 164 under the Securities Act of securities of an issuer eligible to use Form F-3 for primary offerings pursuant to General Instruction I.B.1 of such Form; and

- if the issuer does not fall within any of the prior provisions, then, subject to the provisions of Rules 164(e), 164(f), and 164(g) under the Securities Act, any person participating in the offer or sale of the securities may use a free writing prospectus as follows:
  - if the free writing prospectus is or was prepared by or on behalf of or used or referred to by an issuer or any other offering participant, if consideration has been or will be given by the issuer or other offering participant for the dissemination (in any format) of any free writing prospectus (including any published article, publication, or advertisement), or if Section 17(b) of the Securities Act requires disclosure that consideration has been or will be given by the issuer or other offering participant for any activity described therein in connection with the free writing prospectus, then a registration statement relating to the offering must have been filed that includes a prospectus that, other than by reason of Rule 433 under the Securities Act or Rule 431 under the Securities Act, satisfies the requirements of Section 10 of the Securities Act, including a price range where required by rule, and the free writing prospectus shall be accompanied or preceded by the most recent such prospectus; provided, however, that use of the free writing prospectus is not conditioned on providing the most recent such prospectus if a prior such prospectus has been provided and there is no material change from the prior prospectus reflected in the most recent prospectus; provided further, that after effectiveness and availability of a final prospectus meeting the requirements of Section 10(a) of the Securities Act, no such earlier prospectus may be provided in satisfaction of this condition, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier prospectus had been previously provided; the condition that a free writing prospectus shall be accompanied or preceded by the most recent prospectus satisfying the requirements of Section 10 of the Securities Act would be satisfied if a free writing prospectus that is an electronic communication contained an active hyperlink to such most recent prospectus; a communication for which disclosure would be required under Section 17(b) of the Securities Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer or other offering participant is an offer by the issuer or such other offering participant as the case may be and is, if written, a free writing prospectus of the issuer or other offering participant; and
  - where the prior bullet point does not apply, a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of Rule 433 under the Securities Act or Rule 431 under the Securities Act, satisfies the requirements of Section 10 of the Securities Act, including a price range where required by rule; for purposes of the provisions below relating to publications by media, the prospectus included in the registration statement

relating to the offering that has been filed does not have to include a price range otherwise required by rule.

A successor issuer will be considered to satisfy the applicable provisions set forth above if:

- its predecessor and it, taken together, satisfy the conditions, provided that the succession was primarily for the purpose of changing the state or other jurisdiction of incorporation of the predecessor or forming a holding company and the assets and liabilities of the successor at the time of succession were substantially the same as those of the predecessor; or
- all predecessors met the conditions at the time of succession and the issuer has continued to do so since the succession.

A free writing prospectus used in reliance on Rule 433 under the Securities Act may include information the substance of which is not included in the registration statement but such information shall not conflict with:

- information contained in the filed registration statement, including any prospectus or prospectus supplement that is part of the registration statement (including pursuant to Rule 430B under the Securities Act, Rule 430C under the Securities Act or Rule 430D under the Securities Act) and not superseded or modified; or
- information contained in the issuer's periodic and current reports filed or furnished to the SEC pursuant to Section 13 or 15(d) of the Exchange Act that are incorporated by reference into the registration statement and not superseded or modified.

A free writing prospectus used in reliance on Rule 433 under the Securities Act shall contain substantially the following legend: "The issuer has filed a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at www.sec.gov. Alternatively, the issuer, any underwriter or any dealer participating in the offering will arrange to send you the prospectus if you request it by calling toll-free 1-8[xx-xxx-xxxx]."

The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's web site and provide the Internet address and the particular location of the documents on the web site.

Except as otherwise provided in Rule 433 under the Securities Act, the following shall be filed with the SEC under Rule 433 under the Securities Act by a means reasonably calculated to result in filing no later than the date of first use (the free writing prospectus filed for purposes of Rule 433 under the Securities Act will not be filed as part of the registration statement):

- any issuer free writing prospectus (as defined below);
- any issuer information (as defined below) that is contained in a free writing prospectus prepared by or on behalf of or used by any other offering participant (but not information prepared by or on behalf of a person other than the issuer on the basis of or derived from that issuer information); and
- a description of the final terms of the issuer's securities in the offering or of the offering contained in a free writing prospectus or portion thereof prepared by or on behalf of the issuer or any offering participant, after such terms have been established for all classes in the offering.

Any offering participant, other than the issuer, shall file any free writing prospectus that is used or referred to by such offering participant and distributed by or on behalf of such person in a manner reasonably designed to lead to its broad unrestricted dissemination.

Each free writing prospectus or issuer information contained in a free writing prospectus filed under Rule 433 under the Securities Act shall identify in the filing the SEC file number for the related registration statement or, if that file number is unknown, a description sufficient to identify the related registration statement.

The condition described above to file a free writing prospectus shall not apply if the free writing prospectus does not contain substantive changes from or additions to a free writing prospectus previously filed with the SEC.

The condition to file issuer information contained in a free writing prospectus of an offering participant other than the issuer shall not apply if such information is included (including through incorporation by reference) in a prospectus or free writing prospectus previously filed that relates to the offering.

To the extent a free writing prospectus or portion thereof otherwise required to be filed contains a description of terms of the issuer's securities in the offering or of the offering that does not reflect the final terms, such free writing prospectus or portion thereof is not required to be filed.

A free writing prospectus or portion thereof that contains only a description of the final terms of the issuer's securities in the offering or of the offerings shall be filed by the issuer within two days of the later of the date such final terms have been established for all classes of the offering and the date of first use.

A road show (as defined below) for an offering that is a written communication is a free writing prospectus, provided that, except as provided in the following paragraph, a written communication that is a road show shall not be required to be filed.

In the case of a road show that is a written communication for an offering of common equity or convertible equity securities by an issuer that is, at the time of the filing of the registration statement for the offering, not required to file reports with the SEC

pursuant to Section 13 or Section 15(d) of the Exchange Act, such a road show is required to be filed pursuant to Rule 433 under the Securities Act unless the issuer of the securities makes at least one version of a bona fide electronic road show (as defined below) available without restriction by means of graphic communication to any person, including any potential investor in the securities (and if there is more than one version of a road show for the offering that is a written communication, the version available without restriction is made available no later than the other versions).

A communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not separately is deemed to be part of the road show. Therefore, if the road show is not a written communication, such a simultaneous communication (even if it would otherwise be a graphic communication or other written communication) is also deemed not to be written. If the road show is written and not required to be filed, such a simultaneous communication is also not required to be filed. Otherwise, a written communication that is an offer contained in a separate file from a road show, whether or not the road show is a written communication, or otherwise transmitted separately from a road show, will be a free writing prospectus subject to any applicable filing conditions of Rule 433 under the Securities Act.

An offer of an issuer's securities that is contained on an issuer's web site or hyperlinked by the issuer from the issuer's web site to a third party's web site is a written offer of such securities by the issuer and, unless otherwise exempt or excluded from the requirements of Section 5(b)(1) of the Securities Act, the filing conditions of Rule 433 under the Securities Act apply to such offer.

Notwithstanding the prior paragraph, historical issuer information that is identified as such and located in a separate section of the issuer's web site containing historical issuer information, that has not been incorporated by reference into or otherwise included in a prospectus of the issuer for the offering and that has not otherwise been used or referred to in connection with the offering, will not be considered a current offer of the issuer's securities and therefore will not be a free writing prospectus.

Any written offer for which an issuer or any other offering participant or any person acting on its behalf provided, authorized, or approved information that is prepared and published or disseminated by a person unaffiliated with the issuer or any other offering participant that is in the business of publishing, radio or television broadcasting or otherwise disseminating written communications would be considered at the time of publication or dissemination to be a free writing prospectus prepared by or on behalf of the issuer or such other offering participant for purposes of Rule 433 under the Securities Act subject to the following:

- certain conditions of Rule 433 under the Securities Act will not apply or will be deemed to be satisfied if:
  - no payment is made or consideration given by or on behalf of the issuer or other offering participant for the written communication or its dissemination; and
  - the issuer or other offering participant in question files the written communication with the SEC, and includes in the filing the legend required, within four business days after the issuer or other offering participant becomes aware of the publication, radio or television broadcast, or other dissemination of the written communication;
- the filing obligation under the prior bullet point shall be subject to the following:
  - the issuer or other offering participant shall not be required to file a free writing prospectus if the substance of that free writing prospectus has previously been filed with the SEC;
  - any filing made pursuant to such prior bullet point may include information that the issuer or offering participant in question reasonably believes is necessary or appropriate to correct information included in the communication; and
  - in lieu of filing the actual written communication as published or disseminated as required by such prior bullet point, the issuer or offering participant in question may file a copy of the materials provided to the media, including transcripts of interviews or similar materials, provided the copy or transcripts contain all the information provided to the media; and
- an issuer that is in the business of publishing or radio or television broadcasting may rely on the foregoing provisions as to any publication or radio or television broadcast that is a free writing prospectus in respect of an offering of securities of the issuer if the issuer or an affiliate:
  - is the publisher of a bona fide newspaper, magazine, or business or financial publication of general and regular circulation or bona fide broadcaster of news including business and financial news;
  - has established policies and procedures for the independence of the content of the publications or broadcasts from the offering activities of the issuer; and
  - publishes or broadcasts the communication in the ordinary course.

Issuers and offering participants shall retain all free writing prospectuses they have used, and that have not been filed pursuant to Rule 433 under the Securities Act, for three years following the initial bona fide offering of the securities in question.

To the extent that the record retention requirements of Rule 17a-4 under the Exchange Act apply to free writing prospectuses required to be retained by a broker-dealer under this section, such free writing prospectuses are required to be retained in accordance with such requirements.

An "**issuer free writing prospectus**" means a free writing prospectus prepared by or on behalf of the issuer or used or referred to by the issuer.

"**Issuer information**" means material information about the issuer or its securities that has been provided by or on behalf of the issuer.

A written communication or information is prepared or provided by or on behalf of a person if the person or an agent or representative of the person authorizes the communication or information or approves the communication or information before it is used. An offering participant other than the issuer shall not be an agent or representative of the issuer solely by virtue of its acting as an offering participant.

A "**road show**" means an offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the issuer's management and includes discussion of one or more of the issuer, such management, and the securities being offered.

A "**bona fide electronic road show**" means a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer's management and, if more than one road show that is a written communication is being used, includes discussion of the same general areas of information regarding the issuer, such management, and the securities being offered as such other issuer road show or shows for the same offering that are written communications.

(c) Rule 164

In connection with a registered offering of an issuer meeting the requirements of Rule 164 under the Securities Act, a free writing prospectus of the issuer or any other offering participant, including any underwriter or dealer, after the filing of the registration statement will be a prospectus pursuant to Section 10(b) of the Securities Act for purposes of Section 5(b)(1) of the Securities Act provided that the conditions set forth in Rule 433 under the Securities Act are satisfied.

An immaterial or unintentional failure to file or delay in filing a free writing prospectus as necessary to satisfy the filing conditions contained in Rule 433 under the Securities Act will not result in a violation of Section 5(b)(1) of the Securities Act or the loss of the ability to rely on Rule 164 under the Securities Act so long as:

- a good faith and reasonable effort was made to comply with the filing condition; and
- the free writing prospectus is filed as soon as practicable after discovery of the failure to file.

An immaterial or unintentional failure to include the specified legend in a free writing prospectus as necessary to satisfy the legend condition contained in Rule 433 under the Securities Act will not result in a violation of Section 5(b)(1) of the Securities Act or the loss of the ability to rely on Rule 164 under the Securities Act so long as:

- a good faith and reasonable effort was made to comply with the legend condition;
- the free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend; and
- if the free writing prospectus has been transmitted without the specified legend, the free writing prospectus must be retransmitted with the legend by substantially the same means as, and directed to substantially the same prospective purchasers to whom, the free writing prospectus was originally transmitted.

Solely for purposes of Rule 164 under the Securities Act, an immaterial or unintentional failure to retain a free writing prospectus as necessary to satisfy the record retention condition contained in Rule 433 under the Securities Act will not result in a violation of Section 5(b)(1) of the Securities Act or the loss of the ability to rely on Rule 164 under the Securities Act so long as a good faith and reasonable effort was made to comply with the record retention condition. Nothing in this paragraph will affect, however, any other record retention provisions applicable to the issuer or any offering participant.

Rule 164 under the Securities Act and Rule 433 under the Securities Act are available only if at the eligibility determination date for the offering in question, determined pursuant to the provisions below, the issuer is not an ineligible issuer as defined in Rule 405 under the Securities Act (or in the case of any offering participant, other than the issuer, the participant has a reasonable belief that the issuer is not an ineligible issuer).

Notwithstanding the prior paragraph, Rule 164 under the Securities Act and Rule 433 under the Securities Act are available to an ineligible issuer with respect to a free writing prospectus that contains only descriptions of the terms of the securities in the offering or the offering, unless the issuer is or during the last three years the issuer or any of its predecessors was:

- a blank check company as defined in Rule 419(a)(2) under the Securities Act;
- a shell company, other than a business combination related shell company, as defined in Rule 405 under the Securities Act; or
- an issuer for an offering of penny stock as defined in Rule 3a51-1 under the Exchange Act.

Rule 164 under the Securities Act and Rule 433 under the Securities Act are not available if the issuer is an investment company registered under the U.S. Investment Company Act of 1940 or a business development company as defined in Section 2(a)(48) of the U.S. Investment Company Act of 1940.

Rule 164 under the Securities Act and Rule 433 under the Securities Act are not available if the issuer is registering a business combination transaction as defined in Rule 165(f)(1) under the Securities Act or the issuer, other than a well-known seasoned issuer, is registering an offering on Form S-8.

For purposes of Rule 164 under the Securities Act and Rule 433 under the Securities Act, the determination date as to whether an issuer is an ineligible issuer in respect of an offering shall be:

- except as provided in the following bullet point, the time of filing of the registration statement covering the offering; or
- if the offering is being registered pursuant to Rule 415 under the Securities Act, the earliest time after the filing of the registration statement covering the offering at which the issuer, or in the case of an underwritten offering the issuer or another offering participant, makes a bona fide offer, including without limitation through the use of a free writing prospectus, in the offering.

XIV. Private Offers without General Solicitation or Advertising

Offers not involving a public offering are not covered by Section 5 of the Securities Act. Accordingly, other than offerings conducted pursuant to Rule 144A under the Securities Act or Rule 506(c) under the Securities Act, private offers that avoid general solicitation and general advertising are permitted under the U.S. federal securities laws. It is important to note that the anti-fraud provisions of the U.S. federal securities laws nonetheless continue to apply even to private offers.

XV. Rule 144A and Rule 506(c): General Solicitation and General Advertising Permitted

Private offerings conducted pursuant to Rule 144A under the Securities Act or Rule 506(c) under the Securities Act are not subject to prohibitions on general solicitation or general advertising. Accordingly, offers conducted pursuant to those rules may be made to the public orally and in writing by means of press releases, interviews, email messages, newspaper "advertisements" and trade magazines. The principal requirement of Rule 144A under the Securities Act (discussed in greater detail under "Private Resales (Rule 144A)" at Part VI.D.2. (page 55) of this publication) is that the securities are resold only to a QIB or to a purchaser that the seller and any person acting on behalf of the seller reasonably believe is a QIB. The principal requirement of Rule 506(c) under the Securities Act (discussed in greater detail under "Rule 506(c) Exemption" at Part VI.B.2. (page 44) of this publication) is that the securities are sold only to accredited investors. In offerings conducted pursuant to both Rule 144A under the Securities Act and Regulation S under the Securities Act, care should be taken to ensure that any directed selling efforts in the United States are not

deemed to be part of the offshore selling efforts. In addition, issuers should consider how any permitted general solicitation and general advertising could run afoul of applicable non-U.S. securities laws. It is important to note that the anti-fraud provisions of the U.S. federal securities laws nonetheless continue to apply even to offers conducted pursuant to Rule 144A under the Securities Act or Rule 506(c) under the Securities Act.

Annex A

Glossary

"ADR"	American Depositary Receipt
"DTC"	The Depository Trust Company
"EDGAR"	SEC's Electronic Data Gathering, Analysis, and Retrieval system into which companies electronically file registration statements, periodic reports and other forms
"Exchange Act"	U.S. Securities Exchange Act of 1934
"FINRA"	Financial Industry Regulatory Authority, Inc.
"GAAP"	Generally accepted accounting principles
"IASB"	International Accounting Standards Board
"IFRS"	International Financial Reporting Standards
"JOBS Act"	U.S. Jumpstart Our Business Startups Act
"NYSE"	New York Stock Exchange
"QIB"	Qualified institutional buyer (as defined in Rule 144A(a)(1) under the Securities Act)
"SEC"	U.S. Securities and Exchange Commission
"Securities Act"	U.S. Securities Act of 1933

Contacting Pillsbury

Questions regarding the matters discussed in this publication may be directed to the authors listed below, or to any other Pillsbury Winthrop Shaw Pittman LLP lawyer with whom you have consulted in the past on similar matters.

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U.S. Capital Markets Regulation and Practices:
An Overview for Non-U.S. Companies

Capital markets in the United States provide an unparalleled source of investment capital, measured in trillions of dollars, for companies located outside the United States. For non-U.S. companies (which we refer to in this publication as "foreign" companies) that sell securities in the United States, U.S. markets and rules allow companies to raise funds on an expedited and economically efficient basis with significant benefits. The purpose of this publication is to assist business executives from outside the United States in developing a business plan for accessing the U.S. capital markets.

About Pillsbury Winthrop Shaw Pittman LLP

Pillsbury Winthrop Shaw Pittman LLP is a leading international law firm with offices around the world and a particular focus on the energy & natural resources, financial services, real estate & construction, and technology sectors. Recognized by *Financial Times* as one of the most innovative law firms, Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their unsurpassed commercial awareness.

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