CLEARY GOTTLIEB

Guide to Public ADR Offerings in the United States

October 1, 2012

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I. Introduction

In the United States, the shares of many foreign corporations are traded in the form of American Depositary Shares ("ADSs") that represent the underlying foreign shares on a share-for-share, partial-share or multiple-share basis. ADSs are usually issued by a U.S. commercial bank (the "Depositary"), which holds the underlying foreign shares directly or through a foreign correspondent (the "Custodian"). ADSs historically have been referred to by the negotiable certificates evidencing the ADSs, known as American Depositary Receipts ("ADRs").[1]

The issuance of ADRs may be either "sponsored" or "unsponsored." "Unsponsored" ADRs are issued by a Depositary for already outstanding foreign shares, without an agreement with the issuer of the shares. An ADR facility for an issuer's shares, however, cannot be established unless the issuer either (i) is subject to the periodic reporting requirements under the Securities Exchange Act of 1934 (the "1934 Act"), or (ii) is exempt from these reporting requirements pursuant to Rule 12g3-2(b) under the 1934 Act.[2] Consequently, in the case of an issuer that does not meet either of these two conditions, a Depositary cannot create an unsponsored ADR facility without the issuer's cooperation.[3]

"Sponsored" ADRs are issued by a Depositary pursuant to an agreement with the issuer and with its financial support for shares that are already outstanding or for shares issued

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[1] In a technical sense, "an ADR is the physical certificate that evidences [an] ADS . . . and an ADS is the security that represents an ownership interest in deposited securities . . . ." SEC Release No. 33-6894 (May 23, 1991). However, market practice has tended to refer to the underlying security as an "ADR" whether or not the security is in certificated or book-entry form. Today, most ADSs are in book-entry form, although many deposit agreements allow investors to exchange book-entry ADSs for certificated ADRs. In light of market practice, this memorandum will refer to the security as an "ADR".

[2] However, under Rule 12g3-2(b), a foreign private issuer is automatically exempt from the registration and periodic reporting requirements of the 1934 Act if the issuer (i) is not currently required to file or furnish reports under Section 13(a) or 15(d) of the 1934 Act (i.e., has not publicly offered or listed securities in the United States, including on the OTC Bulletin Board), (ii) has a class of securities listed on one or more exchanges in its primary trading market (i.e., a foreign jurisdiction that, either singly or together with the trading of the securities in a second foreign jurisdiction, constitutes at least 55% of its worldwide trading volume) and (iii) has published on a website or other electronic information delivery system English translations of the material information it has (a) made public pursuant to the law of its home country, (b) filed with a securities exchange or (c) distributed to its security holders, including, at a minimum, English translations of its annual report (including annual financial statements), interim reports that contain financial statements, press releases and all other communications and documents distributed directly to holders of each class of securities to which the exemption relates. See SEC Release No. 34-58465 (Sep. 5, 2008). According to the SEC, there are only 970 foreign issuers with securities registered in the United States, of which 347 are Canadian issuers. See SEC Division of Corporation Finance, "International Registered and Reporting Companies," available at http://sec.gov/divisions/corpfin/internatl/companies.shtml.

[3] It is important for issuers to consider that depositaries can and have set up unsponsored ADR facilities for those issuers that are automatically exempt from registration and reporting requirements pursuant to Rule 12g3-2(b) without the issuer's cooperation. The existence of unsponsored ADR facilities may become an obstacle to an issuer's establishing a sponsored ADR facility, since it is the position of the staff of the SEC that a sponsored ADR facility may not be established unless all unsponsored ADR facilities relating to the same underlying securities are terminated. In such a case, negotiated fees for cancellation of the unsponsored ADRs must be paid to the depositaries of the unsponsored programs; these fees, which can be quite significant, are typically borne by the issuer or by the depositary of the new sponsored facility.

specifically for an offering of ADRs in the United States. There are three "levels" of programs for publicly traded ADRs: Levels 1 and 2 relate to shares already outstanding, while Level 3 relates to a new offering of shares. Each level involves registration requirements of varying complexity.

In brief, a Level 1 program is the most accessible for foreign issuers whose securities are traded on a foreign stock exchange. ADRs issued under a Level 1 program are traded in the U.S. over-the-counter ("OTC") market. A Level 1 program requires that only Form F-6, a simplified 1933 Act registration statement, be filed with the SEC. Level 2 ADR programs involve U.S. exchange-listed ADRs without raising new capital. In addition to a 1933 Act registration statement on Form F-6, Level 2 ADR programs require filing of a more extensive 1934 Act registration statement on Form 20-F. Level 3 programs involve a public offering to raise capital in addition to an exchange listing. Level 3 programs require filing of a 1933 Act registration statement on Form F-1, which requires substantially the same issuer information as Form 20-F. Level 3 ADR programs similarly require filing of the simplified 1933 Act registration statement on Form F-6.

In addition to the three levels of programs for publicly traded ADRs, issuers may also opt for a "restricted" ADR program, which provides access to the U.S. markets through Rule 144A under the 1933 Act without SEC registration. Restricted ADR programs enable issuers to raise capital through the private placement of ADRs with large institutional investors in the United States and do not require filing any registration statement with the SEC.

This memorandum describes the U.S. legal requirements and the principal procedures involved in the public offering in the United States of shares of a "foreign private issuer"[4] represented by ADRs issued under a sponsored ADR program.

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[4] A corporation incorporated or organized under the laws of a foreign country is a "foreign private issuer" under Rule 405 under the 1933 Act and Rule 3b-4 under the 1934 Act, unless (A) more than 50 percent of the corporation's outstanding voting securities are directly or indirectly held of record by residents of the United States, and (B)(i) the majority of its executive officers or directors are U.S. citizens or residents, (ii) more than 50 percent of its assets are located in the United States or (iii) its business is administered principally in the United States. If a foreign corporation ceases to qualify as a "foreign private issuer," it will become subject to the provisions of the U.S. securities laws applicable to a domestic corporation.

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

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

II. Nature and Purpose of ADRs

Shares of foreign corporations may be issued and traded in the United States in three different forms: (i) as a direct listing of ordinary shares,[5] (ii) as shares issued by the foreign corporation specifically for the U.S. market in a form adapted to the needs of U.S. investors (e.g., "Shares of New York Registry" issued by Royal Phillips Electronics and ArcelorMittal), or (iii) through ADRs. ADRs currently are by far the most prevalent form through which foreign corporations list and offer equity securities in the United States.

The ADR, similar in form to a standard U.S. registered stock certificate, is a substitute trading certificate evidencing the ADSs that represent the underlying shares of the foreign corporation. The underlying shares remain at the office of the foreign bank acting as Custodian. ADR holders wishing to trade the underlying shares (as opposed to the ADRs) may submit their ADRs to the Depositary for cancellation and withdrawal of the underlying shares. Similarly, a holder of underlying shares can deposit such shares with the Depositary (by delivery to the Custodian) against issuance by the Depositary of ADRs. Each ADR evidences one or more ADSs, with each ADS representing a number or a fraction of underlying shares. Typically, an ADR is issued in global book-entry form. If the U.S. dollar equivalent of the underlying shares would be unusually low or high by U.S. market standards, the ratio of ADRs to underlying shares can be adjusted to establish an ADR price in dollars that is consistent with U.S. market practice.

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

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

- Whereas a holder of foreign registered securities may be required to follow inconvenient transfer procedures, ADRs may be transferred through book-entry procedures in the same manner as domestic shares. In addition, in certain countries, investors are required to register with the securities regulator or central bank prior to investing in a local company; ADRs permit the Custodian to be the registrant instead.

[5] Historically, direct listings of ordinary shares of foreign private issuers have essentially been limited to Canadian issuers and issuers based in certain Caribbean and Micronesian countries. A handful of foreign private issuers, however, have turned to direct listings as an alternative to ADRs. The New York Stock Exchange (the "NYSE") has also established a "Global Share" program to facilitate the listing of ordinary shares of foreign private issuers. The Global Shares that are listed directly on the NYSE are fungible with those listed in the issuers' home countries. Difficulties in transfers of shares between U.S. and non-U.S. clearing systems and in the payment of dividends denominated in currencies other than the U.S. dollar, however, have prevented issuers in many jurisdictions from taking advantage of this program, and as of the date of this memorandum, only two issuers (Deutsche Bank and UBS) currently have Global Shares listed on the NYSE.

- ADRs also eliminate the need for the U.S. investor to convert dividends paid in a foreign currency into dollars. Dividends on the underlying shares are collected by the Custodian, converted into dollars and transmitted by the Depositary to the ADR holders.[6]

- The Depositary often also assists ADR holders with filings that are necessary for a reduction in foreign withholding tax available under a U.S. tax treaty (as discussed in Part IV.B below).

- Use of ADRs may also assist in compliance with any exchange controls, restrictions on foreign investment or reporting requirements that may apply to foreign holders of the issuer's stock, since it generally will be possible for the Depositary to comply with the necessary formalities with respect to the underlying shares.[7]

The Depositary keeps ADR holders informed of important developments concerning the issuer of the underlying securities, such as recapitalization plans, security exchange offers and subscription rights. In most cases, the Depositary informs ADR holders of matters submitted for the vote of shareholders.[8] Depositaries will, of course, vote the shares they hold in accordance with instructions from ADR holders, and are often willing to vote shares for which no instruction is given in accordance with management's direction or in the same proportion that all other outstanding shares are voted.[9]

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[6] Until 2006, dividends typically were distributed at no charge to investors in sponsored ADR programs and this was a condition, for example, of listing the ADRs on the NYSE. Any charges levied by the Depositary in connection with the distribution of dividends were paid by the issuer. Only some privately placed, sponsored ADR programs required investors to bear dividend charges. In May 2006, the NYSE amended its rules to eliminate restrictions on ADR Depositary dividend and servicing fees, noting that the restrictions adversely affected the NYSE's competitive position relative to other exchanges that did not limit these fees. See SEC Release No. 34-53978 (June 13, 2006). Nonetheless, the ability of a Depositary to charge these fees to ADR holders is governed by the terms of the relevant Deposit Agreement, which, in the case of some agreements, may not allow the Depositary to charge these fees. Accordingly, if the Depositary wishes to charge fees to holders of NYSE-listed ADRs, the Depositary may have to negotiate with the issuer to amend the Deposit Agreement to reflect the rule change. In addition, issuers are required to disclose any charges levied by a Depositary in connection with the distribution of dividends in their annual reports on Form 20-F.

[7] An additional benefit of ADRs is that because each ADR often represents multiple underlying shares, stock exchange listing fees on ADRs are generally lower than on ordinary shares. See Appendix B.

[8] The New York Stock Exchange requires all issuers, including foreign private issuers, to solicit proxies for all stockholder meetings. NASDAQ permits foreign private issuers to follow home country practice in lieu of soliciting proxies, if home country practice does not otherwise require proxy solicitation. See infra Notes 180 and 190.

[9] The NYSE has taken a number of steps in recent years to restrict a similar practice, known as broker discretionary voting, for member companies. On July 1, 2009, the SEC approved a change to NYSE Rule 452 that eliminated broker discretionary voting in elections of members of the board of directors of U.S. companies listed on the NYSE. This amendment currently applies to all shareholder meetings of U.S. companies. See SR-NYSE-2006-92 (filed with the SEC Oct. 24, 2006, as amended May 23, 2007, June 28, 2007 and February 26, 2009); Release No. 34-60215 (July 1, 2009) (approving the rule change). Effective October 15, 2010, the SEC approved an NYSE rule change, required by Section 957 of the Dodd-Frank Act, Pub. L. No. 111-203 (July 21, 2010) (the "Dodd-Frank Act"), to eliminate broker discretionary voting with respect to executive compensation matters for all listed companies, including foreign private issuers. See SR-NYSE-2010-59 (filed with the SEC

A foreign private issuer that chooses to issue its shares in the United States through ADRs enters into a deposit agreement (the "Deposit Agreement") with the Depositary, which governs the creation and maintenance of the deposit facility. The Deposit Agreement sets forth the rights and obligations of the ADR holders and covers matters such as the issuance of ADRs upon deposit of underlying shares (and the withdrawal of underlying shares upon presentation of ADRs), the treatment of dividends and other distributions, the procedure for voting the underlying shares, and the amendment and termination of the Deposit Agreement. The Deposit Agreement also specifies the fees of the Depositary for the issuance and cancellation of ADRs,[10] which generally are waived for an initial issuance in connection with a public offering, but are paid by investors for the subsequent deposit and withdrawal of the underlying shares.

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

Some Depositaries have offered to reimburse issuers for the issuers' costs of establishing and maintaining an ADR program (ordinarily in an annual fixed amount that is payable to the issuers). The Office of the Chief Counsel of the United States Internal Revenue Service has concluded that payments of the type described above from the Depositary to an issuer are similar to payments made under franchise arrangements and thus are subject to U.S. withholding tax, unless an income tax treaty provides otherwise, or the issuer is engaged in a trade or business in the United States (in which case the payments would be subject to U.S. net income tax).[11] It may be expected that this guidance will be taken into account in future negotiations between issuers and Depositaries regarding any reimbursement arrangements.

Aug. 26, 2010); Release No. 34-62874 (Sep. 9, 2010) (approving the rule change). In addition, on January 25, 2012, the NYSE announced that it would no longer allow broker discretionary voting on a number of matters, including proposals to: (i) destagger a board of directors, (ii) implement majority voting in director elections, (iii) eliminate supermajority voting requirements and (iv) override certain types of antitakeover provisions. See NYSE Information Memo 12-4, Application of Rule 452 to Certain Types of Corporate Governance Proxy Proposals (Jan. 25, 2012), available at http://www.nyse.com/nysenotices/nyse/information-memos/detail?memo_id=12-4. Notably, both of these restrictions apply to all member brokers of the NYSE, regardless of whether the securities being voted are actually listed on the NYSE. See NYSE Rules 450-460, "Applicability of Proxy Rules". Given that there is significant overlap among NYSE member brokers and NASDAQ member brokers, the NYSE rule effectively applies to securities listed on both exchanges, as well as unlisted securities. Depositaries generally have taken the position that these rules do not apply to them because they are acting in their capacities as depositaries, and not brokers. Nevertheless, because broker discretionary voting for these matters is no longer allowed, depositaries and issuers may feel pressure from an investor relations perspective to eliminate proxies for these matters from their deposit agreements.

[10] These fees are generally $5.00 per 100 ADRs, or portion thereof, to be issued or canceled.

[11] See Office of Chief Counsel, Internal Revenue Service, "Memorandum No. AM2010-006," (Dec. 17, 2010), available at http://www.irs.gov/pub/irs-utl/am2010006.pdf.

Foreign private issuers with a sponsored ADR facility are required to disclose in their annual report on Form 20-F the fees the Depositary charges to investors, as well as payments, if any, made by the Depositary to the issuer (including payments for expenses of the issuer that are reimbursed by the Depositary).[12]

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

Two principal U.S. federal laws govern the issuance and sale of securities in the United States. The 1933 Act regulates the public offering of securities. The 1934 Act regulates securities markets and generally requires periodic reporting by issuers of securities publicly traded in the United States.[13]

The Jumpstart Our Business Startups Act (the "JOBS Act"), enacted on April 5, 2012, liberalized certain aspects of the 1933 Act and 1934 Act registration and reporting regimes for issuers that qualify as "Emerging Growth Companies" ("EGCs"), including permitting EGCs to make some otherwise restricted pre- and post-filing communications with certain large institutional investors, allowing for confidential SEC submission and review of EGC registration statements and exempting EGCs from certain disclosure requirements and obligations, including under the Sarbanes-Oxley Act.[14] The variances from the general 1933 Act and 1934 Act registration and reporting regimes applicable to EGCs are described in the following sections.

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[12] See SEC Release Nos. 33-8959, 34-58620 (Sep. 23, 2008).

[13] The Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") was enacted in response to a series of corporate scandals in the United States. The Sarbanes-Oxley Act affects all SEC-reporting companies, both domestic and foreign, as well as any company that has publicly filed a 1933 Act registration statement that has not yet become effective and that it has not withdrawn. The Sarbanes-Oxley Act is discussed in more detail in Part III.D below. For more information about the Sarbanes-Oxley Act generally, see THE SARBANES-OXLEY ACT OF 2002: ANALYSIS AND PRACTICE (2003), written by partners of this Firm.

[14] Pub. L. No. 112-106, 126 Stat. 306. An issuer qualifies as an EGC if (i) it had annual gross revenues of less than $1 billion during its most recent fiscal year; (ii) it has not issued more than $1 billion in non-convertible debt during the previous three-year period; *and* (iii) its initial registered public offering of stock occurred on or after December 9, 2011. Once qualified, an issuer will remain an EGC until the earliest of: (i) the last day of the fiscal year five years after its initial public offering; (ii) the last day of the fiscal year in which annual gross revenues exceed $1 billion; (iii) the date on which it has issued more than $1 billion in non-convertible debt during the previous three-year period; or (iv) the date on which it is determined to be a "large accelerated filer," defined as having a public float of at least $700 million and having been a 1934 Act reporting company for at least 12 months. Foreign private issuers may elect to be treated as EGCs, and *must* elect EGC treatment if they wish to take advantage of any benefit offered to EGCs under the JOBS Act.

For purposes of the revenue test described above, the SEC staff has indicated that "total annual gross revenues" is the total revenue presented on the company's income statement under U.S. GAAP or International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board IASB ("IASB") (if used as the basis of reporting by a foreign private issuer). Total annual gross revenues presented in a foreign currency should be translated to U.S. dollars using the exchange rate as of the last day of the most recently completed fiscal year. SEC Division of Corporation Finance, "Jumpstart Our Business Startups Act Frequently Asked Questions" (April 16 and May 3, 2012), available at http://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm (hereinafter "JOBS Act FAQ").

A. 1933 Act Registration Requirement and Related Publicity Restrictions

Under the 1933 Act, a public offering in the United States of securities, including equity securities in the form of ADRs, ordinarily must be registered with the SEC.[15] The issuer of the securities is required to file with the SEC a 1933 Act registration statement (a "Registration Statement") containing a prospectus to be made available to prospective investors (a "Prospectus"). In the Registration Statement, the issuer must disclose information concerning itself and the securities to be offered, in compliance with detailed SEC regulations. The SEC does not itself judge the merits of any public offering, but it does seek to ensure that investors have the opportunity to base their decisions upon adequate and accurate factual information included in the Registration Statement and Prospectus.

The 1933 Act provides that an offering of securities may not commence until the related Registration Statement has been filed with the SEC and the appropriate filing fees paid[16], unless the offering is made pursuant to an exemption from the registration requirements of the 1933 Act.[17] Actions taken in advance of a public offering that have the effect of arousing public interest in the issuer or its securities, including posting information on the issuer's web site, may constitute an "offer" of securities in violation of the 1933 Act.[18] There are several relevant safe harbors that allow communications that would otherwise constitute impermissible "offers" under the 1933 Act. Pursuant to Rule 135 under the 1933 Act an issuer may, prior to filing a

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[15] On June 29, 2005, the SEC adopted significant changes to the securities registration and offering rules under the 1933 Act and the 1934 Act that apply to both U.S. and foreign private issuers (the "Securities Offering Reform"). The Securities Offering Reform, which came into effect on December 1, 2005, liberalized communications in connection with registered offerings, clarified the liability framework applicable to registered offerings, and streamlined the securities registration process. For a more detailed discussion of the Securities Offering Reform, see SEC Release Nos. 33-8591 and 34-52056 (July 19, 2005) and this Firm's memorandum entitled "SEC Adopts Securities Offering Reforms" dated October 19, 2005.

[16] The Investor and Capital Markets Fee Relief Act, enacted on January 16, 2002 (Pub. L. No. 107-123, 115 Stat. 2390 (2002)), substantially reduced SEC filing fees. Effective October 1, 2012, the filing fee for a Registration Statement (whether on Form F-1 or Form F-3) is equal to 0.01364% ($136.40 per $1 million of securities) of the aggregate offering price of the securities being registered or, with respect to ADRs (registered on Form F-6) representing underlying shares, the maximum aggregate charges to be imposed in connection with the issuance of the related ADRs (generally $5.00 per 100 ADRs, as indicated above, with a minimum registration fee of $100). See SEC Fee Rate Advisory #7 for Fiscal Year 2013 (Aug. 31, 2012) and Rule 457 under the 1933 Act.

[17] Rule 163 under the 1933 Act allows "well-known seasoned issuers," referred to as "WKSIs," to make offers before filing a Registration Statement, including written offers by means of a "free writing prospectus." A "free writing prospectus" is generally defined as any written communication representing an offer to sell or a solicitation of an offer to buy securities that is or will be the subject of a Registration Statement that does not otherwise satisfy the statutory prospectus requirements. WKSIs are generally companies that (i) meet the registrant requirements of Form S-3 or F-3, including having timely filed their SEC reports during the past year; and (ii) have either (a) a worldwide market value of voting and non-voting common equity held by non-affiliates of at least $700 million or (b) for purposes of registering debt securities only, have issued at least $1 billion aggregate amount of registered debt securities in primary offerings for cash in the preceding three years. Under certain circumstances, a majority owned subsidiary of a WKSI may also qualify as a WKSI.

[18] Pre-filing publicity that constitutes an offer, even if inadvertent, is known as "gun-jumping." For example, the U.S. initial public offering prospectuses of Google and Salesforce.com each contained extensive risk factor disclosure concerning potential gun jumping violations in connection with those offerings, which resulted in delays to those offerings to allow for "cooling off" periods to reduce the risk of possible reliance by investors on information not included in those prospectuses.

Registration Statement, publicly disclose that it intends to make a public offering of securities if certain conditions are met.[19] A foreign issuer also may rely on Rule 135e under the 1933 Act to hold offshore press conferences or issue press releases offshore without such publicity resulting in a violation of the 1933 Act.[20] In addition:

- Rule 163A under the 1933 Act provides a safe harbor for communications made by or on behalf of an issuer more than 30 days prior to the filing of the Registration Statement if the communication does not reference a securities offering and the issuer takes "reasonable steps" to ensure that the communication is not redistributed or republished during the 30-day period prior to the filing. All communications by or on behalf of an issuer continue to be restricted during the 30-day period prior to a filing;

- Rules 168 and 169 under the 1933 Act provide a safe harbor for ongoing communications at any time during the offering process of (i) regularly released "factual business information"[21] by or on behalf of any issuer and (ii) regularly released "forward-looking information"[22] by or on behalf of any "reporting issuer."[23]

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[19] The Rule 135 notice may contain only the name of the issuer; the title, amount and basic terms of the securities proposed to be offered; the anticipated time of the offering; and a brief statement of the manner and purpose of the offering. It may not identify the prospective underwriters for the offering.

[20] Rule 135e establishes a safe harbor for foreign issuers under which members of the U.S. press may have access to offshore press conferences and press materials released offshore as long as: (i) the press activity is conducted offshore; (ii) at least part of the offering is conducted outside the United States; (iii) access to the offshore press activities is also provided to members of the foreign press; and (iv) any written materials related to offerings likely to have significant U.S. investor interest contain a cautionary legend and do not contain any form of purchase order or coupon that may be returned to express interest in the offering. Caution should be exercised, however, regarding the content of offshore press conferences and press materials as the SEC staff has been requiring that issuers include in their Registration Statements and Prospectuses substantive disclosures made in offshore conferences and press materials, including projections.

[21] "Factual business information" is limited to: (i) factual information about the issuer or its business and financial developments or other aspects of its business (for all issuers), (ii) advertisements of, or other information about, the issuer's products or services (for all issuers), and (iii) dividend notices (only for reporting issuers). To qualify for the safe harbor, the issuer must have previously released the same type of information in the ordinary course of business, and the timing, manner and form in which the information is disclosed must be consistent with past practice. In addition, information released by non-reporting issuers must be intended for persons, such as customers and suppliers, other than in their capacity as investors or potential investors.

[22] "Forward looking information" is limited to: (i) projections of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items, (ii) statements about management's plans and objectives for future operations, products or services, (iii) statements about future economic performance and (iv) assumptions underlying or relating to any of the foregoing information. The safe harbor for forward looking information is subject to the same conditions regarding consistency with past practice as apply to the safe harbor for factual business information.

[23] For purposes of these rules, a "reporting issuer" includes a foreign private issuer that (i) meets the registrant requirements of Form F-3 other than the reporting history provisions, (ii) meets the public float requirements of Form F-3 and (iii) either has had its equity securities traded on a "designated offshore securities market" for at least 12 months or has a worldwide market value of common equity held by non-affiliates of at least $700 million. A "designated offshore securities market" is defined as any foreign securities exchange or non-exchange market designated by the SEC under Regulation S under the 1933 Act and currently includes the

Publicity regarding the issuer or the offering is also restricted during the period between the filing of the Registration Statement and its effectiveness. Generally, the issuer may make written or oral offers during this period. Prior to the effectiveness of the Securities Offering Reform on December 1, 2005, written offers had to be made exclusively through the preliminary Prospectus (the "Preliminary Prospectus," also known as a "red herring") as initially filed with the Registration Statement, subject to limited exceptions for Rule 134 notices[24] and Rule 135e communications. Since that date, eligible issuers may also, under certain conditions, use "free writing prospectuses" during the period between filing and effectiveness of the Registration Statement in reliance on the non-exclusive safe harbor provided by Rule 164 under the 1933 Act.[25]

The JOBS Act eased certain of the foregoing restrictions on publicity and offerings of securities for issuers that qualify as EGCs. The JOBS Act amended the 1933 Act to allow an EGC issuer to gauge investor interest in a securities offering—to "test the waters"—through oral or written communications to "qualified institutional buyers" as defined in Rule 144A under the 1933 Act or institutions that are "accredited investors" as defined in Regulation D under the 1933 Act, before or after the filing of a registration statement. These types of marketing communications are already common outside the United States, and now are no longer subject to restrictions on pre-filing publicity under the 1933 Act or to the requirement that post-filing written communications conform to the requirements of a prospectus or free-writing

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Eurobond market (as regulated by the International Securities Market Association), the Alberta Stock Exchange, the Australian Stock Exchange Limited, the Barcelona Stock Exchange, the Berlin Stock Exchange, the Bermuda Stock Exchange, the Bilbao Stock Exchange, the Cairo and Alexandria Stock Exchanges, the Canadian National Stock Exchange, the Canadian Venture Exchange Inc., the Channel Islands Stock Exchange, the Copenhagen Stock Exchange, Euronext Amsterdam N.V., Euronext Brussels S.A./N.V., the Frankfurt Stock Exchange, the Helsinki Stock Exchange, the Stock Exchange of Hong Kong Limited (including the Growth Enterprises Market), the Irish Stock Exchange, the Istanbul Stock Exchange, the Johannesburg Stock Exchange, the Korea Exchange, the Bolsa de Valores de Lima, the London Stock Exchange (including SEAQ International and the Alternative Investment Market), the Bourse de Luxembourg, the Madrid Stock Exchange, the Bursa Malaysia Securities Berhad, the Mexican Stock Exchange, the Borsa Valori di Milano, the Montreal Stock Exchange, the Oslo Stock Exchange, the Panama Stock Exchange, the Bourse de Paris (including the Eurolist Market and the Alternext Market), the Prague Stock Exchange, the Stock Exchange of Singapore Ltd., the Stockholm Stock Exchange, the SWX Swiss Exchange, the Taiwan Stock Exchange, the Tel-Aviv Stock Exchange Ltd., the Tokyo Stock Exchange (including the Tokyo Stock Exchange's Market of High Growth and Emerging Stocks (Mothers)), the Toronto Stock Exchange, the Valencia Stock Exchange, the Vienna Stock Exchange (Wiener Börse) and the Warsaw Stock Exchange.

[24] Rule 134 under the 1933 Act permits limited information regarding the offering to be publicly disclosed during this period, including the identity of the underwriters.

[25] Pursuant to Rule 164, any free writing prospectus used by an eligible issuer that is not a WKSI or a "seasoned issuer" (i.e., an issuer that is eligible to use Form S-3 or F-3 for a primary offering of securities) must be accompanied or preceded by the Preliminary Prospectus (which, if the issuer is not an SEC-reporting company, must contain an estimated price range and an estimate of the maximum size of the offering). In addition, Rule 433 under the 1933 Act contains certain eligibility, legend, record retention and SEC filing requirements in connection with the use of free writing prospectuses. Rule 433 also provides guidelines for the treatment of certain communications under the free writing prospectus rules, such as media publications, electronic roadshows, information posted on web sites and term sheets.

prospectus. However, underwriters may not solicit orders from investors prior to the distribution of a preliminary prospectus.[26]

Sales of publicly offered securities of any issuer, including those qualifying as EGCs, may not be made or confirmed until the SEC has declared the related Registration Statement "effective," generally after review to ensure compliance with applicable disclosure requirements.

Issuers that have made a public offering under the 1933 Act become subject to the disclosure requirements of the 1934 Act and must periodically file reports with the SEC. Issuers whose securities are listed on a national securities exchange (e.g., the NYSE or NASDAQ) also become subject to the disclosure requirements of the 1934 Act and must comply with the registration requirements of that Act. The purpose of these disclosure and registration requirements, which are similar to those of the 1933 Act, is to enable investors trading in the secondary markets to make well-informed investment decisions. Although an issuer must register under the 1934 Act in a procedure separate from 1933 Act registration, in practice preparation of the 1934 Act registration statement required in connection with a public offering registered under the 1933 Act is a simple matter since it does little more than incorporate by reference the information in the Registration Statement.[27]

All issuers, both domestic and foreign, must file their 1933 Act and 1934 Act registration statements, 1934 Act periodic reports and other documents electronically through the SEC's Electronic Data Gathering Analysis and Retrieval ("EDGAR")[28] system. This

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[26] See Rule 15c2-8 under the 1934 Act. While the solicitation of binding customer orders is not permitted, SEC staff recently confirmed that "testing the waters" may include the solicitation of non-binding indications of customer interest. See SEC Division of Trading and Markets, "Jumpstart Our Business Startups Act Frequently Asked Questions About Analysts and Underwriters" (Aug. 22, 2012), available at http://www.sec.gov/divisions/marketreg/tmjobsact-researchanalystsfaq.htm.

[27] The information required to be disclosed in a Registration Statement and under the 1934 Act is set forth in various SEC forms. A summary of the principal SEC forms for foreign private issuers under the 1933 Act (Forms F-1 and F-3) and under the 1934 Act (Form 20-F) is attached as Appendix A. The Securities Offering Reform eliminated Form F-2, which was rarely used, and introduced the flexibility to incorporate certain information from 1934 Act reports into Form F-1.

[28] In addition, the SEC is currently phasing in a requirement for issuers to provide data on EDGAR in "XBRL" format. XBRL is an interactive data format, the use of which is expected to make it easier for analysts, investors and companies to analyze financial data. The requirement to provide data in XBRL format currently applies to (i) all large accelerated filers that use U.S. GAAP and have a worldwide public float above $5 billion; (ii) all other large accelerated filers (i.e., issuers with a worldwide public float above $700 million) using U.S. GAAP for financial statements in respect of fiscal years ended on or after June 15, 2010; and (iii) all other filers that use U.S. GAAP for financial statements in respect of fiscal years ended on or after June 15, 2011. See SEC Release 33-9002, 34-59324 (Jan. 30, 2009). According to the original adoption schedule published by the SEC, foreign private issuers using IFRS as issued by the IASB would also have been required to use XBRL for financial statements in respect of fiscal years ended on or after June 15, 2011. However, in April 2011 the SEC indicated that foreign issuers would not be required to submit financial statements in XBRL format until the SEC specifies an IFRS "taxonomy," or standardized dictionary, of XBRL data tags. See Center for Audit Quality, SEC No-Action Letter (Apr. 8, 2011). Foreign private issuers that use home-country accounting standards reconciled to U.S. GAAP are not required to submit financial statements in XBRL format.

requirement, which became applicable to foreign companies in November 2002, does not apply to a limited subset of documents, including "glossy" annual reports and "statutory reports."[29]

B. 1933 Act Registration Procedures

The offer and sale of new equity securities in the United States in the form of ADRs technically involve the registration of two securities, i.e., the underlying shares and the ADRs. The ADRs are registered by filing a relatively simple Registration Statement on Form F-6, which requires certain information concerning the depositary arrangement and consists principally of the Deposit Agreement and a sample ADR certificate.[30] However, a more elaborate Registration Statement must be filed concerning the underlying shares, containing information regarding the business and operating and financial history of the issuer, and a description of the securities being offered.

Most of the time and effort in registering an offering of ADRs is devoted to preparing the Registration Statement concerning the underlying shares of the foreign company. It is filed generally on one of two SEC forms, Forms F-1 and F-3, which contain detailed instructions as to the information to be included. The Prospectus included in the Registration Statement is the main selling document permitted to be used in soliciting the interest of investors for the new securities and, except in the case of a WKSI or a seasoned issuer, must accompany or precede any permitted free writing prospectus.[31] Depending in large part upon whether the issuer has previously offered securities in the United States and the nature of the particular offering, a considerable amount of time and planning may be required for preparation of the Prospectus. The issuer is primarily responsible for the preparation of its Registration Statement, with the assistance of its counsel and independent accountants. It is usually advisable for the issuer, the issuer's counsel and accountants and the underwriters and underwriters' counsel to meet as early as possible to discuss scheduling and assignments.

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[29] "Statutory reports" are defined as reports that an issuer must make public under the laws of its jurisdiction of organization or the rules of any exchange on which its securities are traded, so long as the report or other document is not a press release, is not required to be and has not been distributed to its security holders and, if discussing a material event, has already been the subject of an SEC filing. When foreign companies became subject to mandatory EDGAR filings, they also became subject to new requirements regarding the filing of foreign language documents. Issuers are required to submit an English translation or summary of any foreign language document filed as an exhibit to any SEC-filed document. Full translations are required for specified documents, including press releases, annual audited and interim consolidated financial information, and other information distributed directly to security holders (other than "glossy" annual reports that are required to be made public but not distributed directly to security holders), organizational documents, instruments affecting the rights of security holders, voting agreements, contracts on which the issuer's business is substantially dependent and related party contracts. These translations do not need to be official translations. See SEC Release Nos. 33-8099 and 34-45922 (May 15, 2002).

[30] Form F-6 is also used to register "unsponsored" ADRs. In these cases, the Depositary must state that (i) it is relying on the issuer's 12g3-2b exemption from 1934 Act registration (based on its "reasonable good faith belief after exercising reasonable diligence") or (ii) the issuer is subject to the 1934 Act periodic reporting requirements, that it has complied with these requirements and that the reports are available for public inspection and copying via the EDGAR system or at the SEC's headquarters. See SEC Release No. 34-58465 (Sep. 5, 2008).

[31] See supra Note 25.

An issuer that has not previously made a public offering of securities in the United States or listed its securities on a national securities exchange[32] will file on Form F-1, which requires extensive information concerning both the issuer and the securities to be offered. Preparation of a Registration Statement for issuers that have previously made a U.S. public offering or whose securities are already listed on a national securities exchange, may be greatly expedited through either the incorporation by reference into the Registration Statement of certain information previously filed in SEC reports or the use of a "short-form" Registration Statement, Form F-3. Qualification for the use of this short form depends upon the nature of the issuer and the length of time that it has been filing periodic reports under the 1934 Act, as well as on the type of security being offered.

Historically, the length of time required to compile the necessary information and draft the Registration Statement is often primarily a function of the amount of work needed to prepare audited consolidated financial statements reconciled to generally accepted accounting principles ("GAAP") in the United States ("U.S. GAAP"). The time required to prepare SEC-compliant financial information has been shortened in recent years in light of the SEC's rule changes allowing foreign private issuers to present financial statements that comply with IFRS without a reconciliation to U.S. GAAP.[33]

A foreign private issuer that has been subject to the periodic reporting requirements of the 1934 Act for at least 12 months, has timely filed all required reports in the last 12 months and has filed at least one annual report on Form 20-F may register equity securities on Form F-3 if its voting and non-voting common stock held by non-affiliates has an

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

[33] On December 21, 2007, the SEC approved new rules and amendments to its disclosure forms that allow a foreign private issuer to present financial statements that comply with IFRS without reconciling those financial statements to U.S. GAAP. In order to take advantage of these rules, a foreign private issuer must state unreservedly and explicitly in an appropriate note to the financial statements that the statements comply with IFRS as issued by the IASB. In addition, the foreign private issuer's independent auditor must state this in its report. The IFRS with which the financial statements must comply must be the English-language IFRS as adopted by the IASB; compliance with a modified version of IFRS is not permitted under the rule.

On November 14, 2008, the SEC released for public comment a proposed "Roadmap for the Potential Use of Financial Statements Prepared in Accordance with IFRS by U.S. Issuers," which, if adopted, would have represented a significant step towards convergence of financial reporting standards, and would likely facilitate cross-border transactions by eliminating the need to reconcile financial statements prepared under different sets of accounting principles. See SEC Release Nos. 33-8982, 34-58960 (Nov. 14, 2008). On February 24, 2010, the SEC reiterated its goal of a single set of global accounting standards, and proposed a "Work Plan" that would provide the SEC with a framework for determining whether to incorporate IFRS into the financial reporting system for U.S. issuers and how to address some of the related transitional concerns. See SEC Release Nos. 33-9109; 34-61578 (Feb. 24, 2010). On July 13, 2012, the SEC's Office of the Chief Accountant issued its Final Staff Report on the IFRS Work Plan, which included no decision or time frame regarding whether to allow U.S. companies to present financial statements according to IFRS. See SEC Office of the Chief Accountant, "Work Plan for the Consideration of Incorporating International Financial Reporting Standards into the Financial Reporting System for U.S. Issuers; Final Staff Report" (Jul. 13, 2012). Further, SEC Chairman Mary Schapiro stated, in a speech addressing the Final Staff Report, that she has "no timeline" for when the SEC would determine whether U.S. companies could use IFRS for SEC filings. Steven Marcy, *Schapiro Has No Time Frame for SEC Decision on IFRS Use in U.S.*, BLOOMBERG BNA SEC. L. DAILY, July 13, 2012.

aggregate worldwide market value ("float") equivalent to at least $75 million and if it has not defaulted on certain payments. A foreign private issuer with a public float less than $75 million may also use Form F-3 if (a) it is not a shell company and has not been a shell company for at least 12 calendar months, (b) it has a class of common equity securities listed on a national securities exchange, and (c) the aggregate of the proposed sale and all sales for the period of 12 calendar months prior to the proposed sale does not exceed one third of its public float. An issuer using Form F-3 simply incorporates by reference in the Prospectus its most recent annual report on Form 20-F and any other periodic reports filed thereafter and prior to the termination of the offering (see Part III.C below), with the result that the Registration Statement often may be prepared relatively quickly and easily.[34]

Once a Registration Statement has been filed, the staff of the SEC may elect to review it, and may give comments to the issuer and its counsel indicating changes the staff will require before declaring the Registration Statement effective.[35] As noted above, while an offering of securities may commence upon the filing of the Registration Statement, sales may be made only after this declaration of effectiveness by the SEC. During the period between the filing of the Registration Statement and its effective date, copies of the Preliminary Prospectus may be circulated to prospective purchasers and to sales personnel of securities dealers involved in the offering.[36] The Preliminary Prospectus typically omits information as to pricing and final underwriting arrangements, but is otherwise essentially complete.[37] The final Prospectus

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

[35] Pursuant to SEC staff policy, the SEC has been making staff comment and issuer response letters publicly available on its web site, http://www.sec.gov. This policy, which applies to correspondence on Registration Statements filed on or after August 1, 2004 under the 1933 Act, 1934 Act and the Trust Indenture Act of 1939, represents a significant departure from the SEC's previous practice, whereby such correspondence was made publicly available only pursuant to requests under the U.S. Freedom of Information Act. See SEC Division of Corporation Finance, SEC Staff to Publicly Release Comment Letters and Responses, SEC Release No. 2004-89 (June 24, 2004). In addition, the SEC has indicated that it may release correspondence as early as 20 days following completion of a filing review, a decrease from the previous minimum of 45 days after completion of review. See SEC Division of Corporation Finance, SEC Staff to Release Filing Review Correspondence Earlier, (Dec. 1, 2011) available at www.sec.gov/divisions/corpfin/cfannouncements/edgarcorrespondence.htm; see also infra Note 40 and accompanying text.

[36] Pursuant to Rule 164, any free writing prospectus used by an issuer other than a WKSI or a seasoned issuer must be accompanied or preceded by the Preliminary Prospectus. See supra Note 25.

[37] If the registrant is not an SEC-reporting company prior to filing the Registration Statement, Item 501(b)(3) of Regulation S-K requires the Preliminary Prospectus first "circulated," or distributed to the market, to contain an estimated price range and an estimate of the maximum size of the offering. According to recent SEC staff guidance, the estimated price range generally cannot be wider than $2.00 (if the maximum price is $10 or less)

containing all information required by the 1933 Act must, however, be filed with the SEC prior to delivery of the securities purchased.[38]

While the period of SEC review of a Registration Statement may vary widely and the SEC may elect not to review the Registration Statement at all, it is ordinarily prudent to allow at least six to eight weeks for SEC review and the resolution of any SEC comments. In the case of issuers filing on Form F-3, the likelihood that the SEC will elect not to review the Registration Statement is significantly greater because the SEC will already have had an opportunity to review most of the information in the Registration Statement. In such cases the SEC may be willing to declare the Registration Statement effective as early as 48 hours after filing. Particular timing requirements, such as those that may arise in coordinating a global offering, should be raised in advance with the SEC staff, which has demonstrated a willingness to accommodate such requirements.

Until recently, the SEC accepted draft Registration Statements for review on a confidential basis from foreign private issuers that had not previously filed a Registration Statement under either the 1933 Act or the 1934 Act.[39] However, on December 8, 2011, the SEC announced that this confidential review procedure would no longer be available[40] unless the registrant is:

- A foreign government registering its debt securities;
- A foreign private issuer that is listed or is concurrently listing its securities on a non-U.S. securities exchange;
- A foreign private issuer that is being privatized by a foreign government; or
- A foreign private issuer that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.

The SEC has indicated that a foreign private issuer falling within the letter of the exceptions described above may still be required by the SEC to publicly file its Registration

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or 20% of the maximum price (if the maximum price is greater than $10). With respect to foreign registrants that are listed in their home country prior to filing, the SEC staff has often permitted such registrants to provide share price information for the home market as of a recent date in lieu of the price range information referred to above. See infra Note 147.

[38] The issuer will also satisfy the filing requirement if it has made a good faith and reasonable effort to file the final Prospectus in a timely manner under the 1933 Act and makes such filing as soon as practicable thereafter. Prior to the Securities Offering Reform, copies of the final Prospectus had to be physically delivered to investors at or prior to the earlier of delivery of a confirmation of sale and delivery of the securities.

[39] See SEC Division of Corporation Finance, International Financial Reporting and Disclosure Issues (Nov. 1, 2004, as updated Feb. 24, 2005).

[40] Both foreign and U.S. companies may continue to use the SEC's confidential treatment procedure under Rule 83 of the Freedom of Information Act for portions of their written responses to staff comments on filings other than registration statements. The SEC has indicated that it will challenge what it views to be overly broad requests. See SEC Staff to Publicly Release Comment Letters and Responses, SEC Release No. 2004-89 (June 24, 2004).

Statement in certain circumstances, such as where there is "publicity about a proposed offering or listing."[41] In addition, such draft submissions are no longer permitted to remain confidential—at the time of public filing, a foreign private issuer must publicly file all previously submitted draft registration statements and response letters.[42]

Furthermore, under the JOBS Act, foreign private issuers that qualify and elect to be treated as EGCs may confidentially submit draft registration statements in connection with an initial public offering of their common stock (including common stock represented by ADRs). As for foreign private issuers submitting under the confidential review procedures described above, an issuer that submits its draft registration statement for confidential review under the EGC confidential review regime is required to publicly file all confidentially submitted drafts together with its initial public filing. For an EGC, this public filing must take place at least 21 days prior to the first road show in connection with the offering.[43]

C. Disclosure Requirements

The disclosure requirements for foreign private issuers under the 1933 Act and the 1934 Act are based upon SEC Form 20-F. Although the primary use of Form 20-F is for the 1934 Act annual reports, the information about the issuer that is required to be provided in a Registration Statement is substantially the same as that required by Form 20-F. The requirements of Form 20-F are outlined in Section 3 of Appendix A.

The disclosure requirements of Form 20-F are substantially the same as those applicable to the annual reports on Form 10-K filed by U.S. corporations, subject to certain exceptions. In particular, information concerning the compensation of directors and officers may be provided in an aggregate amount unless the issuer has otherwise made such data public with respect to individual directors and officers.[44]

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41 Shell companies, blank check companies and issuers with no or substantially no business operations will be ineligible for confidential treatment of their submissions. It is unclear how this might affect submissions by finance companies or guarantors of debt securities that have no business operations. See SEC Division of Corporation Finance, Non-Public Submissions from Foreign Private Issuers (Dec. 8, 2011, updated May 30, 2012).

42 Following the SEC's revisions to the confidential submission rules for foreign private issuers on May 30, 2012, foreign private issuers are required to comply with the same requirements as EGCs with respect to the public filing of confidential submissions and response letters, except for the requirement (discussed in the text) that such public filing take place at least 21 days prior to the first road show in connection with the offering. Id.

43 Note that if a foreign private issuer that qualifies as an EGC wishes to take advantage of any benefit available to EGCs, including reduced Sarbanes-Oxley compliance obligations and more liberal pre-filing publicity regimes, it must follow the EGC confidential review process (and make public its confidential filings at least 21 days prior to the first road show) even if it also qualifies for confidential review under the SEC's general guidelines for non-public submissions from foreign private issuers. Comment letters and issuer responses on confidential draft submissions by EGCs will be publicly released on the same timeframe as letters and responses with respect to filings not submitted confidentially. SEC Division of Corporation Finance, "JOBS Act FAQ," supra Note 14.

44 On July 26, 2006, the SEC adopted new rules requiring U.S. companies to disclose detailed information on the company's compensation for its named executive officers and directors in a new Compensation Discussion and Analysis ("CD&A") section of the company's annual report on Form 10-K (which generally is incorporated by

Financial statement requirements for Form 20-F also differ from those applicable to U.S. corporations. The principal difference, as to content, is described in Item 18 of Form 20-F.[45] Item 18 requires all information mandated by SEC regulations, including full segment disclosure,[46] except that for first time registrants only the financial statements for the two most recent fiscal years and any required interim period need comply with Item 18.[47]

Other than the differences noted above, all financial statements of a foreign private issuer must be substantially similar in form and content to financial statements prepared in accordance with U.S. GAAP or IFRS,[48] and to SEC regulations applicable to U.S.

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reference to the company's proxy statement). See SEC Release Nos. 33-8732A and 34-54302A (Aug. 29, 2006). These rules do not apply to foreign private issuers.

[45] Until 2011, foreign private issuers had the option of electing to provide financial statements under Item 17 of Form 20-F. Item 17 is less stringent than Item 18, as it allows the omission of certain items of supplemental information ordinarily required to be disclosed in financial statements presented in accordance with SEC regulations. The most important part of this supplemental information is "segment" financial information, i.e., specified information with respect to the assets and results of operations of each of a company's "operating segments." However, the SEC phased out Item 17 for most issuers, other than Canadian Multi-Jurisdictional Disclosure System ("MJDS") filers, starting with financial years ending on or after December 15, 2011. Annual reports filed on Form 20-F may not omit segment data from U.S. GAAP financial statements filed in accordance with Item 17. See SEC Release Nos. 33-8989, 34-58620 (Sep. 23, 2008). Additionally, although Item 17 does not itself require segment financial information, accounting principles used in the issuer's home country and IFRS may nevertheless require reporting of financial information by segment.

[46] The SEC's segment reporting requirements are consistent with those of the Financial Accounting Standards Board's Statement of Financial Accounting Standards ("SFAS") No. 131. See SEC Release Nos. 33-7620 and 34-40884 (Jan. 5, 1999). Among other things, SFAS No. 131 defines an "operating segment" as a component of a business enterprise that engages in business activities from which it may earn revenues and incur expenses (including revenues and expenses relating to transactions with other components of the same enterprise), whose operating results are regularly reviewed by the enterprise's chief operating decision maker to make decisions about resources to be allocated to the segment and assess its performance, and for which discrete financial information is available. To be reportable, an operating segment of an enterprise must meet any of the following thresholds: (i) its reported revenue, including both sales to external customers and inter-segment sales and transfers, must represent 10% or more of the combined revenue of all reported operating segments, whether generated inside or outside the company; (ii) its reported profit or loss must be 10% or more of the greater, in absolute amounts, of: (a) the combined reported profit of all operating segments that did not report a loss or (b) the combined reported loss of all operating segments that did report a loss; or (iii) its assets must be 10% or more of the combined assets of all operating segments. For each reportable segment, issuers must disclose the factors used to identify the enterprise's reportable segments, including the basis of organization and the types of products and services from which each reportable segment derives its revenues. In addition, issuers must disclose information about reported segment profit or loss, including certain revenues and expenses included in the reported segment profit or loss, segment assets, and the basis of measurement. The following items must be disclosed for each reportable segment if management considers them in measuring profit or loss: revenues from external customers and other operating segments, interest income and expense, depreciation, depletion, amortization and other significant non-cash items, unusual and extraordinary items, equity in net income of equity method investees and income taxes.

[47] See infra Note 52.

[48] In December 2007, the SEC amended its disclosure forms to permit eligible foreign private issuers in their first year of reporting under IFRS to file two years rather than three years of financial statements, with appropriate related disclosure. However, IFRS also requires issuers to present an opening statement of financial position as of January 1 for the earliest of the two years included in their financial statements, in addition to the statements of financial position as of the end of each of the two years. The SEC has clarified in meetings with the Center for Audit Quality that foreign private issuers relying on the first-time IFRS adopter exception need include only two years of selected financial data prepared in accordance with IFRS, and may omit the prior three years of

companies.[49] Financial statements of a foreign private issuer may, however, be presented in accordance with other accounting principles used in the issuer's home country if the issuer provides an explanation of the principal differences between those accounting principles and U.S. GAAP[50] and also a numerical reconciliation of the differences in financial results and principal balance sheet items as reported under its accounting practices and those that would have been obtained under U.S. GAAP and SEC regulations.[51] This numerical reconciliation is required both in Registration Statements and Form 20-F annual reports filed under the 1934 Act, except that for first time registrants the numerical reconciliation of financial results is required only for the two most recent fiscal years and any required interim period.[52]

Subject to the exceptions noted below, financial statements for all foreign private issuers other than those that qualify and elect to be treated as EGCs must include audited balance sheets as of the end of each of the three most recent fiscal years and audited statements of income and cash flow for each of the three most recent fiscal years.[53] However, a foreign private issuer may provide audited financial statements as of the end of the three fiscal years preceding the most recently completed fiscal year if (i) the audited balance sheet for the most recent fiscal year is not available, and (ii) the last audited financial statements included in the Registration

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financial data prepared in accordance with home-country GAAP. See Center for Audit Quality International Practices Task Force, Highlights (Nov. 24, 2009), at 11, available at http://thecaq.org/iptf/pdfs/highlights/2009_IPTF11-24-09JointMeetingHLspostedon6-2-10.pdf and infra Note 152.

Although this accommodation addressed an issue of great concern to European companies, which were required under European legislation to adopt IFRS for their financial years beginning on or after January 1, 2005, any foreign private issuer may rely on the new rules if it is submitting its first SEC registration statement under IFRS, regardless of whether it had previously adopted IFRS as its accounting standards. See SEC Release Nos. 33-8567 and 34-51535 (Apr. 12, 2005); SEC Release Nos. 33-8879; 34-57036 (Dec. 21, 2007).

[49] A registrant may be required to include in its Registration Statement audited financial statements of certain significant acquired businesses (or businesses for which acquisition is probable) and equity investees pursuant to Rules 3-05 and 3-09(a) of Regulation S-X under the 1933 Act, respectively. Depending on their significance, a registrant may also be required to present *pro forma* financial statements reflecting historical and probable future acquisitions and business combinations pursuant to Article 11 of Regulation S-X. First-time foreign registrants are not required to include a U.S. GAAP reconciliation of these supplemental financial statements if the acquired business or investee falls below a specified threshold. See SEC Release No. 33-7053 (Apr. 19, 1994).

[50] A foreign private issuer that presents its financial statements in accordance with accounting standards other than U.S. GAAP or IFRS as adopted by the IASB may not reconcile those statements to IFRS; they must be reconciled to U.S. GAAP.

[51] A foreign private issuer that accounts in its primary financial statements for its operations in a hyper-inflationary economy in accordance with IFRS does not need to reconcile the differences in such financial statements and those that would result from application of U.S. GAAP and SEC regulations insofar as they arise from accounting for the effects of inflation.

[52] If a foreign private issuer prepares its primary financial statements in accordance with U.S. GAAP, the financial statements for a first-time registrant need only include audited balance sheets and statements of income and cash flows for the two most recent fiscal years. See SEC Release No. 33-7053 (Apr. 19, 1994).

[53] A balance sheet for the earliest of the three-year periods is not required, however, if that balance sheet is not required by the issuer's home jurisdiction (or other jurisdiction applicable to the issuer outside the United States). Two years of financial statements also will suffice under certain circumstances. See supra Notes 48 and 52.

Statement are no older than 15 months at the time the Registration Statement is declared effective.[54] Furthermore, if the foreign private issuer is making its initial public offering (i.e., before the offering, the foreign private issuer is public in neither the United States nor its home country), the last audited financial statements must be no older than 12 months.[55]

Pursuant to the JOBS Act, an EGC that is conducting an initial public offering need only provide audited financial statements for the two most recently completed fiscal years, together with two years of selected financial data and management's discussion and analysis (MD&A).[56] However, a foreign private issuer EGC that is dual-listing its securities in the U.S. and another jurisdiction may be required to provide additional years if so required by the other jurisdiction.[57]

Unaudited interim financial statements also must be included in the Registration Statement if the Registration Statement is declared effective more than nine months after the end of the last audited fiscal year. These financial statements must cover at least the first six months of the current fiscal year and must comply with U.S. GAAP or IFRS, or, if they are presented in accordance with other home country accounting principles, they must include a reconciliation to U.S. GAAP. Finally, if a foreign private issuer prepares and discloses to its shareholders or otherwise makes public interim financial information relating to revenues and income that is more current than the interim financial statement requirements described in this paragraph, the registrant is required to include the more current interim financial information in its Registration Statement (but not in an annual report on Form 20-F).[58]

If securities are registered on Form F-3, information must be provided regarding (i) material changes in the foreign private issuer's affairs that have occurred since the end of the

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[54] Item 8.A.4 of Form 20-F clarifies that, for purposes of the 15-month rule, the last audited financial statements must be annual financial statements (rather than audited interim financial statements). See SEC, Division of Corporation Finance, International Disclosure Standards; Correction, SEC Release No. 34-44406 (June 11, 2001).

[55] The SEC has indicated it will waive this requirement where the issuer adequately represents to the SEC that this requirement is not applicable to the issuer in any jurisdiction outside the United States and that compliance with this requirement by the issuer is impracticable or involves undue hardship. In these cases, the issuer must file these representations as an exhibit to the Registration Statement and comply with the 15-month rule. See Instructions to Item 8.A.4 of Form 20-F.

[56] Foreign private issuers making their first filing with the SEC containing financial information prepared in accordance with IFRS as issued by the IASB or prepared in accordance with U.S. GAAP are also permitted to include just two years of financial data in certain cases. See supra Note 48.

[57] While the SEC has not yet amended Form 20-F to reflect all of the scaled-down disclosure requirements applicable to EGCs, including with respect to financial statements, it has indicated that foreign private issuers may proceed as if these scaled disclosure requirements have been incorporated therein until the form is amended. See SEC Division of Corporation Finance, "JOBS Act FAQ," supra Note 14.

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

fiscal year covered by the Form 20-F incorporated by reference, and (ii) significant business acquisitions, changes in accounting principles, corrections of previous accounting errors, and material dispositions of assets outside the normal course of business if not incorporated by reference to other filings under the 1934 Act or set forth in another 1933 Act Prospectus. If the financial statements in the Form 20-F are not sufficiently current to comply with the financial statement requirements for Registration Statements, complying financial statements must be included in the Prospectus. If the financial statements in the Form 20-F comply with Item 17 of Form 20-F, they generally must be revised to comply with Item 18 of Form 20-F, and the revised financial statements may be included in the Prospectus or an amended Form 20-F. If the registrant chooses to amend its Form 20-F, the Prospectus must disclose the existence of that amendment.

In connection with the disclosure of financial information, Form 20-F imposes conditions on the use of non-GAAP financial measures.[59] All filings under the 1933 Act[60], other than documents filed by eligible Canadian issuers under the MJDS, that include a non-GAAP financial measure must also include:

- a presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;

- a reconciliation (by schedule or other clearly understandable method), which must be quantitative (subject to an exception for forward-looking

[59] A "non-GAAP financial measure" is defined as a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that (i) 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 (ii) 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. In the case of a foreign private issuer whose primary financial statements are prepared in accordance with non-U.S. GAAP, GAAP refers to such non-U.S. GAAP (other than with respect to any U.S. GAAP-derived measures provided by that issuer). See SEC Releases Nos. 33-8176 and 34-47226 (Jan. 22, 2003). There are a number of exceptions to the rules prohibiting the dissemination of non-GAAP information applicable to foreign private issuers. See infra Note 93 and accompanying text. In addition, a non-GAAP financial measure that would otherwise be prohibited may be permitted in a filing of a foreign private issuer, provided that the non-GAAP financial measure: (i) relates to the GAAP used in the issuer's primary financial statements included in its filings with the SEC; (ii) is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and (iii) is included in the annual report prepared by the issuer for use in its home jurisdiction or for distribution to its security holders. The SEC has clarified that a measure is "expressly permitted" if either (i) the particular measure is clearly and specifically identified as an acceptable measure by the standard setter or (ii) the issuer's primary security regulator in its home jurisdiction has explicitly accepted the measure by publishing its view that the measure is permitted or has provided a letter to the issuer indicating acceptance of the measure. See SEC Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 106.01 (Jan. 11, 2010).

[60] Because a free-writing prospectus is not "filed" pursuant to the 1933 Act, it is not subject to the restrictions on non-GAAP financial measures unless it is otherwise filed as part of an issuer's periodic reporting obligations under the 1934 Act. See SEC Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 102.08 (Jan. 11, 2010).

information),[61] of the differences between the non-GAAP financial measure disclosed and the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;

- a statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations;[62] and

- to the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not disclosed under the preceding bullet point.[63]

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

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[61] Regulation S-K provides an exception from the quantitative reconciliation requirement with respect to forward-looking non-GAAP financial measures in situations where a quantitative reconciliation is not available without unreasonable effort. Where this exception applies, the SEC expects the issuer to (i) disclose the fact that the most directly comparable GAAP measure is unavailable; (ii) provide reconciling information that is available without unreasonable effort; and (iii) identify information that is unavailable and disclose its probable significance. In addition, the SEC recently indicated that an issuer could reconcile a non-GAAP financial measure to a *pro forma* measure prepared and presented in accordance with Article 11 of Regulation S-X in lieu of a GAAP measure, if the *pro forma* measure was the most directly comparable measure. See SEC Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 101.02 (Jan. 11, 2010).

[62] The adopting release indicates that the fact that a non-GAAP financial measure is used by or is useful to analysts cannot be the sole support for presenting the non-GAAP measure. The justification must be substantive, although it can be the reason that causes a measure to be used by or useful to analysts. See SEC Release Nos. 33-8176; 34-47226 (Jan. 22, 2003) at Note 44. However, the issuer need not actually use the non-GAAP financial measure in managing its business in order to be able to present it. See SEC Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 102.04 (Jan. 11, 2010)

[63] In the case of filings other than annual reports on Form 20-F, an issuer need not include information regarding the purpose for which the non-GAAP financial measure is used and the reasons why that financial measure is believed to be useful to investors, so long as (i) that information was included in the registrant's most recent annual report on Form 20-F or a more recent filing; and (ii) that information is updated to the extent necessary to meet the applicable requirements at the time of the current filing. The SEC has confirmed that the reference to filings does not include reports on Form 6-K, which are "furnished" to the SEC, except insofar as they are incorporated by reference into a Registration Statement or Prospectus or a 1934 Act report filed with the SEC. See SEC Release Nos. 33-8176; 34-47226 (Jan. 22, 2003). The SEC has also confirmed that the reference to filings does not include free writing prospectuses, unless the free writing prospectus is included in or incorporated by reference into a Registration Statement. See SEC, Division of Corporation Finance, Securities Offering Reform Questions and Answers (Nov. 30, 2005).

required to restate its financial statements as if the newly adopted currency had been used since at least the earliest period presented in the filing.

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

The auditors' report issued by the issuer's foreign auditors should be acceptable to the SEC if the auditors are independent[64] of the issuer, have conducted an examination in accordance with auditing standards and practices generally accepted in the United States and are registered with the Public Company Accounting Oversight Board ("PCAOB"). Some procedures required by U.S. auditing standards, such as observation of physical inventory and other field work, may not be customary in certain countries. Advance notice should be given to the issuer's

[64] The independence standards for auditors are contained in Rule 2-01 of Regulation S-X under the 1934 Act. In general, the independence standards (i) prohibit an audit firm, the engagement team or any partner who has provided ten or more hours of non-audit services to the issuer, or any of their immediate family members, from having certain direct and indirect financial relationships with the issuer and from providing certain non-audit services to the issuer (such as bookkeeping, financial information systems consulting, appraisal, management, human resources, or legal services); (ii) require that the issuer's audit committee supervise the engagement of the auditor of its financial statements to provide audit and non-audit services; (iii) require that (a) the lead and concurring audit partners of an issuer's audit team rotate every five years and (b) other audit team engagement partners who provide more than 10 hours of audit, review or attest services for the issuer (excluding, among others, certain "specialty" or "national office" partners who do not have significant ongoing interaction with the issuer's management) or serve as the lead audit partner for any subsidiary of the issuer whose assets or revenues constitute 20% or more of the issuer's consolidated assets or revenues rotate every seven years; (iv) impose a "time out" period of five or two years, in each case depending on the partner's respective role in the audit; (v) make an issuer's employment of former auditor personnel in certain positions involving a financial reporting oversight role inconsistent with independence of that auditor; (vi) prohibit audit partners from receiving compensation from the accounting firm with respect to non-audit services provided to the issuer; (vii) require that the auditor report certain matters to the issuer's audit committee, including the issuer's "critical" accounting policies and practices; and (viii) require disclosure in the issuer's Form 20-F of information related to the audit and non-audit services provided by, and fees paid by the issuer to, the auditor of the issuer's financial statements for each of the two most recent fiscal years, including itemized disclosure of amounts paid to an issuer's principal accountant for audit fees, audit-related fees, tax preparation fees and all other fees. In addition, the PCAOB requires auditors to communicate with the issuer's audit committee in writing, prior to accepting an initial engagement and annually thereafter, about any services the audit firm has provided or is providing that might be reasonably thought to bear on the audit firm's independence. See PCAOB Rule 3526.

The PCAOB also has ethics rules on auditor independence that focus on tax services provided by audit firms, which impose requirements that are clearer and more restrictive than the applicable SEC rules, including a prohibition on contingent fees for tax services. The PCAOB's rules provide, among other things, that an audit firm generally is not independent of an audit client if that firm, or an affiliate of the firm, provides tax services during the audit or professional engagement period to a person in, or an immediate family member of a person in, a financial reporting oversight role at that audit client. This rule is applicable only to tax services provided after April 30, 2007. However, there is an exception that allows a firm that provides prohibited tax services during a portion of the audit period that precedes the professional engagement period, or, in the context of an initial public offering, prior to the engagement of the audit firm, to nevertheless be considered "independent." See PCAOB Rule 3523.

auditors to enable them to comply with these requirements if they do not already do so.[65] SEC standards concerning the independence of auditors are also more stringent than those of many other countries. Issuers should confirm their auditor's independence under SEC standards as soon as an offering is being considered to allow for consultation with the staff of the SEC, if necessary.

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

To assist foreign issuers in resolving conflicting accounting requirements and other procedural matters involved in the registration process, the SEC has established a special staff section for foreign issuers. This section, the Office of International Corporate Finance, often provides guidance to a foreign issuer, its counsel and its investment banker during the course of a public offering. If necessary, an issuer contemplating a U.S. public offering may schedule a preliminary meeting with the SEC staff in advance of filing the Registration Statement. The issuer's U.S. counsel ordinarily assists the issuer in scheduling the meeting and often accompanies the issuer to the SEC. An agenda for the conference or, if the issuer is eligible for confidential SEC review, a preliminary draft of the Registration Statement,[66] should be circulated in advance to the SEC staff.

D. 1934 Act Reporting Requirements

Section 15(d) of the 1934 Act imposes reporting obligations that commence during the fiscal year in which the Registration Statement becomes effective and continue during each fiscal year thereafter until such time as fewer than 300 persons resident in the United States hold of record securities of the same class as the securities to which the Registration Statement relates.[67] For purposes of Section 15(d), ADR holders are considered to hold the shares

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[65] In adopting Item 8 of Form 20-F in 1999, the SEC made clear it would require that foreign audit procedures include all auditing procedures necessary under U.S. auditing standards. See SEC Release Nos. 33-7745 and 34-41936 (Sep. 28, 1999). On September 16, 2008, the SEC approved a new PCAOB auditing standard (Auditing Standard No. 6, Evaluating Consistency of Financial Statements) that updates and clarifies auditor requirements for evaluating the consistency of the issuer's application of U.S. GAAP to better align these requirements with PCAOB standards. See PCAOB Release No. 2008-001 (Feb. 4, 2008) and SEC Release No. 34-58555 (Sep. 16, 2008).

[66] See supra Note 41 and accompanying text.

[67] On March 21, 2007, the SEC adopted rule amendments making it easier for foreign private issuers to terminate their 1934 Act registration and reporting obligations. A foreign private issuer that is listed in its home country is able to terminate its 1934 Act registration (and related reporting obligations) with respect to a class of equity securities if: (i) it has been registered for at least one year, (ii) it has filed all required SEC reports, including at least one annual report, (iii) subject to certain exceptions, it has not offered any securities in an SEC-registered offering in the United States for at least a year, and (iv) the average daily trading volume of its equity securities in the United States in the prior 12 months represented 5% or less of its worldwide average daily trading volume during the same period. An issuer must wait 12 months before terminating its 1934 Act registration if it has terminated any sponsored ADR facility or delisted a class of equity securities from a national securities exchange or inter-dealer quotation system in the United States and the average daily trading volume in the

underlying the ADRs and the relevant class of securities is the class of the underlying shares. For issuers subject to 1934 Act reporting requirements, within four months after the close of each fiscal year, annual reports on Form 20-F must be filed with the SEC.[68] The disclosure requirements for a Form 20-F used as an annual report under the 1934 Act are generally the same as for registration under the 1933 Act.[69] The SEC is not required to review or approve annual reports on Form 20-F before they are filed; however, the SEC does engage in periodic review of annual reports and may provide comments intended to improve the quality of disclosure provided and remedy any possible non-compliance with the requirements of Form 20-F.[70]

In addition to filing annual reports on Form 20-F, foreign private issuers are required from time to time to file a current report on Form 6-K, which requires that the issuer promptly provide to the SEC and to each U.S. stock exchange on which its securities are listed significant information that (i) must be made public in its country of domicile or incorporation pursuant to the law of that country, (ii) is filed with any foreign stock exchange on which its securities are listed and made public by such exchange, or (iii) is distributed to its security holders.[71] All information filed on Form 6-K must be in the English language. Where such information is made public by press releases or communications or materials distributed directly to security holders, an English translation or a summary in English must be furnished if the information is in a foreign language. In all other cases, a brief description in English of such documents is sufficient, unless the issuer has prepared English translations or summaries, in which case such translations or summaries are to be filed.[72] Copies of the original documents

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United States of the underlying securities or the delisted class of securities exceeded 5% of the worldwide average daily trading volume during the 12 months prior to such termination or delisting. The amendments also simplify the manner of counting U.S. holders to make it easier for foreign companies to determine their U.S. shareholder base. See SEC Release No. 34-55540 (Mar. 27, 2007).

68 The four-month deadline for filing the Form 20-F applies to fiscal years ending on or after December 15, 2011. Previously, the filing deadline for the Form 20-F was six months after the end of the issuer's fiscal year. See SEC Release Nos. 33-8959; 34-58620 (Sep. 23, 2008).

69 There are certain limited exceptions for the small number of Canadian MJDS filers eligible to use Item 17. See supra Note 45. In addition, the financial statement requirements of Rule 3-05 and the *pro forma* requirements of Article 11 of Regulation S-X do not apply to annual reports on Form 20-F; foreign private issuers need only provide the financial statements required by Rule 3-09. See supra Note 49. In 2008, the SEC considered and rejected a rule change that would require foreign private issuers to include in their annual reports on Form 20-F the financial statements required by Rule 3-05 and the *pro forma* financial statements required by Article 11 of Regulation S-X for completed acquisitions that are significant at the 50% or greater level. See SEC Release Nos. 33-8900, 34-57409 (Feb. 29, 2008); SEC Release Nos. 34-8959, 34-5866 (Sep. 23, 2008).

70 Section 408 of the Sarbanes-Oxley Act requires SEC review of the filings of each reporting company, including foreign issuers, at least once every three years.

71 Foreign private issuers should consider the list of items required to be reported in Form 8-K (which is applicable only to domestic issuers) in deciding whether particular press releases or home-country filings are significant and which Form 6-K reports should be incorporated into their Registration Statements. In addition, recent remarks by the SEC's Director of the Division of Corporation Finance have indicated that the SEC may be considering revisions to the Form 6-K disclosure regime in light of the fact that many more issuers are using the United States as their primary, rather than secondary, listing jurisdiction, and therefore fewer foreign private issuers have obligations under home country law to make information public. See Meredith Cross, "Keynote Address at PLI – Eleventh Annual Institute on Securities Regulation in Europe" (March 8, 2012), available at http://www.sec.gov/news/speech/2012/spch030812mc.htm.

72 See supra Note 29 for a further discussion of the translation requirements applicable to foreign language documents filed with the SEC.

are not required and the documents included in Form 6-K are not deemed to be "filed" for the purpose of Section 18 of the 1934 Act or otherwise subject to the liabilities of that Section.[73]

E. 1934 Act Registration and the Sarbanes-Oxley Act

As previously noted, a foreign private issuer becomes subject to the periodic reporting requirements of the 1934 Act as a result of its registration of securities under the 1933 Act. A foreign private issuer generally will also be required to register securities under Section 12 of the 1934 Act, and file annual reports on Form 20-F and current reports on Form 6-K, if the issuer lists its securities on a national securities exchange.

Foreign issuers that register securities under the 1933 Act or with securities listed on a national securities exchange are subject to a number of additional requirements as a result of the enactment of the Sarbanes-Oxley Act in 2002, which significantly amended the 1934 Act and the rules and forms thereunder.

1. CEO and CFO Certifications

Pursuant to Section 302 of the Sarbanes-Oxley Act, in connection with the filing of an annual report on Form 20-F,[74] the chief executive officer ("CEO") and chief financial officer ("CFO") of a foreign issuer must certify that:

- he or she has reviewed the report;
- based on his or her knowledge, the report contains no material misstatements or statements made misleading by the omission of material facts;
- based on his or her knowledge, the financial statements and other financial information fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of, and for, the periods presented in the report;
- the CEO and CFO are responsible for establishing and maintaining "disclosure controls and procedures" and internal control over financial reporting[75] and that they have:

[73] Section 18 of the 1934 Act imposes liability on any person who makes a false or misleading statement in any application, report or document filed with the SEC pursuant to that Act. See Part III.F below.

[74] Information included in a Form 6-K is not subject to the certification requirements of Section 302.

[75] "Disclosure controls and procedures" cover both financial and non-financial information, and are defined as controls and other procedures designed to ensure that information required to be disclosed under the 1934 Act is recorded, processed, summarized and reported in a timely and accurate manner. Rules 13a-15 and 15d-15 under the 1934 Act require that all issuers filing reports under the 1934 Act maintain disclosure controls and procedures. These cover all 1934 Act reporting obligations, including requirements to furnish reports on Form 6-K (in the case of foreign private issuers). The disclosure controls and procedures maintained by foreign private issuers should be designed to ensure timely submission of Form 6-K reports and to take into account that information submitted in Form 6-K reports is subject to 1934 Act Rule 12b-20 (which requires that, in addition to the information expressly required to be included in a Form 6-K report, a Form 6-K shall also include such

- designed the disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under their supervision, to ensure that material information about the issuer and its consolidated subsidiaries is made known to them by others within those entities, particularly during the period during which the report is being prepared;

- designed internal control over financial reporting, or caused it to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

- evaluated the effectiveness of the disclosure controls and procedures as of the end of the period covered by the report;

- presented in the report their conclusions about the effectiveness of the controls and procedures based on that evaluation; and

- disclosed in the report any change in the issuer's internal control over financial reporting that occurred during its most recent fiscal quarter (the fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.

- the CEO and CFO, based on their most recent evaluation of internal control over financial reporting, have disclosed to the audit committee and the issuer's auditors:

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

- any fraud (regardless of materiality) involving persons having a significant role in the internal control over financial reporting of the issuer.[76]

Pursuant to Section 906 of the Sarbanes-Oxley Act, in connection with the filing of an annual report on Form 20-F,[77] the CEO and CFO of a foreign private issuer must certify

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further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading).

[76] See Part III.D.2 below.

[77] Form 6-K is event-driven and falls outside the scope of Section 906. See SEC Release Nos. 33-8400 and 34-49424 (Mar. 16, 2004). The SEC has adopted rules that require an issuer to furnish the Section 906 certifications as exhibits to its annual report for those required to be filed after June 30, 2003. See SEC Release Nos. 33-8238 and 34-47986 (June 5, 2003). The release makes clear the SEC's view that Section 906 certifications should be "furnished," rather than "filed," with the SEC. Accordingly, Section 906 certifications

that the report fully complies with the requirements of Section 13(a) or 15(d) of the 1934 Act (as applicable) and that the information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the issuer.[78]

2. Internal Control over Financial Reporting

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

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

In addition, pursuant to Section 404(b) of the Sarbanes-Oxley Act, "accelerated filers" (issuers that have been 1934 Act reporting companies for at least 12 months and have a public float of between U.S. $75 million and U.S. $700 million) and "large accelerated filers" (issuers that have been 1934 Act reporting companies for at least 12 months and have a public float of U.S. $700 million or more),[79] must include a statement that the auditor of the financial statements included in the annual report has issued an attestation report on internal control over financial reporting.[80]

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would not be subject to the civil anti-fraud provisions of Section 18 of the 1934 Act, nor would they be automatically incorporated by reference into an issuer's Registration Statement.

[78] The Sarbanes-Oxley Act contains criminal penalties for false certifications pursuant to Section 906.

[79] Until 2010, "non-accelerated" filers were also required to include the attestation report in their internal control report beginning with annual reports filed for fiscal years beginning on or after June 15, 2010. However, Section 989(g) of the Dodd-Frank Act amended Section 404(c) of the Sarbanes-Oxley Act, eliminating this requirement for "non-accelerated" filers. As a result, the SEC amended Form 20-F to eliminate the auditor attestation requirement for foreign private issuers that are "non-accelerated" filers. See SEC Release Nos. 33-9142, 34-62914 (Sep. 15, 2010).

[80] See SEC Release Nos. 33-8238 and 34-47986 (June 5, 2003). In February 2006 the SEC approved a new auditing standard adopted by the PCAOB (Auditing Standard No. 4, Reporting on Whether a Previously Reported Material Weakness Continues to Exist), which establishes the procedures necessary to allow an auditor, at the issuer's request, to express a formal opinion that a previously reported material weakness in the issuer's internal controls over financial reporting has been corrected without having to complete a new audit of such controls. See PCAOB Release No. 2005-001 (July 26, 2005) and SEC Release No. 34-53227 (Feb. 6, 2006). On June 20, 2007, the SEC adopted rule changes and interpretive guidance relating to reporting on internal control over financial reporting under Section 404 of the Sarbanes-Oxley Act, in a coordinated effort with the PCAOB to improve the implementation of Section 404. The guidance focuses on how management should evaluate the effectiveness of internal controls, and the rules simplify the auditor's report on internal

Although the rules do not specify the method or procedures management should use to assess internal control over financial reporting or prescribe detailed criteria for the content of the report, the report must include disclosure of any material weakness in internal control over financial reporting identified by management and management may not conclude that internal control over financial reporting is effective where one or more material weaknesses exist. The evaluation of internal control over financial reporting should be based on a company's primary financial statements but also should take into account controls related to U.S. GAAP reconciliation.[81] In addition, the SEC has indicated that management may not qualify its conclusions in its internal control report by saying that internal control over financial reporting is effective subject to certain qualifications or exceptions. Also, while the issuer is not required to disclose changes or improvements to internal controls made as a result of preparing for the first management report on internal control over financial reporting, the issuer will be required to identify and disclose any material changes in subsequent periodic reports.

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

First-time registrants that do not qualify to be treated as EGCs are exempt from these rules until their second annual report filed with the SEC. A first-time registrant that is subject to the requirement to include an auditor's attestation report must comply with this requirement at the same time that it furnishes its first management report on internal controls.[82] Issuers that qualify to be treated as EGCs pursuant to the JOBS Act are exempt from the

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controls by eliminating the requirement that the auditors express an opinion on whether management's assessment is fairly stated, establish a safe harbor for management evaluations performed in accordance with the guidance, and change the definition of "material weakness" from "more than a remote possibility" to "a reasonable possibility" that a material misstatement will not be prohibited or detected on a timely basis. See SEC Release Nos. 33-8809 and 34-55928 (June 20, 2007); SEC Release Nos. 33-8810 and 34-55929 (June 27, 2007).

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

81 See SEC, Division of Corporation Finance, Answers to Frequently Asked Questions Concerning Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports (Sep. 24, 2007) available at www.sec.gov/info/accountants/controlfaq.htm.

82 See supra Note 79.

requirements under Section 404(b) of the Sarbanes-Oxley Act as long as they continue to qualify as EGCs.[83]

3. Audit Committee Requirements

The Sarbanes-Oxley Act requires that the SEC mandate that all companies (including foreign private issuers) listed in the United States have a fully independent audit committee. "Independent" in this context, as the SEC has defined the term in Rule 10A-3 under the 1934 Act, means that no member of the audit committee may be an "affiliated person" of the issuer or any subsidiary of the issuer, apart from his or her capacity as a member of the board of directors or any board committee, and may not accept any consulting, advisory or other "compensatory fee" (including fees paid directly or indirectly)[84] from the issuer or any of its subsidiaries, other than in his or her capacity as a member of the board of directors or any board committee (including the audit committee).[85]

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

Rule 10A-3 also includes three exemptions for foreign private issuers from the independence requirements that permit the following persons to sit on the audit committee: (i) any employee who is not an executive officer, if that employee is elected or named to the board of directors or audit committee pursuant to the issuer's governing law or constitutive documents, an employee collective bargaining or similar agreement or other home country legal or listing requirements; (ii) a person that is an affiliate or representative of an affiliate (including a

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83 An issuer that ceases to qualify as an EGC will be required to begin complying with Section 404(b) in its next annual report.

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

85 Section 10A(m)(3) of the 1934 Act. Under Rule 10A-3, the term "affiliate" of, or person "affiliated" with, a specified person means a person that directly or indirectly controls, or is controlled by or is under common control with, the person specified. The term "control" means "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." See Rule 10A-3(e)(4). The rule also provides that persons holding specified positions at an affiliate will themselves be deemed to be affiliates. The specified positions are executive officer, director (if the director is also an employee), general partner and managing member. The adopting release specifies that an outside director or another person with a passive, non-control position, such as limited partner, will not be deemed to be an affiliate. The adopting release also cautions that an affiliate cannot evade the prohibitions in the rule simply by designating a representative or agent that it directs to act in its place. The determination of affiliate status requires a factual analysis based on all the relevant facts and circumstances. Rule 10A-3 contains an explicit safe harbor for audit committee members who are not executive officers or beneficial owners, directly or indirectly, of more than 10% of any class of voting equity securities of the issuer. These persons are deemed not to control the issuer for purposes of the rule. In addition, the rule specifies that the safe harbor does not create a presumption that those outside the safe harbor are affiliates.

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

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

Although Rule 10A-3 does not contain "look-back" requirements with respect to the period before an audit committee member's appointment when determining such member's independence, the enhanced corporate governance standards adopted by the NYSE and NASDAQ apply three-year look back periods to domestic issuers.[86]

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

4. Additional Disclosure Requirements

The Sarbanes-Oxley Act also mandates certain disclosures in annual reports relating to corporate governance practices, namely whether the issuer's audit committee includes an "audit committee financial expert,"[87] whether such person is "independent"[88] and whether or

[86] See NYSE LISTED COMPANY MANUAL §303A.02; NASDAQ STOCK MARKET RULES § 5605(c).

[87] The SEC's rules define an "audit committee financial expert" as a person who has all of the following attributes: (i) an understanding of generally accepted accounting principles and financial statements; (ii) the ability to assess the general application of those principles in connection with the accounting for estimates, accruals and reserves; (iii) experience preparing, auditing, analyzing or evaluating financial statements that

not an issuer has adopted a code of ethics for its CEO and senior financial officers regarding their conduct with respect to the business of the issuer.[89]

In addition, a foreign private issuer listed on the NYSE must disclose any significant ways in which its corporate governance practices differ from those followed by U.S. companies under the NYSE listing standards. Foreign private issuers must disclose these differences in their annual report on Form 20-F.[90] Like NYSE-listed foreign issuers, a foreign private issuer listed on NASDAQ must disclose in its annual report on Form 20-F each corporate governance requirement applicable to NASDAQ-listed companies that it does not follow and describe the alternative home country practice followed in lieu of such requirement.[91]

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present a breadth and level of complexity of accounting issues that are generally comparable to those that can reasonably be expected to be raised by the issuer's financial statements, or experience actively supervising persons engaged in such activities; (iv) an understanding of internal controls and procedures for financial reporting; and (v) an understanding of audit committee functions. See SEC Release Nos. 33-8177 and 34-47235 (Jan. 23, 2003). The instructions to the disclosure requirements state that, in the case of a foreign private issuer, for these purposes the term "generally accepted accounting principles" means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the SEC. The expert must have obtained these attributes through (i) education and experience as a principal financial officer or accounting officer, controller, public accountant or auditor, or experience in one or more positions that involve the performance of similar functions; (ii) experience actively supervising such a person; (iii) experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or (iv) other relevant experience. See also infra Note 149 and accompanying text.

88 A U.S.-listed foreign private issuer must disclose whether its audit committee financial expert is independent, as that term is defined by the U.S. securities exchange or U.S. securities association rules applicable to that issuer. A foreign private issuer not listed or quoted in the United States must disclose the independence of its audit committee financial expert (if it has one) using any of the exchange or association definitions that have been approved by the SEC. Note that while a foreign private issuer not listed or quoted in the United States is not required to have an audit committee pursuant to the requirements of the Sarbanes-Oxley Act, this disclosure requirement will nonetheless apply. If a company does not have an audit committee, the full board of directors is the audit committee under the definition of that term in the Sarbanes-Oxley Act. Accordingly, such a company would be required to provide disclosure concerning the presence of an audit committee financial expert on its board of directors as a whole.

89 In covering CEOs, Item 16B of Form 20-F is broader than Section 406 of the Sarbanes-Oxley Act, which only addresses "senior financial officers."

90 In August 2006, the SEC approved an NYSE rule change that eliminated the previous NYSE requirement that a listed company physically distribute an annual report to shareholders and now requires foreign private issuers to make annual reports available through the company's web site. The web site must include a clear statement in English indicating that any shareholder is entitled to a paper copy of the issuer's audited financial statements (and not the entire annual report) free of charge. The company must also issue a press release at the same time as the web posting of the annual report stating that the annual report has been filed with the SEC and indicating the web site reference and the availability of paper copies of the company's financial statements free of charge. See SEC Release No. 34-54344 (Aug. 21, 2006); NYSE LISTED COMPANY MANUAL § 203.01.

91 NASDAQ STOCK MARKET RULES § 5615-3(B). NASDAQ's disclosure requirement is substantially similar to the NYSE's, except that NASDAQ requires disclosure of "each requirement" that the foreign issuer does not follow, while the NYSE only requires disclosure of "significant ways" in which the foreign issuer's home country corporate governance practices differ from the NYSE's requirements.

Regulation G imposes conditions on the use of non-GAAP financial measures in public disclosures in 1934 Act reports.[92] Rule 100(c) offers an exemption from Regulation G to foreign private issuers with securities listed outside the United States that disclose, outside the United States, non-GAAP financial measures not derived from U.S. GAAP.[93]

5. Other Sarbanes-Oxley Requirements

The Sarbanes-Oxley Act further imposes a number of other duties on, and prohibitions with regard to, the conduct of issuers. The Sarbanes-Oxley Act, among other things, (i) imposes duties on an issuer's lawyers (including in-house lawyers) to report suspected violations of securities laws or fiduciary duties up-the-ladder, including, in certain circumstances, to the issuer's board of directors, (ii) prohibits any issuer, directly or indirectly, from extending or maintaining credit or arranging for the extension of credit, in the form of a personal loan, to or for any director or executive officer of that issuer,[94] (iii) requires the reimbursement to the issuer of incentive or equity-based compensation paid to CEOs and CFOs in the 12 months following the filing of a financial document subject to restatement as a result of "misconduct," and (iv) prohibits officers and directors, or any other person acting under their direction, from taking any action to fraudulently influence, coerce, manipulate or mislead an issuer's independent auditors for the purpose of rendering the issuer's financial statements materially misleading.[95]

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92 A non-GAAP financial measure under Regulation G is defined in the same manner as such a measure under Item 10 of Regulation S-K. There are also a number of prohibitions regarding the manner in which non-GAAP information may be presented, which are subject to limited exemptions for foreign issuers. See supra Notes 59-63 and accompanying text.

93 If the conditions for the exemption are satisfied, the exemption is available even if the information: (i) is included in a written communication released inside and 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 targeted at persons located in the United States; (ii) is accessible by U.S. journalists; (iii) appears on one or more web sites maintained by the issuer, so long as the web sites, taken together, are not available exclusively to, or targeted at, persons located in the United States; and/or (iv) is included in a Form 6-K submitted to the SEC after it is disclosed outside the United States. Many foreign private issuers have a practice of publishing advertisements highlighting their financial results in their home country press and in major U.S. financial newspapers. Because an advertisement in the U.S. press or in the U.S. edition of a foreign newspaper may be viewed as targeting persons located in the United States and thereby violating one of the requirements of Rule 100(c), foreign private issuers that wish to publish advertisements in the U.S. press or the U.S. edition of a foreign newspaper should ensure that any non-GAAP financial measures included in the advertisements comply with Regulation G.

94 The SEC has exempted certain qualifying foreign banks from the insider lending prohibitions of Section 13(k) of the 1934 Act, which was added by Section 402 of the Sarbanes-Oxley Act. The SEC also amended Form 20-F to require foreign bank issuers to disclose "problematic" loans to insiders in a manner that more closely mirrors the disclosure required from domestic banks under Regulation S-K. See SEC Release No. 34-49616 (Apr. 26, 2004). For a detailed description of the requirements related to this exemption, see this Firm's memorandum entitled "SEC Adopts Foreign Bank Exemption from Insider Lending Prohibitions of the Sarbanes-Oxley Act" dated May 7, 2004.

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

F. The Dodd-Frank Act

The Dodd-Frank Act, which was enacted in 2010, requires the SEC to adopt rules regarding a number of requirements applicable to foreign private issuers. The SEC has adopted rules with respect to some of these items and rulemaking with respect to others remains pending, as noted below.

On June 20, 2012, the SEC released its final rules implementing Section 952 of the Dodd-Frank Act, which added Section 10C to the 1934 Act and contain a number of provisions generally relating to the independence of compensation committees of boards of directors and their advisers.[96] Foreign private issuers are generally subject to the final rules implementing Section 952 of the Dodd-Frank Act, except those that disclose in their annual reports the reasons they do not have an independent compensation committee are exempt from the compensation committee independence requirements.[97]

The final rules direct the national securities exchanges to adopt listing standards requiring members of committees that oversee executive compensation (whether or not the committee is formally designated as a compensation committee or performs duties routinely performed by a compensation committee) to be members of the board of directors and to be independent.[98] The rules also direct national securities exchanges to adopt rules requiring a listed issuer to give its compensation committee the authority, exercised in its sole discretion, to retain an independent compensation consultant, legal counsel or other adviser and to provide the compensation committee with sufficient funding for such retention. New Section 10C(b) of the 1934 Act provides that while a compensation adviser is not required to be independent, a listed company's compensation committee must undertake an evaluation of a compensation adviser's independence during the selection process.[99] The final rules also implemented compensation

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[96] See SEC Release Nos. 33-9330, 34-67220 (Jun. 20, 2012). The Dodd-Frank Act did not prescribe a deadline by which the exchanges' listing rules must become effective. The final rules require that each exchange provide to the SEC proposed listing rules or rule amendments consistent with the final rules not later than 90 days after publication of the final rules in the Federal Register and that the proposed listing rules or rule amendments must be approved by the SEC no later than one year after publication of the final rules in the Federal Register. The NASDAQ and the NYSE currently do require compensation committees to be independent and will have to propose further modifications to their rules to comply with the other SEC directives pursuant to the Dodd-Frank Act. See NASDAQ STOCK MARKET RULES 5605(d)(1) & (2) (independence of directors); NYSE LISTED COMPANY MANUAL § 303A.05 (independence standard), § 303A.00 (exemption for foreign private issuers) and § 303A.11 (foreign private issuer disclosure requirements).

[97] See SEC Release Nos. 33-9330, 34-67220 (Jun. 20, 2012).

[98] The final rules direct the national securities exchanges to establish a definition of "independence" taking into account the following factors, which were included in Section 952 of the Dodd-Frank Act: (a) the sources of a compensation committee member's compensation (including consulting, advisory or other compensatory fees paid to the compensation committee member by the issuer) and (b) whether the compensation committee member is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer. The final rules require the listing rules to provide that if a compensation committee member ceases to be independent for reasons beyond the member's control, the member may, with notice by the issuer to the applicable exchange, remain a compensation committee member until the earlier of the next annual meeting of shareholders or one year from the occurrence of the event that caused the member to no longer be independent.

[99] A compensation committee may retain non-independent legal counsel and use in-house counsel or outside counsel retained by the issuer or management and is not required to hire "independent" legal counsel. Other than with respect to in-house counsel, a compensation committee must consider the independence of any

committee consultant conflict of interest disclosure requirements applicable to all reporting companies (whether or not listed on a national exchange) subject to the U.S. proxy rules. Foreign private issuers are exempt from these conflict of interest disclosure requirements.

On August 22, 2012, the SEC adopted rules imposing the following new requirements affecting foreign private issuers, pursuant to the Dodd-Frank Act:

- All issuers will be required to disclose whether gold, wolframite, columbite-tantalite (coltan) or cassiterite, or three derivatives (tin, tantalum and tungsten), are necessary to the functionality or production of their products, and, if they are, whether any of these "conflict minerals" or derivatives originated in the Democratic Republic of the Congo or an adjoining country.[100]

- Issuers involved in the commercial development of oil, natural gas or minerals will be required to disclose any non-*de minimis* payments made by or on behalf of the issuer to the U.S. or any other government in connection with such activities, including the types and amounts of each payment, the aggregate payments to each government and the project of the issuer to which the payments relate.[101]

In addition, the Dodd-Frank Act provides that if any issuer (including a foreign private issuer) operates mines that are subject to oversight by the Mine Safety and Health Administration, the issuer will be required to disclose certain information regarding health and safety violations at those mines. Under the Dodd-Frank Act, this disclosure obligation became effective July 21, 2010 without further action by the SEC.[102]

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adviser from which it obtains advice, including outside counsel retained by the issuer or management. The final rules extend the requirement to consider the independence of a compensation adviser to individual directors responsible for a compensation committee's typical duties.

[100] Dodd-Frank Act § 1502. If any of the "conflict minerals" used by the issuer or its suppliers did originate in the Democratic Republic of the Congo or adjoining countries, the issuer will be required to submit to the SEC a Conflict Minerals Report as an exhibit to Form SD that includes, among other information, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of those "conflict minerals" and a description of any products manufactured or contracted to be manufactured with such "conflict materials," along with an independent private sector audit of the report. The rules adopted by the SEC on August 22, 2012 to implement the Dodd-Frank Act provisions regarding conflict minerals require issuer compliance for the calendar year beginning January 1, 2013 and the first reports are due May 31, 2014. See SEC Release No. 34-67716 (Aug. 22, 2012) and infra Note 159 and accompanying text. For more information on these new requirements, see this Firm's memorandum entitled "SEC Adopts Disclosure Rules on Conflict Minerals," dated September 12, 2012.

[101] Dodd-Frank Act § 1504. The rules adopted by the SEC require disclosure of such payments even if it conflicts with host country law. Disclosure relating to resource extraction payments will be filed on Form SD. See SEC Release No. 34-67717 (Aug. 22, 2012) and infra Note 160 and accompanying text. For more information on the new requirements for resource extraction payments disclosure, see this Firm's memorandum entitled "SEC Adopts Disclosure Rules on Resource Extraction Payments," dated September 12, 2012.

[102] Dodd-Frank Act § 1503. On December 21, 2011, the SEC adopted rules to "facilitate consistent compliance" with the currently applicable Dodd-Frank Act provisions regarding mine safety reporting. See SEC Release Nos. 33-9286, 34-66019 and infra Note 151 and accompanying text.

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

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

1. Beneficial Ownership Reporting

Persons who are directly or indirectly beneficial owners of more than five percent of any class of voting equity securities registered under Section 12 of the 1934 Act will be required to file reports under Sections 13(d) and 13(g) of that Act.[103] Regulation 13D-G under that Act generally requires each such person (or group of persons acting together for the purpose of acquiring, holding, voting or disposing of securities), within ten days[104] after the five percent threshold is crossed, to file a report on Schedule 13D with the SEC and send copies to the issuer and relevant exchanges. Schedule 13D requires substantial disclosure regarding the identity of the acquirer, the source and amount of funds used to acquire the securities, the purpose of the acquisition, the amount and percentage of securities held by the acquirer, and related details about the acquirer's involvement with the securities.

Certain investors, however, are permitted to report their beneficial ownership positions on the less burdensome Schedule 13G. For example, certain types of regulated institutional investors, such as U.S. banks and broker-dealers (or their foreign counterparts),[105] that have acquired the securities in the ordinary course of their business without the purpose or effect of changing or influencing the control of the issuer may qualify, under certain circumstances, to file a report on Schedule 13G within 45 days after the end of the calendar year in which the acquisition occurred. In addition, other, non-regulated investors that acquire beneficial ownership of less than 20% of a class of securities and that hold such securities without the purpose or effect of changing or influencing the control of the issuer may qualify to file under Schedule 13G within 10 days of such acquisition. Furthermore, investors that crossed the five percent threshold before the equity securities in question were registered under the 1934 Act are permitted to file on Schedule 13G rather than Schedule 13D, and such filing must be made within 45 days after the end of the calendar year in which the securities were registered under the 1934 Act. Investors that have acquired less than two percent of the relevant class of

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

[104] The Dodd-Frank Act authorizes the SEC to shorten this ten-day reporting period. As of the date of this memorandum, the SEC had not used this new authority. See Dodd-Frank Act, § 929R(a).

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

voting equity securities during the preceding 12 months also may report their beneficial ownership, when it exceeds five percent, on Schedule 13G within 45 days after the end of the calendar year in which their ownership position first exceeds five percent.

2. Tender Offers

Tender offers in the United States for the shares of issuers whose securities are registered under Section 12 of the 1934 Act generally are subject to the tender offer provisions of Section 14 of that Act. These provisions set certain requirements for the terms and timing of, and disclosure regarding, tender offers to purchase a class of securities from its holders and, together with other provisions of the 1934 Act (see Part III.F below), generally prohibit fraudulent, deceptive or manipulative acts in connection with such purchases.

There are two significant exemptions to the tender offer rules applicable to securities of foreign private issuers. The "Tier I exemption" provides that tender offers for the securities of foreign private issuers, whether for consideration of cash or securities, are exempt from the tender offer rules if 10% or less of the class of securities subject to the tender offer is owned by U.S. persons. In making this computation, the securities held by the bidder are excluded from the outstanding securities of the class (i.e., such securities are excluded from both the numerator and the denominator). The "Tier II exemption" provides more limited relief from the tender offer rules to accommodate practices outside the United States. The Tier II exemption applies in circumstances where the target company is a foreign private issuer and 40% or less of the class of securities subject to the tender are owned by U.S. holders.[106]

Repurchases of securities that do not constitute a tender offer may nonetheless give rise to concerns that those repurchases resulted in the manipulation of the price of the issuer's securities. To avoid these concerns, issuers repurchasing their securities should consider doing so pursuant to Rule 10b-18 under the 1934 Act.[107]

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[106] When the SEC adopted these tender offer exemptions in January 2000, it also adopted two exemptions from 1933 Act registration of securities issued to holders of securities of foreign private issuers in exchange offers, business combinations and rights offerings, if, in each instance, U.S. ownership is 10% or less. For more information about the SEC rules affecting cross-border tender offers, exchange offers, business combinations and rights offerings, see Chapter 7 of U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS (10th ed. 2011), written by current and former partners of this Firm.

[107] Rule 10b-18 under the 1934 Act provides issuers and their affiliated purchasers with a safe harbor from liability under anti-manipulation provisions of the 1934 Act, including Rule 10b-5 thereunder, when they repurchase the issuer's common stock on the open market in accordance with the Rule's restrictions. In November 2003, the SEC adopted amendments to Rule 10b-18 that (i) shorten the time period in which issuers meeting minimum average daily trading volume and public float thresholds must be out of the market prior to the scheduled close of trading to qualify for the safe harbor, (ii) apply a uniform price condition, regardless of where an equity security is traded, and (iii) modify the treatment of block purchases in applying the Rule's volume limitation and calculating a security's average daily trading volume. Failure to meet any one of the manner, timing, price and volume conditions will disqualify the issuer's purchases from the safe harbor for that day. The SEC did not adopt a proposed change that would have extended the Rule to cover issuer repurchases effected in markets outside the United States. See SEC Release Nos. 33-8335 and 34-48766 (Nov. 10, 2003). The SEC has subsequently clarified that foreign trading volume should be disregarded when calculating the average daily trading volume of a security. See SEC, Division of Market Regulation, Answers to Frequently Asked Questions Concerning Rule 10b-18 ("Safe Harbor" for Issuer Repurchases) (May 18, 2004). In addition, Form 20-F requires disclosure of all issuer repurchases of any class of equity securities registered under Section 12 of

3. Books and Records

Pursuant to Section 13(b)(2) of the 1934 Act, any issuer that has registered a class of equity securities under Section 12 of that Act or otherwise has a periodic reporting obligation under the 1934 Act, and its subsidiaries (domestic or foreign), must maintain accurate books and records and an adequate system of internal controls.[108] Section 30A of the 1934 Act also prohibits any such issuer from using the mails or any means or instrumentality of interstate commerce (which includes communication between the United States and any foreign country) to make payments to foreign officials, foreign political parties or candidates for foreign political office for the purpose of corruptly influencing actions or decisions by them in order to assist the issuer in obtaining or retaining business for or with, or directing business to, any person.

H. Civil Liabilities under the 1933 Act and the 1934 Act

Various provisions of the 1933 Act and the 1934 Act prohibit manipulation or fraud in connection with securities transactions. Under Section 11 of the 1933 Act, any person who purchases a security covered by a Registration Statement has a private right of action, if at the time the Registration Statement became effective[109] it contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, against (i) the issuer, (ii) its principal executive officer, its principal financial officer and its principal accounting officer, (iii) its duly authorized representative in the United States[110], (iv) every person who is, or who consented to be named as a person who is about to become, a director at the time the Registration Statement became effective, (v) every accountant, engineer, appraiser or other professional person who has with his consent been named as having prepared or certified any part of the Registration Statement, and (vi) every underwriter of the security. Section 11(a) provides that a person who purchases securities after an earnings statement covering a period of at least 12 months beginning after the effective date of the Registration Statement has been made available must prove that he acquired the securities in reliance on a materially false or misleading statement in the Registration Statement in order to have a right of recovery under Section 11. Accordingly, it is customary for

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the 1934 Act, whether or not the repurchases are effected in accordance with Rule 10b-18. Disclosure is required regardless of whether the issuer has repurchased the shares themselves or ADRs that represent the underlying shares.

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

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

[110] Section 6(a) of the 1933 Act provides that the Registration Statement of a foreign private issuer must be signed by a duly authorized representative of such issuer in the United States.

a foreign issuer to agree in the underwriting agreement (see Part V.A below) to make generally available to its security holders such an earnings statement (which must include a reconciliation to U.S. GAAP, if the issuer's financial statements are presented in accordance with accounting principles used in the issuer's home country other than IFRS as issued by the IASB). The filing of a Form 20-F is one method of satisfying the requirements of this provision.[111]

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

Thus, officers, directors and underwriters must exercise "due diligence" with respect to the preparation of the Registration Statement. They may not avoid liability by relying solely upon counsel or some other person to prepare the Registration Statement. If the issuer has made provision for the indemnification of its officers and directors, these arrangements must be disclosed in the Registration Statement. Any indemnification by the issuer of the underwriters or their controlling persons against liability under the securities laws must also be disclosed in the Prospectus.[112]

In addition, under Section 12(a)(2) of the 1933 Act, the purchaser of a security has a right of action for damages or rescission against the person who offered or sold the security to him by means of any prospectus or oral communication containing a material misstatement or omission (unless the purchaser was aware of the misstatement or omission). Section 12(a)(2)

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[111] Rule 158 under the 1933 Act.

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

provides the seller with a "due diligence" defense, although one couched in somewhat different terms from that of Section 11: the seller is not liable if he can prove that "he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission."

Rule 159 under the 1933 Act, which was adopted as part of the Securities Offering Reform, provides that information conveyed to an investor *after* the time of sale should not be taken into account in determining whether the information conveyed to an investor *at* the time of sale (including any free writing prospectus) was materially deficient under Section 12(a)(2) of the 1933 Act.[113] The determination of whether information has been conveyed to an investor at or prior to the time of sale is a facts and circumstances test, though the SEC, in the adopting release for the Securities Offering Reform, has confirmed that the correct standard to apply is what information is "reasonably available" to the investor and not what the investor "truly knew."[114]

One of the most significant anti-fraud and anti-manipulation provisions of the U.S. securities laws (although one that requires proof of scienter—i.e., that the defendant engaged in willful misconduct or at least acted recklessly) appears in the 1934 Act. Section 10(b) of the 1934 Act forbids the use of any "manipulative" or "deceptive" device in connection with the purchase or sale of any securities. Rule 10b-5 prohibits the use of any device, scheme or artifice to defraud; the making of any untrue statement of a material fact or the omission of a material fact necessary to make the statements made not misleading; or the engaging in "any act, practice or course of business" that would operate to deceive any person in connection with the purchase or sale of any securities. Under Rule 10b-5, the issuer and its employees or agents may be liable for disseminating false or misleading information or suppressing material information about the issuer, whether or not the issuer or any of its employees or agents purchased or sold any securities. Such liability can be based on information filed in a registration statement or report filed with the SEC (including on Form 6-K), or upon public statements issued by the company.[115]

Press releases and other public information should, therefore, be carefully reviewed prior to release.[116] Furthermore, liability may arise under Rule 10b-5 from "insider"

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[113] For these purposes, the SEC states in the adopting release that a "sale" (including a contract of sale) occurs at the time an investment decision is made. See SEC Release Nos. 33-8591 and 34-52056 (July 19, 2005).

[114] See SEC Release No. 33-8591, 34-52056 (July 19, 2005). To date, the SEC has not provided any safe harbors for determining when information is "reasonably available," but we believe that the SEC's own emphasis on the integrated disclosure system makes it clear that information contained in 1934 Act reports filed electronically with the SEC is "reasonably available." However, pending further judicial or regulatory guidance, it would be prudent to make use of the free writing prospectus rules to communicate to investors information that is clearly material that is added to the public record shortly before the time of sale.

[115] In addition, without having alleged fraud or recklessness tantamount to fraud as would be required under Rule 10b-5, the SEC has cited Rule 12b-20 under the 1934 Act as the basis for a proceeding against a foreign private issuer and one of its executives for allegedly providing materially misleading information in a filing on Form 6-K. Rule 12b-20 requires that periodic reports include any additional information "as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading." This proceeding is discussed in greater detail in this Firm's memorandum entitled "Memorandum Regarding SEC's Sony Proceeding" dated August 13, 1998.

[116] An SEC administrative ruling, In re E.ON AG, demonstrates the extent to which 10b-5 liability can attach to foreign private issuers. See SEC Release No. 34-43372 (Sep. 28, 2000). In re E.ON AG involved management

trading in securities while material information remains undisclosed.[117] Insiders should not trade when a material event (including a proposed financing or acquisition) is developing but is not yet ripe for disclosure. A corporate insider also may be held liable for the actions of persons to whom he discloses material non-public information, even though the insider has not personally profited.[118]

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denials that merger discussions between two German companies were occurring when in fact they were. E.ON AG asserted that the denials were not a violation of German law. Moreover, while one of the parties was listed on the NYSE, U.S. investors held only a small number of its shares. Both companies were persuaded that a no-comment policy would be construed by the German press as a confirmation that talks were going on, and premature disclosure would have jeopardized the eventual merger. The SEC ruled that denying the merger discussions was false and therefore constituted a violation of Rule 10b-5. E.ON AG subsequently adopted a no-comment policy, as have most other German companies publicly traded in the United States.

[117] Rule 10b-5 creates a general prohibition on trading when the person or entity trading is "aware" of material nonpublic information. See SEC v. Adler, 137 F.3d 1325, 1337-39 (11th Cir. 1998). In 2000, the SEC adopted Rule 10b5-1, which sets forth two affirmative defenses to liability in circumstances where it is clear that a trade was not made "on the basis of" the material nonpublic information. The first affirmative defense provided by Rule 10b5-1(c)(1)(i) applies if: (i) a person had, before becoming aware of material non-public information (a) entered into a binding contract to purchase or sell the securities; (b) provided instructions to another person to purchase or sell the securities; or (c) adopted a written plan for trading the securities; (ii) the contract, instructions or plan: (a) specified the amount of, price of and date on which the securities were to be purchased or sold; (b) provided a written formula or computer program for determining the amount of, price of and date on which the securities were to be purchased or sold; or (c) did not permit the person to exercise any subsequent influence over how, when or whether to effect purchases or sales of the securities, and no person exercising such influence was aware of the material nonpublic information when doing so; and (iii) the purchase or sale occurred pursuant to the contract, instruction or plan. For example, an issuer operating a repurchase program need not specify with precision the amounts, prices and dates on which it will repurchase its securities. Rather, it could adopt a written plan, when it is not aware of material nonpublic information, that uses a written formula to derive amounts, prices and dates. Or the plan could simply delegate all the discretion to determine amounts, prices and dates to another person who is not aware of the information, provided that the plan did not permit the issuer to (and the issuer in fact did not) exercise any subsequent influence over the purchases or sales. The second affirmative defense, provided by Rule 10b5-1(c)(2), is based on the existence of effective information barriers and generally relied on by securities professionals, such as broker-dealers. It negates entity liability for insider trading where the entity can demonstrate that (i) the individual making a decision to trade on behalf of the entity was not aware of material nonpublic information and (ii) the entity had implemented reasonable policies and procedures, taking into consideration the nature of its business, to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information. These policies and procedures may include those that restrict any purchase, sale, and causing any purchase or sale of any security as to which the entity has material nonpublic information, or those that prevent such individuals from becoming aware of such information. See 17 C.F.R. § 240.10b5-1; SEC Release Nos. 33-7881 and 34-43154 (Aug. 15, 2000).

[118] In 2000, the SEC adopted Regulation FD (Fair Disclosure), which prohibits issuers from selectively disclosing material nonpublic information to market professionals and holders of the issuer's securities under circumstances in which it is reasonably foreseeable that the security holders will trade on the basis of the information. See SEC Release Nos. 33-7881 and 34-43154 (Aug. 15, 2000). Although Regulation FD does not apply to foreign private issuers, such issuers should continue to avoid selective disclosure of material nonpublic information out of concern for potential liability under Rule 10b-5. In addition, both the NYSE and NASDAQ require that listed companies make prompt disclosure of material information similar to that required by Regulation FD, through any Regulation FD-compliant method (or combination of methods). See NYSE LISTED COMPANY MANUAL §202.06(A) and NASDAQ STOCK MARKET RULES § 5250(b)(1). For guidelines regarding communications between management and securities analysts in light of applicable case law and Regulation FD, see this Firm's memorandum entitled "Communication with Financial Analysts and Related Disclosure Issues" dated January 1, 2012.

Regulation M under the 1934 Act generally makes it unlawful for participants in a distribution of securities to purchase any such security, or any securities of the same class or series, from a specified date — ordinarily either one or five business days (depending on the trading characteristics of the securities being offered) — prior to the commencement of the offering (i.e., after pricing) until completion of the distribution. The prohibition extends to underwriters, the issuer, any selling stockholders and certain of their respective affiliates. There are certain exemptions, including for the underwriters generally in the case of distributions of actively traded securities and for specified stabilizing transactions by underwriters, and the SEC may grant additional exemptions upon application.[119]

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

- Giving the SEC the authority to freeze possible "extraordinary payments" to directors, officers, agents and employees during the course of an investigation involving "possible" violations of the U.S. federal securities laws;

- Giving the SEC the authority to bar persons from serving as directors or officers of public companies in cease and desist proceedings;

- Creating a new securities fraud crime with respect to public companies that does not contain a purchase or sale requirement, and simply prohibits defrauding any person (or attempting to do so) in connection with any security of an issuer, with violators subject to fines and imprisonment of up to 25 years;

- Increasing maximum prison terms for mail and wire fraud and violations of the 1934 Act; and

[119] In December 2004, the SEC proposed amendments to Regulation M that would, among other things, extend the restricted period for initial public offerings beyond the current five-day period, prohibit the conditioning or "tying" of an allocation of shares to an agreement to buy shares in another offering or to payment of excessive commissions to the underwriters, enhance transparency of syndicate covering bids, prohibit the use of penalty bids, institute a record-keeping requirement with respect to the existing *de minimis* exception and adjust certain dollar value thresholds for inflation. See SEC Release Nos. 33-8511 and 34-50831 (Dec. 9, 2004). To date the proposed rule has not been adopted. In addition, in June 2007 the SEC modified Rule 105 of Regulation M. Rule 105 previously prohibited a person from effecting a short sale in a security during a specified period prior to the pricing of a registered offering of the same class of securities and then purchasing securities in the offering to cover that short sale. Rule 105 now provides instead that any purchase in an offering of equity securities by a person who had effected a short sale as described above would be prohibited (even if the purchase is not for the purpose of covering the prior short sale). Two exceptions exist. First, there is an exception for a person who established a short position that it closes out in a *bona fide* transaction prior to pricing. A *bona fide* transaction is a purchase of shares that equals or exceeds the quantity of shares in the short sale. In addition, the transaction must occur during regular banking hours, must be reported, and must occur between the last Rule 105 short sale and 30 minutes prior to the end of the last business day before the day of pricing. Second, there is an exception for a person who makes a Rule 105 short sale and a purchase through separate accounts, provided that such separate accounts are managed separately and without coordination or cooperation. This exception is likewise available to investment companies registered under Section 8 of the Investment Company Act of 1940, even if an affiliated investment company (or fund in the same family) made a Rule 105 short sale. See SEC Release No. 34-56206 (Aug. 6, 2007).

- Enacting a broad new "anti-shredding" prohibition and sweeping new obstruction of justice offenses (not limited to document destruction).

In addition, the recently-enacted Dodd-Frank Act:

- Grants the SEC the power to impose civil penalties on persons or companies (or their directors, officers or employees) for violations of the 1933 and 1934 Acts. Prior to the adoption of the Dodd-Frank Act, the SEC could request that such penalties be imposed through a court proceeding, but could not do so directly;

- Provides United States federal courts with jurisdiction to hear cases brought by the SEC or other agencies of the United States government under the anti-fraud provisions of the 1933 and 1934 Acts that involve conduct (i) within the United States that constitutes significant steps in furtherance of a violation of those provisions, even if the securities transaction occurs outside the United States and involves only foreign investors and (ii) outside the United States, if that conduct would have a foreseeable substantial effect in the United States[120];

- Establishes that persons who "knowingly" or "recklessly" provide substantial assistance to conduct that violates the anti-fraud provisions of the 1933 or 1934 Acts can be criminally or civilly liable for such conduct;

- Extends the statute of limitations for criminal violations of the 1933 and 1934 Acts from five years to six years.

IV. Other Legal Considerations

A. State "Blue Sky" and "Legal Investment" Requirements

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

[120] This provision was adopted in response to the U.S. Supreme Court's decision in Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010). In Morrison, the Supreme Court overturned the Second Circuit's test for when Section 10(b) (and, by extension, Rule 10b-5) of the 1934 Act applied to conduct or transactions that occurred outside the United States. Prior to Morrison, the Second Circuit had held that Section 10(b) of the 1934 Act extended to "wrongful conduct that had a substantial effect in the United States or upon United States citizens" or "wrongful conduct [that] occurred in the United States." SEC v. Berger, 322 F.3d 187, 192-193 (2d Cir. 2003). Morrison found the Second Circuit's standard overly broad, and instead held that Section 10(b) of the 1934 Act applies only to securities transactions that occur in the United States or transactions in securities that are listed on a securities exchange in the United States. Morrison, 130 S. Ct. at 2886. The Dodd-Frank Act restores the earlier, broader Second Circuit test with respect to actions brought by the SEC or other U.S. government agencies, but it left the Supreme Court's more restrictive standard in place for private suits brought under the 1934 Act while the SEC studies whether private suits should also be subject to the broader standard.

The National Securities Markets Improvement Act of 1996 ("NSMIA") amended Section 18 of the 1933 Act to provide for federal preemption of any state laws and regulations requiring registration of securities or securities transactions that apply to a "covered security." Among other categories, a covered security includes a security that is listed, or authorized for listing, on the NYSE, the American Stock Exchange ("AMEX"), NASDAQ (including NASDAQ Capital Market), the Philadelphia Stock Exchange, the Chicago Board of Trade Exchange or the International Securities Exchange or a security of the same issuer that is equal or senior in rank to a security so listed or authorized for listing. For the most part, this language tracks that of the current exemption under the Uniform Securities Act of 1956 (the "1956 USA") adopted by most states, which provides an exemption from securities registration for stock exchange listed and blue chip securities.[121] Accordingly, no notice filings, sales reports or filing fee requirements may be imposed by the states in connection with an offering of listed securities.[122]

If the offered securities are not listed, other exemptions from individual state securities registration requirements may be available in certain instances, e.g., when sales within a state will be made exclusively to certain classes of institutional investors.[123]

Typically, legal counsel for the underwriters is responsible for obtaining approval of the necessary state securities registrations, and the issuer is responsible for paying the fees of underwriters' counsel for blue sky work, any state filing fees and for executing individual state registration forms. If federal preemption under NSMIA does not apply and no other state exemption is available, securities registration applications must be filed with the state regulators. Generally, the application for registration in any state includes a uniform state application form, a copy of the Registration Statement and exhibits thereto, a consent to service of process and payment of a fee ranging from $100 to $2,000 depending upon the aggregate dollar amount of securities registered in the state.

The extent of the state regulators' review of the registration or filing materials submitted varies widely. Many states have adopted a standard of review that differs from the SEC's "full disclosure" requirements. In these states, the securities commissioner may deny registration if the offering is determined to be unfair, unjust or inequitable. Generally, these states have adopted regulations and policies which establish standards that an issuer must meet if

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[121] This preemptive provision does not, however, include rights to purchase listed securities as does the 1956 USA listing exemption. The new version of the Uniform Securities Act (2002) (the "2002 USA") specifically exempts covered securities that are listed and warrants or subscription rights with respect to such securities. As of the date of this memorandum, 17 states and the U.S. Virgin Islands have adopted the 2002 USA.

[122] Federal preemption of state securities registration applies to any security that is a covered security or will be a covered security upon completion of the transaction. Accordingly, preemption will apply as long as the offered securities are approved for listing prior to the effective date of the Registration Statement.

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

its offering is to be considered "fair" and appropriate as an investment for the state's residents. These standards include (i) a prohibition against offering a class of equity securities with no voting rights or rights unequal to other classes of outstanding shares, (ii) limitations on the maximum underwriting commissions and other selling expenses that may be incurred by the issuer in connection with the offering, (iii) limitations on the amount of securities that may be covered by options issued or to be issued to management and underwriters, (iv) limitations on the price-earnings ratio of the securities offered, (v) a prohibition against loans to management, and (vi) limitations on securities issued to management for a consideration less than the public offering price.

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

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

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

B. Tax Considerations

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

deduction allowed to corporate holders of equity securities but may qualify for the special 15% maximum tax rate applicable to individuals.

Many countries impose a withholding tax on dividends paid to non-residents. It is not customary for foreign issuers to provide any gross-up for such withholding taxes. However, U.S. holders may be entitled to credit such taxes against their U.S. income tax liability, subject to the limitations and conditions generally applicable for U.S. tax purposes in determining the availability and amount of foreign tax credits. The United States has entered into tax treaties with most of its major trading partners under which the rate of withholding tax that may be imposed on payment of dividends is limited, generally to 15% for portfolio investors. The marketability of ADRs in the United States may be enhanced to the extent that an issuer makes arrangements with the Depositary for expedited procedures for claiming a reduced rate of withholding and any other benefits to which a U.S. holder is entitled under a tax treaty.[124]

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

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

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

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

V. Underwriting Arrangements and Listing

A. Underwriting Agreement

Public offerings of securities in the United States generally are made through a syndicate of underwriters led by one or more managing underwriters.[125] The underwriting agreement, which defines the relationship between the issuer and the underwriters, is prepared in preliminary form by counsel for the underwriters and filed with the Registration Statement. It is not finalized until the "pricing" of an offering, when the issue price, underwriters' compensation and other final terms are fixed. At that time the agreement is signed by the manager or managers on behalf of the underwriting group.

Typically, the underwriters agree to purchase the offered securities on a specified closing date, generally three business days after pricing.[126] Each underwriter is responsible to the issuer only for its individual underwriting commitment. The underwriting agreement also includes various representations and warranties by the issuer regarding its legal status and financial condition, and a covenant by the issuer to indemnify the underwriters in respect of liabilities that may arise out of any inaccuracy or incompleteness of the information contained in the Registration Statement. The agreement also describes in detail the conditions to be fulfilled by the issuer prior to the closing, including delivery of legal opinions, officers' certificates and the accountants' "comfort" letters.[127]

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[125] On June 19, 2012, Congressman Darrell Issa sent a letter to Mary Schapiro expressing concern about the underwriting process in the Facebook IPO and other IPOs, in particular with respect to the ability of underwriters to set non-market-based prices for shares and regulatory impediments to the ability of underwriters and issuers to conduct "price discovery" by communicating with retail investors during the quiet period. See Letter from Darrell Issa, Chairman of the H. Comm. on Oversight and Gov. Reforms to Mary Schapiro, Chairman of the Securities and Exchange Commission (Jun. 19, 2012). In addition, the Wall Street Journal has reported that the chairman of a subcommittee of the Senate Banking Committee suggested that regulatory changes to the 1933 Act regime may be needed to restore investor confidence in the underwriting process following the IPO of Facebook. Jean Eaglesham, *Lawmakers Push for Overhaul of IPO Process*, WALL ST. J., June 21, 2012, at A1.

[126] The three-business day settlement period, effective as of June 7, 1995, is consistent with settlement requirements for securities traded generally in the United States. See Rule 15c6-7 under the 1934 Act. If pricing occurs after the U.S. markets close (which is typical in equity deals), settlement generally will occur on the fourth business day after pricing.

[127] It is also customary in U.S. public offerings for the issuer to grant the underwriters the authority to overallot (i.e., to offer and sell more securities than the underwriters have contracted to purchase from the issuer on a "firm" basis), so the underwriters can ensure that there are purchasers ready to accept resales of shares that the underwriters purchase in the market as a result of stabilization. In order to protect the underwriters in circumstances in which the shares purchased as a result of stabilization are not sufficient to cover the short position created through overallotments, the issuer typically will grant them a so-called "overallotment option," also called a "green shoe option." The overallotment option generally allows the underwriters, for a period beginning with the execution of the underwriting agreement and ending 30 days after the closing date, to purchase from the issuer, at the public offering price less the commissions provided for in the underwriting agreement, up to 15% of the shares (or ADRs) being offered but solely for the purpose of covering any overallotments.

Rule 5110(f)(2)(J) of the FINRA Securities Offering and Trading Standards and Practices prohibits the receipt by FINRA members in a firm commitment underwriting of an overallotment option relating to more than 15% of the securities being offered, without taking into account the securities offered pursuant to the overallotment

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

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

It is advisable that the ADRs publicly offered in the United States be listed on a U.S. national securities exchange such as the NYSE or NASDAQ,[128] to provide a secondary trading market for the ADRs with readily available quotations, in U.S. dollars, based on actual trades. The listing requirements and procedures of the NYSE and NASDAQ are outlined in Appendix B. As discussed in Parts III.D and III.E above, before any securities can be admitted to trading on a national securities exchange, the issuer must file with the SEC a 1934 Act registration statement covering such securities and the SEC must declare this registration statement effective (independently of the effectiveness of the Registration Statement). Once a Registration Statement under the 1933 Act has become effective and the NYSE or NASDAQ has approved listing, registration of ADRs under the 1934 Act generally becomes effective concurrently with the Registration Statement.[129]

As a result of recent corporate governance failures, both the NYSE and NASDAQ have adopted more stringent corporate governance standards than those previously applicable. Not all of these standards, however, apply to foreign issuers. The NYSE and NASDAQ have generally exempted foreign issuers from their corporate governance standards to the extent those standards exceed the requirements of the Sarbanes-Oxley Act. Both the NYSE and the NASDAQ, however, require a foreign issuer to disclose any significant ways in which its corporate governance practices differ from the relevant listing standards.[130] In addition, any foreign issuer whose shares are listed on a national securities exchange is required to disclose in its annual report filed on Form 20-F any significant differences between its corporate governance practices and those followed by domestic companies under the listing standards of the securities exchange.

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option. The FINRA staff has indicated that it interprets this rule as prohibiting FINRA members participating in a firm commitment global offering from being allocated overallotment option securities in excess of 15% of the aggregate amount of securities registered with the SEC in the global offering, regardless of the number of securities actually sold by such members.

128 On August 1, 2006 NASDAQ became a self-regulatory organization in its own right that is responsible for its own and its members' compliance with the federal securities laws, and is no longer subject to supervision and control by FINRA.

129 In 2004, NASDAQ began to permit issuers with securities listed on the NYSE to also apply to list those securities on NASDAQ. See 69 Fed. Reg. 8253 (Feb. 23, 2004) (citing the repeal of NYSE Rule 500 as the catalyst for NASDAQ's dual listing initiative and noting that NASDAQ intends for the initiative to foster competition among markets and benefit investors and shareholders by increasing liquidity, reducing execution time and narrowing spreads).

130 See supra Notes 90-91 and accompanying text.

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APPENDIX A
Outlines of Forms Used in Registration[131]

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

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

Certain portions of the Prospectus, including the cover page and the section entitled "Risk Factors," are required to be drafted in "plain English." The SEC's plain English rules generally require the use of simplified sentence structure, non-technical language and the active voice.

For fiscal years ending on or after December 15, 2011, the deadline for filing the 20-F is four months after end of the issuer's fiscal year.[132]

1. Registration Statement on Form F-1

Part I of the Registration Statement on Form F-1 includes the following:

Item 1. Forepart of Registration Statement and Outside Front Cover Page of Prospectus. Pursuant to Item 501 of Regulation S-K, these sections must contain such basic information as the approximate date of the proposed offering, the issuer's name (and, if not in English, an English translation), the title, amount and a brief description of the securities offered, including price, underwriting discounts and commissions, and net proceeds to the issuer; and cross-reference to and identification of the risk factors section, including the page number where it appears in the Prospectus.

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

Item 3. Summary Information, Risk Factors, and Ratio of Earnings to Fixed Charges. Pursuant to Item 503 of Regulation S-K, the Prospectus, if lengthy or complex, must include a summary of the information it provides. The summary, which must be written in plain

[131] As of the date of this report, the SEC has not yet amended Form 20-F to reflect all of the scaled-down disclosure requirements applicable to EGCs under the JOBS Act, including with respect to financial statements. However, the staff of the SEC has indicated that foreign private issuers may proceed as if these scaled disclosure requirements have been incorporated in Form 20-F. See SEC Division of Corporation Finance, "JOBS Act FAQ," supra Note 14.

[132] Previously, an issuer was required to file Form 20-F within six months of the end of its fiscal year. See SEC Release Nos. 33-8959; 34-58620 (Sep. 23, 2008).

English, should provide a brief overview of the key aspects of the offering. The Prospectus must also include the address and telephone number of the principal executive offices of the issuer, a statement of any special risk factors concerning the issuer and the offering, and if debt or preferred equity securities are being registered, a statement of the ratio of earnings to fixed charges for the issuer.

Item 4. Information With Respect to the Registrant and the Offering. All of the information required by Part I of Form 20-F (as described below) is to be provided in the Prospectus itself, as well as the information required by Item 18 of Form 20-F.[133]

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

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

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

* * *

Part II of the Registration Statement on Form F-1 ("Information Not Required in Prospectus") includes the following:

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

[133] MJDS filers may still use Item 17 of Form 20-F.

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

Item 8. Exhibits and Financial Statement Schedules. Form F-1 requires that the issuer furnish the financial schedules mandated by the SEC's Regulation S-X.[134] In addition, a list of all exhibits filed with the Registration Statement, as required by Item 601 of Regulation S-K, must be provided. For Form F-1, these include:

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

(b) copies of plans of acquisition, reorganization, arrangement, liquidation, or succession;

(c) copies of the issuer's charter and by-laws or corresponding instruments;

(d) instruments defining the rights of security holders, including indentures;

(e) an opinion of counsel as to the legality of the securities being registered;[135]

(f) an opinion of counsel, or revenue ruling from the Internal Revenue Service, supporting statements made in the filing concerning tax consequences to shareholders, if material;

(g) any voting trust agreements and amendments thereto;

(h) copies of every contract of the issuer, material to the issuer or referred to in the Prospectus, made other than in the ordinary course of business within two years prior

[134] First-time adopters of IFRS and EGCs and foreign private issuers that prepare their financial statements in accordance with U.S. GAAP filing their initial registration statement are required to present only two years of financial statements instead of three (with three years of balance sheet information required for foreign private issuers that are first-time adopters of IFRS). See supra Notes 48 to 52 and accompanying text.

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

to the Registration Statement or to be performed in whole or in part at or after the filing of the Registration Statement;[136]

(i) statements of computation of per share earnings and any required ratios;

(j) where applicable, a letter from the independent accountant acknowledging awareness of the use in a Registration Statement of unaudited interim financial statements;

(k) a list of the names of subsidiaries of the issuer and the jurisdiction of incorporation or organization of each;

(l) copies of consents required to be filed and of any powers of attorney (for any name signed pursuant to a power of attorney);

(m) a statement of eligibility and qualification of each person designated to act as a trustee under an indenture to be qualified under the Trust Indenture Act of 1939; and

(n) any additional exhibits the issuer may wish to file or any document incorporated by reference in the filing that is not otherwise required.

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

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

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

2. Registration Statement on Form F-3

Part I of the Registration Statement on Form F-3 includes the following:

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

Item 6. Incorporation of Certain Information by Reference. For Form F-3 the issuer need only incorporate by reference: (i) its most recent Form 20-F filed with the SEC, and (ii) if securities of the same class have been registered under the 1934 Act, the description of this class of securities contained in a registration statement filed under the 1934 Act, including amendments updating this description. The issuer must state that all subsequent filings on Form 20-F prior to termination of the offering shall be deemed incorporated by reference into the Prospectus. The issuer may also incorporate by reference its filings on Form 6-K if they contain interim financial statements or other information that otherwise would have to be included in the Prospectus.[137]

* * *

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

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

(b) copies of plans of acquisition, reorganization, arrangement, liquidation, or succession;

(c) instruments defining the rights of security holders, including indentures;

(d) an opinion of counsel as to the legality of the securities being registered;[138]

(e) an opinion of counsel, or revenue ruling from the Internal Revenue Service, supporting statements made in the filing concerning tax consequences to shareholders, if material;

(f) where applicable, a letter from the independent accountant acknowledging awareness of the use in a Registration Statement of unaudited interim financial statements;

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[137] However, filings on Form 6-K may not be incorporated by reference if they contain non-GAAP financial measures that would not be permitted to be included in a 1933 Act filing. See supra Notes 59-63 and accompanying text. Issuers may incorporate only the portion of the Form 6-K that does not include non-GAAP financial measures. See SEC Compliance and Disclosure Interpretations: Non-GAAP Financial Measures, Question 106.02 (Jan. 15, 2010).

[138] See supra Note 135.

(g) copies of consents required to be filed and of any powers of attorney (for any name signed pursuant to a power of attorney);

(h) a statement of eligibility and qualification of each person designated to act as a trustee under an indenture to be qualified under the Trust Indenture Act of 1939; and

(i) any additional exhibits the issuer may wish to file or any document incorporated by reference in the filing that is not otherwise required.

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

3. Annual Report on Form 20-F

Part I of Form 20-F includes the following:

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

In addition, the issuer must certify:

(a) whether it is a well-known seasoned issuer as defined in Rule 405 under the 1933 Act;

(b) whether the issuer is required to file reports under Section 13 or 15(d) of the 1934 Act, and if so, whether it has filed all such required reports;

(c) whether the issuer has posted on its corporate website, if any, all interactive data files required under Rule 405 of Regulation S-T during the preceding 12 months (or period required, if shorter);[139]

(d) whether the issuer is an accelerated, a large accelerated, or a non-accelerated filer as defined in Rule 12b-2 under the 1934 Act;

(e) whether the basis of accounting for its financial statements is U.S. GAAP, IFRS, or "Other," and if "Other" is the basis of accounting for its financial statements, whether it has chosen to provide financial statements pursuant to Item 17 or Item 18 of the form; and

(f) in the case of an annual report, whether the issuer is a shell company as defined in Rule 12b-2 under the 1934 Act.

[139] To date, XBRL taxonomy has not been released for issuers presenting financial statements under IFRS or non-U.S. GAAP, and therefore those issuers have not yet been required to post interactive data files. See supra Note 28.

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

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

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

Item 3. Key Information. This four-part item requires the issuer to summarize key information about the issuer's financial condition, capitalization, reasons for the offering and risk factors. Part (a) requires disclosure of selected income statement and balance sheet data of the issuer and, in certain cases, its predecessor, for the five most recent years (or three most recent years if five years of information is impossible or unduly burdensome to provide)[140] and for any interim period for which financial statements are required.[141] This part also requires exchange rate disclosure for the five years and any interim period where the financial statements are not prepared in U. S. dollars. Part (b) requires a statement of capitalization and indebtedness as of a date within 60 days prior to filing (and does not apply to annual reports). Part (c) requires an estimate of the net amount of proceeds to be realized from the offering and the intended use thereof (and does not apply to annual reports). Part (d) requires disclosure of risk factors.

Item 4. Information on the Company. The issuer must provide information about its business operations and the products or services it provides. This item requires information

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[140] Any foreign private issuer submitting its first SEC registration statement or annual report under IFRS, and any foreign private issuer that presents its financial statements under U.S. GAAP and is a first-time filer, may provide only two years of selected financial data. See supra Note 48. In addition, an EGC need only present two years of selected financial data for its initial registration statement, see supra Note 56, and in subsequent annual reports and registration statements, is only required to present selected financial data through the earliest audited period presented in connection with its first registration statement.

[141] If the issuer chooses to provide any non-GAAP financial information, it must also provide (i) a presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP, (ii) a quantitative reconciliation between the GAAP measure and the non-GAAP measure in question; (iii) a statement explaining why management believes the non-GAAP measure provides useful information regarding the issuer; and (iv) to the extent material, any additional purposes for which management uses the measure. There are also a number of prohibitions regarding the manner in which non-GAAP information may be presented, which are subject to limited exemptions for foreign issuers. See supra Notes 59-63 and accompanying text.

concerning the issuer's history; a description of the issuer's operations and its principal activities, markets, suppliers, sources, competitive position and seasonality; organizational structure; and information regarding any material tangible fixed assets, including leased property, plant and equipment as well as information about size, use, capacity, improvements, financing, and environmental issues with respect to such property. This item requires disclosure responsive to any of the SEC's industry guides applicable to the issuer.

Item 4A. Unresolved Staff Comments. This item, which was added by the Securities Offering Reform as of December 1, 2005, requires the issuer to disclose the substance of any written comments made by the SEC staff regarding its periodic filings under the 1934 Act not less than 180 days before the end of the fiscal year to which the Form 20-F relates that the issuer believes are material and that remain unresolved at the time the Form 20-F is filed. The disclosure may include the position of the issuer with respect to any such comment.

Item 5. Operating and Financial Review and Prospects. This item requires a discussion of the financial condition, changes in financial condition and results of operations for each year and interim period for which financial statements are required.[142] It calls for disclosure corresponding to what historically has been provided as management's discussion and analysis ("MD&A") of financial condition and results of operations, including with respect to the issuer's U. S. GAAP reconciliation.[143] This item also requires disclosure of off-balance sheet arrangements that may have a current or future material effect on the issuer's financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources, and certain tabular information about specified contractual obligations.[144]

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[142] Because first-time adopters of IFRS and EGCs filing their initial registration statement are required to provide only two years of financial statements, the MD&A will only cover the prior two fiscal years and any subsequent interim periods. See supra Note 134.

[143] Each Registration Statement and Form 20-F is required to contain an MD&A section for the periods covered by the financial statements included in the filing, including interim periods. The MD&A section is intended to permit investors to look at the issuer "through the eyes of management." Concept Release on Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-6711 (Apr. 17, 1987). The section places particular emphasis on the future prospects of the issuer by providing narrative disclosure of information necessary to assess the issuer's financial condition and operating results. For a description of SEC guidance on MD&A, see this Firm's memorandum entitled "SEC Issues Interpretive Guidance on MD&A" dated January 21, 2004.

[144] In 2010, the SEC proposed an amendment to Form 20-F that would require expanded disclosure on "short-term borrowings," which was intended to address concerns that some issuers may have engaged in "window dressing" by engaging in transactions in securities at the end of reporting periods in order to change the appearance of their balance sheet. The proposed amendment would define "short-term borrowings" as amounts payable for short-term obligations that are (i) funds purchased and securities sold under agreements to repurchase; (ii) commercial paper; (iii) borrowings from banks; (iv) borrowings from factors or other financial institutions and (v) any other short-term borrowings reflected on the issuer's balance sheet. Issuers would be required to include tabular disclosure of short-term borrowings, including period-end and average amounts and weighted average interest rates for each category of borrowing, as well as a narrative discussion of short-term borrowings, including a description of arrangements, the importance of short-term borrowings and the reasons for fluctuations and material differences during the fiscal year. The SEC also indicated that it is considering a requirement that issuers disclose their leverage ratio. See SEC Release Nos. 33-9143, 34-62932 (Sep. 17, 2010). The SEC has not yet acted on this proposal. Concurrently with the proposed rules, the SEC issued an interpretive release highlighting the need for issuers to provide adequate disclosure of their liquidity and capital

Item 6. Directors, Senior Management and Employees. This item requires disclosure of the name, business experience, function, outside business activities, date of birth, share ownership and compensation (including pursuant to stock bonus or option plans) of directors and senior management of the issuer. Compensation information must be provided on an individual basis, unless individual disclosure is not required in the issuer's home country.[145] The issuer also must disclose any arrangement or understanding between a director or executive officer and any other person pursuant to which he was selected as a director or executive officer, and any family relationship between any director or executive officer and any other director or executive officer. In addition, information regarding board terms and committees (including the audit committee, or board of auditors where relevant) and the total number of persons employed by the issuer, broken down by category and geographic location, must be disclosed. In particular, an issuer listed or quoted in the United States must disclose whether its entire board of directors is acting as the company's audit committee.

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

Disclosure of transactions and the key terms thereof, including loans, between the issuer and directors, major shareholders, key management personnel, unconsolidated affiliates or by enterprises owned or controlled (with 10% ownership giving rise to presumptive control) by directors, major shareholders or key management also is required.[146]

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

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

Item 9. The Offer and Listing. The issuer must provide information regarding the offer or listing of the securities and the plan for their distribution. The information that must be provided includes the expected price of the offering[147]; the manner of determining the offering

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resources, including the impact of short-term financings on liquidity, and clarifying the SEC's existing policy on disclosure of leverage ratios. See SEC Release Nos. 33-9144, 34-62934 (Sep. 17, 2010).

[145] On July 26, 2006, the SEC adopted new rules requiring U.S. companies to disclose detailed information on the company's compensation for its named executive officers and directors in a new CD&A section of the company's annual report on Form 10-K (which generally is incorporated by reference to the company's proxy statement). These rules do not apply to foreign private issuers.

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

[147] The SEC has informally indicated that price ranges of $2.00, or of 10% if the expected price is over $20 per share, would be acceptable to the SEC, and that issuers that request flexibility to provide for a wider range of prices should be prepared to provide an analysis of economic conditions that support such additional flexibility.

price if there is no established market for the securities; the price history of the securities; the markets on which they trade; the type and class of the securities being offered; and dilution. For annual reports disclosure is required only for price history and trading markets.

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

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

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

Item 12. Description of Securities Other than Equity Securities. This item consists of a description of the securities being registered (other than equity securities), and does not apply to annual reports. If the securities registered are ADRs, the information must include: (i) the name of the Depositary and the address of its principal office; (ii) the title of the ADRs and the identity of the deposited security; (iii) the amount of deposited securities represented by one ADR; (iv) the procedure for voting the deposited securities (if any); (v) the collection and distribution of dividends; (vi) the transmission of notices and reports received from the issuer; (vii) the sale or exercise of rights; (viii) the deposit or sale of securities resulting from dividends or reorganization; (ix) the amendment, extension or termination of the deposit; (x) rights of ADR holders to inspect the transfer books of the Depositary and list of ADR holders; (xi) restrictions upon the right to deposit or withdraw the underlying securities; and (xii) any limitation upon the liability of the Depositary. Any direct or indirect fees or charges payable by ADR holders to the Depositary, as well as any fees or other direct or indirect payments made by the Depositary to the issuer, must also be disclosed.

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Part II of Form 20-F includes the following:

Item 13. Defaults, Dividend Arrearages and Delinquencies. The issuer must identify any of its or its subsidiaries' indebtedness exceeding 5% of the issuer's or its

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

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

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

Items 15(b), (c) and (d) require a management report on internal control over financial reporting, a related attestation report of the auditor, and any changes in internal control over financial reporting identified in connection with the evaluation that occurred during the period covered by the Form 20-F that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting. The requirement to disclose changes in the issuer's internal control over financial reporting occurring during the period that materially affected, or are reasonably likely to materially affect, such internal control, currently applies to all issuers. If the issuer has not filed an annual report with the SEC for the past fiscal year and was not required to do so pursuant to Section 13 or 15(d) of the 1934 Act (i.e., because the issuer is making its initial public offering), it need not comply with Items 15(b) or 15(c), but instead must include the following statement in its first annual report: "This annual report does not include a report of management's assessment regarding internal control over financial reporting or an attestation report of the company's registered public accounting firm due to a transition period established by rules of the Securities and Exchange Commission for newly public companies."[148]

[148] Certain issuers are exempt from portions of this requirement. See supra Notes 79 to 81 and accompanying text. EGCs are exempt from delivering an attestation report pursuant to Section 404(b) of the Sarbanes-Oxley Act. See supra Notes 82 to 83 and accompanying text.

Item 16A. Audit Committee Financial Expert. If the Form 20-F is being used as an annual report, the issuer must disclose whether it has at least one "audit committee financial expert" serving on its audit committee and, if so, the name of the expert. If an issuer does not have an audit committee financial expert, it must disclose this fact and explain why it has no such expert.[149]

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

Item 16C. Principal Accountant Fees and Services. If the Form 20-F is being used as an annual report, the issuer must disclose, with certain specified breakdowns for audit fees, audit-related fees, tax fees and other fees, the aggregate fees billed in each of the prior two fiscal years for products and services provided by the issuer's independent auditor, and other information relating to fee approval.

Item 16D. Exemptions from the Listing Standards for Audit Committees. If the Form 20-F is being used as an annual report for a fiscal year ending on or after July 31, 2005, the issuer must disclose whether it has relied on any of the exemptions from the listing standards for audit committees that are required to be disclosed by Rule 10A-3 of the 1934 Act.

Item 16E. Purchases of Equity Securities by the Issuer and Affiliated Purchasers. Item 16E requires disclosure of all repurchases of shares (or other units) of any class of the issuer's equity securities[150] that is registered under Section 12 of the 1934 Act by or on behalf of the issuer or any affiliated purchaser.

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[149] Note that while a foreign private issuer not listed or quoted in the United States is not required to have an audit committee pursuant to the requirements of the Sarbanes-Oxley Act, this disclosure requirement will nonetheless apply. If a company does not have an audit committee, the full board of directors is the audit committee under the definition of that term in the Sarbanes-Oxley Act. Accordingly, such a company would be required to provide disclosure concerning the presence of an audit committee financial expert on its board of directors as a whole. See also supra Note 87 and accompanying text.

[150] The term "equity securities" has a different meaning for U.S. issuers and non-U.S. issuers. For the corresponding disclosure required of U.S. issuers in Form 10-K and Form 10-Q, "equity securities" has the definition set forth in Section 3(a)(11) of the 1934 Act, while for purposes of Form 20-F, "equity securities" is defined in General Instruction F to Form 20-F. As a result, U.S. issuers will be required to disclose repurchases of convertible debt securities, while non-U.S. issuers will not. Section 3(a)(11) defines "equity security" as "any stock or similar security; or any security future on any such security; or any security convertible, with or

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

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

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

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

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

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without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the [SEC] shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security." Under General Instruction F to Form 20-F, equity security "includes common or ordinary shares, preferred or preference shares, options or warrants to subscribe for equity securities, and any securities, other than debt securities, which are convertible into or exercisable or redeemable for equity securities of the same company or another company." (Emphasis added.)

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

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

Item 16H. Mine Safety Disclosure. In connection with the passage of the Dodd-Frank Act in 2010, the SEC has added a new Item 16H to Form 20-F, effective January 27, 2012, which requires disclosure of mine safety violations in the United States. Issuers may determine the format in which they wish to present the disclosure, although the SEC has provided a sample tabular presentation.[151]

* * *

Part III of Form 20-F includes the following:

Items 17 and 18. Financial Statements. Most foreign private issuers are required to present financial statements that comply with Item 18. Under Item 18, the financial statements must be in essentially the same format as financial statements included in a filing on Form 10-K, the counterpart of Form 20-F for U.S. domestic corporations. They may be presented in accordance with accounting principles other than those generally accepted in the United States or IFRS, but in such cases the issuer must provide a numerical reconciliation of the differences between financial statement amounts presented in accordance with the foreign generally accepted accounting principles and those presented in accordance with U.S. GAAP (except that for first time registrants the numerical reconciliation of net income is required only for the two most recent fiscal years and any required interim period). This numerical reconciliation must be set forth on the face of, or in the notes to, the financial statements.[152]

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[151] The Dodd-Frank Act has required disclosure of mine safety violations in all annual reports filed on Form 20-F since July 21, 2010, but did not specify where this disclosure should be included. The SEC added Item 16H to Form 20-F to "facilitate consistent compliance with this requirement." Effective January 27, 2012, the SEC amended Regulation S-K and Form 20-F. in response to the Dodd-Frank Act. The amendments limit disclosure of mine safety violations to mines located in the United States and clarify that disclosure is required on a mine-by-mine basis; disclosure of violations is not permitted on an aggregate or regional basis. However, the SEC has noted that to the extent that mine safety issues present concerns that should be addressed in other areas of the annual report, such as risk factors, the description of the business, legal matters or MD&A, issuers should include such additional disclosure. The amendments as adopted do not require issuers to disclose mine safety data in XBRL format. See SEC Release Nos. 33-9286, 34-66019 (Dec. 21, 2011).

[152] In 2007, the SEC adopted amendments to Form 20-F to permit foreign private issuers filing a Form 20-F for their first year of reporting under IFRS to file two years rather than three years of financial statements. See SEC Release Nos. 33-8567 and 34-51535 (Apr. 12, 2005); SEC Release Nos. 33-8879 and 34-57026 (Dec. 21, 2007) and supra Note 52.

Item 17 has been phased out for foreign private issuers other than Canadian MJDS filers. Item 17 is less stringent than Item 18, as it allows the omission of many items (including segment data) ordinarily required to be disclosed in financial statements presented in accordance with the SEC's Regulation S-X.[153] Items 17 and 18 are identical in all other respects.

The SEC has begun phasing in a requirement that issuers provide financial statements to the SEC in interactive data (XBRL) format. XBRL is an interactive data format that makes an issuer's financial statements machine-readable so they can be downloaded, analyzed and compared using certain software applications. Issuers that are required to provide financial statements in XBRL format will be required to prepare two versions of its financial statements. The first version will consist of financial statements in ASCII or HMTL format as they are filed today, and will be included directly in the 20-F. The second version will be the XBRL version, which will be filed as an exhibit to the 20-F. This requirement currently applies to Form 20-Fs filed by large accelerated filers using U.S. GAAP. All remaining issuers that use U.S. GAAP must provide financial statements in XBRL for Form 20-Fs filed for fiscal years ending on or after June 15, 2011.[154] Issuers that are required to present their financial statements in interactive data format must also post their financial statements on their website in interactive data format, and the financial statements must remain there for at least 12 months.[155] Issuers that use IFRS as issued by the IASB are not required to provide financial statements in XBRL format until the SEC releases an IFRS taxonomy,[156] while foreign private issuers that continue to use home-country accounting standards and reconcile to U.S. GAAP are not required to provide financial statements in XBRL.

Item 19. Exhibits. The issuer must provide a list of the exhibits filed as part of the Form 20-F, including exhibits incorporated by reference. Where the Form 20-F is being used as an annual report, the certifications to be provided by the CEO and CFO pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act must be filed and furnished, respectively, as exhibits.[157]

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

4. Form SD: Specialized Disclosure Report

Rather than amending Form 20-F to implement Sections 1502 and 1504 of the Dodd-Frank Act relating to "conflict minerals" and resource extraction payments by issuers, the SEC

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153 Nevertheless, an issuer reporting under IFRS may be required to include segment financial information, in which case such information must be included in the financial statements included in accordance with Item 17. See supra Note 46.

154 In recognition of the additional compliance burden, the SEC has provided that each issuer will have a 30-day grace period to file the interactive data for the first set of their financial statements that are required to be filed in interactive data format. In addition, for the first year that the interactive data format applies to each issuer, such issuer will only have to fully tag the face of the financial statements at the individual data element level; notes to the financial statements will only have to be tagged as block text.

155 For more information on filing financial statements in XBRL format, see this Firm's memorandum entitled "SEC Adopts Rules Requiring Filing of Financial Statements in Interactive XBRL Format" dated February 14, 2009.

156 See supra Note 28.

157 See supra Notes 74-78 and accompanying text.

has created a new Form SD for this disclosure. Disclosure on Form SD is considered to be "filed" rather than "furnished" for purposes of 1934 Act liability.

Conflict Minerals. Form SD requires disclosure regarding whether "conflict minerals" (gold wolframite, columbite-tantalite (coltan) or cassiterite, or three derivatives) are necessary to the functionality or production of their products, and, if they are, whether any of these "conflict minerals" originated in the Democratic Republic of the Congo (the "DRC") or an adjoining country. Issuers subject to reporting obligations with respect to these conflict minerals must conduct a "reasonable country of origin" inquiry to determine whether any of these conflict minerals originated in the DRC or any adjoining countries. If an issuer is able to determine that none of its conflict minerals originated in the DRC or adjoining countries, it is required to disclose that determination and the process used to reach it in its report on Form SD, and to post this information on its website for at least one year and retain records regarding the origin of its conflict minerals and its inquiry process.

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

The conflict minerals disclosure for each calendar year must be filed annually, with the first reports due on May 31, 2014 and a temporary transition period of two-to-four years[158] during which issuers may describe their products as "DRC conflict undeterminable";[159]

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

The reporting obligations encompass providers of services that are "directly related to the commercial development" of oil, natural gas or minerals, but do not apply to manufacturers or distributors of products, equipment or services ancillary to extractive industries, such as manufacturers of drill bits and providers of oil and gas transportation services.

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[158] The rule as adopted provides for a temporary transition period of two years for all issuers and four years for "smaller reporting companies," as defined in Rule 12b-2 under the 1934 Act. See SEC Release No. 34-67716 (Aug. 22, 2012).

[159] See id.; see also this Firm's memorandum entitled "SEC Adopts Disclosure Rules on Conflict Minerals" (Sep. 12, 2012).

"Payments" include single payments or a series of related payments equal to or exceeding $100,000 paid to further the commercial development of oil, natural gas or minerals, and include taxes, royalties, fees, production entitlements, bonuses, dividends and infrastructure improvement payments. Importantly, the SEC's rule would not exempt issuers that are subject to confidentiality obligations (either by law or contract) with respect to extractive industries payments.

Issuers subject to these rules must file resource extraction payments disclosures in tabular format on Form SD and in an XBRL annex no later than 150 days after the end of the fiscal year for fiscal years ending on or after September 30, 2013 (a partial report covering only payments made after September 30, 2013 is permitted for fiscal years beginning before that date).[160]

[160] See SEC Release No. 34-67717 (Aug. 22, 2012) and this Firm's memorandum entitled "SEC Adopts Disclosure Rules on Resource Extraction Payments" (Sep. 12, 2012).

APPENDIX B

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

I. New York Stock Exchange

Under U.S. securities law and the rules of the NYSE, all corporate securities must be registered under the 1934 Act before being admitted to trading on the NYSE. A foreign private issuer qualifies to list its securities on the NYSE if it satisfies certain eligibility requirements. In addition, for ADRs to qualify for listing, the ADRs must be sponsored by the foreign private issuer.[161] The NYSE encourages companies seeking to list their securities on the NYSE to obtain informal approval on the basis of a confidential preliminary review of eligibility. The formal listing application can be filed at any time within six months after such approval.

In order to make U.S. equity markets more accessible to foreign private issuers, the NYSE has adopted special standards and procedures for the listing of shares (or ADRs) of foreign private issuers where there is a broad, liquid market for their shares in their home country. The principal criteria include distribution and size requirements that require the foreign private issuer to have, worldwide, a minimum of 5,000 holders[162] of 100 or more shares, and a minimum of 2.5 million shares held publicly having a market value of at least $100 million.[163,164] The alternate listing standards for foreign private issuers also require the issuer to meet one of the following three financial standards (determined under U.S. GAAP or IFRS) based on earnings, operating cash flow or global market capitalization:

(i) to have pre-tax earnings from continuing operations, after minority interest, amortization and equity in the earnings or losses of investees and as adjusted for certain

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[161] Historically, the NYSE required that holders of sponsored ADRs receive without charge such services as cash and stock dividend payments, transfer of ownership and distribution of company financial statements and notices. However, on May 25, 2006, the NYSE amended its rules to eliminate restrictions on ADR depositary dividend and servicing fees, noting that the restrictions adversely affected the NYSE's competitive position relative to other exchanges and quotation systems that did not limit these fees. See SEC Release No. 34-53978 (June 13, 2006). Nonetheless, the ability of the Depositary to charge these fees to ADR holders is governed by the terms of the relevant deposit agreement, which, in the case of some older agreements, may not allow the Depositary to charge these fees and, accordingly, will require an amendment to reflect the rule change. Foreign private issuers with a sponsored ADR facility are required to disclose in their annual report on Form 20-F the fees the Depositary charges to investors, as well as payments, if any, made by the Depositary to the issuer (including payments for expenses of the issuer that are reimbursed by the Depositary). See Section II above.

[162] Determined on the basis of beneficial ownership (if known) in addition to holders of record.

[163] In connection with initial public offerings, the NYSE will accept an undertaking from the underwriters that the offering will meet the NYSE's standards set forth in the clearance letter issued after preliminary review of eligibility of the foreign private issuer by the NYSE.

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

specified items,[165] which totals $100 million in the aggregate for the last three years (with a minimum of $25 million in each of the most recent two years);[166] or

(ii) for companies with a total worldwide market capitalization of not less than $500 million and revenues (in the most recent 12-month period) of $100 million, to have aggregate operating cash flow (calculated in accordance with NYSE specifications) for the last three years of at least $100 million (with a minimum of $25 million, as adjusted for certain specified items, in each of the two most recent years); or

(iii) to have not less than $750 million in total worldwide market capitalization (with not less than $75 million in revenues in the most recent fiscal year).

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

A foreign private issuer can also elect to qualify under the NYSE's domestic listing standards, which impose substantially less stringent financial tests but require a minimum of (i) 400 U.S. holders of 100 shares or more (or of a unit of trading if less than 100 shares), or (ii) 2,200 total U.S. stockholders and average monthly U.S. trading volume of 100,000 shares during the most recent six months, or (iii) 500 total U.S. stockholders and average monthly U.S. trading volume of 1 million shares during the most recent 12 months and a minimum of 1.1 million shares publicly held in the United States with a market value of at least $40 million in the case of companies that list at the time of their initial public offerings[167], or $100 million for other

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[165] These adjustments include non-operating adjustments for currency devaluations when associated with translation adjustments representing a significant devaluation of a country's currency (but not those associated with normal currency gains or losses).

[166] Reconciliation to U.S. GAAP for the third year would only be required if the NYSE determines it is necessary to demonstrate the $100 million threshold is satisfied.

[167] The NYSE recently clarified that this includes both initial public offerings and "Initial Firm Commitment Underwritten Public Offerings," which is defined as an offering of common stock (i) by a company that has a class of common stock registered under the 1934 Act, (ii) that has not been listed on a national securities exchange since the commencement of its current registration and (iii) that is the company's first public offering involving a firm commitment underwriting since the commencement of its current registration. The NYSE has indicated that it will nevertheless apply the higher $100 million threshold for companies engaging in Initial Firm Commitment Underwritten Public Offerings if there is significant trading volume in the company's

companies, excluding shares held by directors, officers, their immediate families or 10% or greater shareholders[168], and a minimum share price of $4.[169] Under the domestic listing standards, the NYSE also requires companies to meet one of five alternative financial standards (determined under U.S. GAAP) based on earnings, operating cash flow or global market capitalization, as follows:

> (i) to have aggregate pre-tax earnings from continuing operations, after minority interest, amortization and equity in the earnings or losses of investees and as adjusted for certain specified items, over the last three years of $10 million in the aggregate together with $2 million in the two most recent fiscal years and positive amounts in all three years, or at least $12 million in the aggregate together with a minimum $5 million in the most recent fiscal year and $2 million in the next most recent fiscal year; or
>
> (ii) for companies with a global market capitalization of not less than $500 million and revenues (in the most recent 12-month period) of $100 million, to have aggregate operating cash flow (calculated in accordance with NYSE specifications) for the last three years of at least $25 million (with each year reporting positive cash flow amounts);
>
> (iii) to have not less than $750 million in total worldwide market capitalization (with not less than $75 million in revenues in the most recent fiscal year);
>
> (iv) for companies that have a parent or affiliated company listed on the NYSE, to have not less than $500 million in total worldwide market capitalization, not less than $60 million in public market value, and an operating history of at least 12 months; or
>
> (v) to have not less than $150 million in total worldwide market capitalization, total assets of $75 million and total stockholders' equity of $50 million.

The NYSE requires issuers whose securities are listed on the exchange to comply with certain financial reporting and corporate governance policies. In November 2003, the NYSE introduced Section 303A to its Listed Company Manual, implementing several of the corporate governance standards that had been proposed to the SEC the previous year. Foreign private issuers are generally exempt from compliance with those new requirements (except with respect to the independent audit committee and audit committee financial expert requirements mandated by the Sarbanes-Oxley Act) provided they disclose any significant way in which their

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securities in the over-the-counter market prior to listing, or if the company has previously registered in one or more 1933 Act registration statements the sale of significant numbers of shares of the class that the company proposes to list, unless there is evidence that subsequent trading has been very limited. See SEC Release No. 34-61407 (Jan. 14, 2010); NYSE LISTED COMPANY MANUAL §102.01(B).

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

[169] The NYSE has historically calculated the $4 minimum share price based on the price of an ADR, rather than the underlying shares. As a result, companies that fail to maintain the $4 minimum share price based on underlying shares may set the shares per ADR ratio such that it complies with the listing standards, and may subsequently adjust this ratio through amendments to their deposit agreement if the need arises.

corporate governance practices differ from those followed by domestic companies under NYSE standards. Until 2009, this disclosure was required to be made in a brief, general summary on the issuer's web site (provided it is in the English language and accessible from the United States) or in its annual report. Recently, however, the NYSE amended its rules to require that a foreign private issuer that files an annual report on Form 20-F include this disclosure in their annual report.[170] All other foreign private issuers (e.g., those that file their annual report on Form 40-F or Form 10-K) may either include this disclosure in their annual report that is filed with the SEC or make it available on the issuer's website and refer to the website in the annual report filed with the SEC. Foreign private issuers' CEOs must promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any non-compliance with any applicable corporate governance standard.[171] In addition, foreign private issuers are required to submit to the NYSE (i) annual written affirmations (with respect to, among other things, compliance with Section 303A and the composition and governance structure of the company's audit and, for domestic issuers, nominating and compensation committees) and (ii) interim written affirmations (with respect to, among other things, changes in director independence determinations and audit and, for domestic issuers, nominating and compensation committees, and compliance with Section 303A).[172]

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

The NYSE requires a foreign private issuer to post its annual report on Form 20-F on its web site, include a prominent undertaking in English on its web site to provide holders the ability, upon request, to receive a hard copy of the audited financial statements (and not the complete annual report) free of charge, and issue a press release stating the Form 20-F has been filed with the SEC specifying the company's web site address and the ability to request a hard copy of the financial statements.[173] In 2008, the NYSE amended this rule to eliminate the press release requirement for any foreign private issuer that provides audited financial statements to beneficial holders of its shares in a manner consistent with the physical or electronic delivery requirement set forth in the proxy rules applicable to domestic issuers (i.e., by delivering a physical copy of the issuer's annual report and financial statements to stockholders and offering stockholders the ability to receive future reports in electronic format, as provided in Rules 14a-3 and 14a-16 under the 1934 Act).[174] Foreign companies that, pursuant to foreign law or practice,

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

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

172 See NYSE LISTED COMPANY MANUAL §303A.12(c). The NYSE has published the annual written affirmation form on its web site at http://usequities.nyx.com/sites/corporate.nyx.com/files/final_fpi_annual_wa_1_4_10.pdf.

173 See SEC Release No. 34-54344 (Aug. 21, 2006).

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

do not issue quarterly reports may issue interim earnings reports only semiannually and still be eligible for NYSE listing.[175]

A foreign private issuer must also quickly release to the public certain information that could reasonably be expected to have a material effect on the market for its securities and act promptly to dispel unfounded rumors that result in unusual market activity or price variations, as well as publish interim statements of earnings as soon as they become available.[176] Information divulged pursuant to these rules should be released by means of a method that complies with Regulation FD. Issuers are encouraged, although not required, to comply with these rules by issuing press releases, which should be given to Dow Jones & Company, Inc., Reuters Economic Services and Bloomberg Business News. Issuers are also encouraged to send the press releases to the Associated Press, United Press International, and newspapers in New York City and in cities where the issuer is located or has plants or other major facilities.[177]

The other corporate governance requirements of the NYSE are found in the NYSE's rules and relate to such matters as mandatory annual shareholders' meetings, concentration of voting power, oversight by each listed company of transactions with its officers and directors, defensive takeover measures that discriminate against certain shareholders, purchases and sales of a listed company's stock by its directors and officers, awards of stock options to directors and officers, redemption of listed securities, tender offers by a listed company for its securities and special rights of certain shareholders. These requirements are not subject to waiver by the NYSE and are applicable to foreign private issuers.[178]

The NYSE also has established rules with respect to the solicitation of proxies and other matters relating to annual meetings of shareholders and to certain transactions involving the issuer or its securities. These rules include a requirement that issuers solicit from each shareholder a proxy (a written authorization given by the shareholder to someone else to vote his shares at a shareholders' meeting) for all shareholder meetings.[179] The NYSE may

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[175] See NYSE LISTED COMPANY MANUAL, §103.00. Issuers seeking relief under this exemption may be required for furnish the NYSE with a written certification from independent counsel as to whether the non-complying practices are prohibited by home country law.

[176] See NYSE LISTED COMPANY MANUAL, §202.05.

[177] Although foreign private issuers are not subject to Regulation FD, the NYSE states that such issuers may comply with the timely alert policy through any method that would constitute compliance with Regulation FD for a domestic U.S. issuer, such as by filing or furnishing a Form 6-K or by distributing a press release through a widely disseminated news or wire service. In addition, a listed company must notify its NYSE representative at least 10 minutes prior to the release of any material announcement occurring during or immediately prior to market hours. See NYSE LISTED COMPANY MANUAL, §§ 202.06(A)-(C) and supra Note 118 and accompanying text.

[178] See NYSE LISTED COMPANY MANUAL, §303A.

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

grant, in very limited circumstances, an exemption from this rule when applicable law precludes or makes virtually impossible the solicitation of proxies in the United States.[180]

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

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

(a) A certified copy of the issuer's charter and by-laws (translated into English);

(b) Specimens of certificates traded or to be traded in the U.S. market;

(c) A copy of the Deposit Agreement;

(d) Copies of the issuer's annual reports to stockholders for the last five years, with two copies of the report for the latest year. If English versions are not available, translations of the last three years' reports must be provided;

(e) The latest available Prospectus covering an offering under the 1933 Act (where available) and the latest annual SEC filing, if any. Where no SEC documents are available, a copy of the most recent document utilized in connection with an offering of securities to the public or existing shareholders as well as any filings made with any regulatory authority;

(f) The proxy statement or equivalent material made available to stockholders for the most recent annual (general) meeting (translated into English);

(g) Worldwide and U.S. stock distribution schedules;

(h) Supplementary data to assist the exchange in determining the character of the share distribution and the number of publicly held shares. This information on both U.S.

[180] The New York Stock Exchange listing agreement for foreign private issuers requires the issuer to "solicit proxies for all meetings of stockholders," NYSE LISTED COMPANY MANUAL §901.02(III)(3), and the NYSE's listing rules provide that "actively operating" issuers are required to solicit proxies except where "applicable law precludes or makes virtually impossible the solicitation of proxies in the United States," id. §402.04(A). Certain ADR depositaries take the view that the NYSE's proxy solicitation requirement is satisfied simply by mailing voting instruction cards to registered holders (rather than beneficial owners) of the underlying securities; these registered holders typically pass along the voting instruction cards to beneficial owners. Other depositaries, however, believe the NYSE requirement is only met if an issuer solicits proxies directly from beneficial owners, which is generally accomplished by sending owners a voting instruction card through a proxy solicitation firm, who then coordinates the delivery of the voting instruction card with the Depositary Trust & Clearing Corporation ("DTCC").

and worldwide holdings includes: (i) the names of the 10 largest holders, (ii) NYSE member organizations holding 1,000 or more shares, (iii) a list of the various stock exchanges or other markets upon which the issuer's securities are currently traded as well as the price range and volume of those securities over the past five years, (iv) stock owned or known to be controlled by officers, directors and their immediate families, or other holdings of 10% or more, (v) any type of restriction (and the details thereof) relating to shares of the company, (vi) an estimate of non-officer employee ownership, and (vii) shares of the issuer held in profit-sharing, savings, pension or similar plans for benefit of its employees;

(i) If the issuer has any partially-owned subsidiaries, a description of the ownership (public or private) of the remainder, including ownership by any of the issuer's officers or directors;

(j) A list of the issuer's principal bankers and a statement of the holdings of its stock by any one of these bankers in excess of 5%;

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

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

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

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

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

The NYSE recently introduced a "Fast Path" program, under which issuers that are applying for listing, or that are already listed, on the NYSE may apply for cross-listing on NYSE Euronext's European markets using documentation previously filed with the SEC. This program is available to all foreign private issuers other than those incorporated in the European Economic Area.

II. NASDAQ

The substantive and procedural requirements for inclusion of common shares (or ADRs) of foreign private issuers in the NASDAQ Capital Market[181] are considerably less burdensome than the corresponding NYSE standards. More stringent requirements must be met for such securities to be included in the NASDAQ Global Select Market or the NASDAQ Global

[181] In September 2005, NASDAQ changed the name of the NASDAQ SmallCap Market to "NASDAQ Capital Market."

Market. [182] The principal difference between these markets and the NASDAQ Capital Market is that the former presents the last sale prices of a security on an immediate basis, while the latter reports only current bid and asked quotations.

The listing requirements for any of the NASDAQ markets consist of criteria relating to distribution of the issuer's stock and the size of the issuer. Effective September 28, 2004, NASDAQ applies the same quantitative initial inclusion standards to non-Canadian foreign private issuers seeking to list on the NASDAQ Capital Market as those applicable to U.S. and Canadian issuers. The initial listing standards for the NASDAQ Capital Market include the following requirements: (i) a minimum bid price of $4; (ii) at least 1 million publicly held shares of the issuer's common stock worldwide (in the case of ADRs, there must be at least 400,000 ADRs outstanding at the time of such inclusion); (iii) at least 300 round lot holders of the security; (iv) at least three registered and active market makers for the security (two for continued inclusion); and (v) the issuer must comply with FINRA's corporate governance requirements.

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

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

Under the second alternative, the issuer's total outstanding listed shares must have a market value of $50 million, stockholders' equity of at least $4 million, and a market value of publicly held shares of at least $15 million.[183]

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

The requirements for inclusion of securities in the NASDAQ Global Market apply to all issuers, both U.S. domestic and foreign. There are four alternative sets of criteria for initial listing on the NASDAQ Global Market. In each case, certain basic requirements must also be met, including (i) a public float of 1.1 million shares or ADRs worldwide, (ii) 400 round lot holders of the shares or ADRs and (iii) a minimum bid price for such securities within a period of approximately five business days preceding inclusion in the NASDAQ Global Market, or a projected offering price of such securities in the case of an initial public offering, of at least $4.

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

[183] If a current publicly traded company is qualifying to list only under this standard, it must also meet the minimum $4 bid price requirement for 90 consecutive days prior to applying for listing.

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

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

Under the third alternative, there are no pre-tax income or operating history requirements, and the public float must have an aggregate market value of at least $20 million. In addition, the issuer must have a market value of total outstanding listed shares of $75 million.[184] Finally, the issuer must have four registered and active market makers.

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

The requirements for inclusion of securities in the NASDAQ Global Select Market also apply to all issuers and there are four alternative sets of criteria for initial listing. In each case, certain basic requirements must also be met, including (i) a public float of 1.25 million shares or ADRs worldwide, (ii) any of (1) 550 beneficial holders of the shares or ADRs with an average monthly trading volume over the prior 12 months of at least 1.1 million shares per month, (2) 2,200 beneficial holders of the shares or ADRs or (3) 450 round lot holders, (iii) a minimum bid price for such securities within a period of approximately five business days preceding inclusion in the NASDAQ Global Select Market, or a projected offering price of such securities in the case of an initial public offering, of at least $4, (iv) a "public float" (i.e., shares that are not held directly or indirectly by any officer or director of the issuer or by any other person who is the beneficial owner of more than 10% of the total shares outstanding) with an aggregate market value of any of (1) $110 million, (2) $100 million and stockholders' equity of $110 million, (3) $45 million in the case of a company listing in connection with its initial public offering or that is affiliated with or being spun off from another issuer listed on the NASDAQ Global Select Market or (4) $70 million in the case of a closed-end management investment company registered under the Investment Company Act of 1940, and (v) at least three[185] registered and active market makers.

Under the first alternative, the issuer must have had (i) aggregate pre-tax operating income of at least $11 million in its three most recent fiscal years, (ii) pre-tax operating

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[184] If a current publicly traded company is qualifying to list only under this standard, it must also meet the minimum $4 bid price requirement for 90 consecutive days prior to applying for listing.

[185] Under circumstances where the issuer does not meet certain income or equity thresholds, the issuer will be required to have at least four registered and active market makers.

income of at least $2.2 million in each of its two most recent fiscal years and (iii) pre-tax operating income (as opposed to a loss) in each of the prior three fiscal years.

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

Under the third alternative, there are no pre-tax income or cash flow requirements, but the issuer must have (i) a market value of total outstanding listed shares of at least $850 million over the prior 12 months and (ii) revenue of at least $90 million in the previous fiscal year.

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

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

The NASDAQ Stock Market Rules[186] establish a set of "corporate governance requirements," generally similar in scope to the corresponding NYSE rules, which are applicable to issuers whose securities are listed on NASDAQ.[187] These rules, like the NYSE rules, generally exempt foreign private issuers from compliance with the corporate governance requirements (except with respect to the independent audit committee and audit committee financial expert requirements mandated by the Sarbanes-Oxley Act) provided that they (1) disclose in their annual reports on Form 20-F each requirement that is not followed and describe

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[186] NASDAQ Stock Market Rules (formerly NASD Rules) 4200 and 4350 were approved by the SEC in November 2003, simultaneous with the SEC's approval of NYSE corporate governance rules. See SEC Release No. 34-48745 (Nov. 4, 2003). The then-NASD subsequently issued rule changes to conform certain provisions of NASDAQ Stock Market Rules 4200 and 4350 to the corresponding NYSE rules. The rule changes provide that a company that has ceased to be a "Controlled Company" is permitted to phase in both independent nominating and compensation committees and majority independent boards on the same schedule as companies that are listing in conjunction with their initial public offering, as follows: (i) one independent member at the time of listing; (ii) a majority of independent members within 90 days of listing; and (iii) all independent members within one year of listing. A company that has ceased to be a "Controlled Company" must, however, comply with the audit committee requirements as of the date it ceased to be a "Controlled Company." The then-NASD also slightly amended the language related to the $60,000 test for independence, providing that the look-back is for any 12-month period within the preceding three years (previously it had applied to any fiscal year within the preceding three years). The rule changes were effective immediately at the time they were issued. See SEC Release No. 34-49901 (June 29, 2004).

In April 2009, FINRA moved the corporate governance rules for issuers from Rule 4350 to a series of rules in Section 5600.

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

the alternative home country practice followed in lieu of such requirement,[188] (2) provide FINRA a written statement from local counsel certifying that the laws of its home country do not prohibit the issuer's practices and (3) participate in the Direct Registration Program (unless prohibited by home country laws).[189] In addition, foreign private issuers may not disparately reduce or restrict the voting rights of shareholders through corporate actions or issuances of securities. Unlike the NYSE, the NASDAQ stock market rules permit an issuer to follow home country practice in lieu of soliciting proxies.[190]

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

(i) distribute annual and interim reports to shareholders (foreign private issuers must make available interim reports disclosing any information submitted to the SEC on Form 6-K and relating primarily to operations and financial position)[191];

(ii) have a majority of independent directors on its board of directors, which must have regularly scheduled meetings ("executive sessions") at which only independent directors are present;

(iii) adopt certain mechanisms for the determination of compensation and the nomination of the issuer's CEO and members of the board of directors;

(iv) have, and certify that it has and will continue to have, an audit committee of at least three members, comprised solely of independent directors each of whom is financially literate and at least one of whom must have an accounting or related financial management experience;

(v) adopt a formal written audit committee charter;

(vi) hold annual meetings of shareholders, prepare proxy statements, solicit proxies for shareholders' meetings and establish a quorum of at least 33 1/3% of the outstanding common shares for shareholders' meetings;

(vii) comply with certain specified conflict of interest rules in connection with related-party transactions;

(viii) obtain shareholder approval prior to the issuance of securities (a) under certain stock option or purchase plans pursuant to which stock may be acquired by officers, directors, employees or consultants of the issuer, (b) when the issuance or

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

189 See NASDAQ Stock Market Rule Interpretation IM-5615-3.

190 NASDAQ STOCK MARKET RULES § 5250(c)(2).

191 NASDAQ recently eliminated a rule requiring that foreign private issuers also disclose interim financial results in a press release. See NASDAQ STOCK MARKET RULES § 5250(c)(2); SEC Release No. 34-61713 (Mar. 15, 2010).

potential issuance will result in a change of control of the issuer, (c) in certain cases, in connection with the acquisition of stock or assets of another company, and (d) in certain cases of private offerings of securities;

(ix) be audited by an independent public accountant who has in turn received external quality control by an independent peer or is enrolled in a peer review program, which itself must be subject to oversight by an independent body such as the PCAOB, and will receive such control within 18 months;

(x) be eligible for a Direct Registration Program (which allows for the electronic transfer of securities);

(xi) adopt a code of conduct applicable to all directors, officers and employees, which shall be publicly available; and

(xii) provide NASDAQ with prompt notification after one of its executive officers becomes aware of any material noncompliance by the issuer of FINRA's corporate governance standards.

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

III. Schedule of Listing Fees For Equity Securities

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

1. Original Listing Fee[192]

Base Amount $50,000[193] ***plus*** $0.0032 per share[194]

[192] The minimum Original Listing Fee for the NYSE is $125,000. The maximum Original Listing Fee is $250,000. In addition, there is a $500,000 cap on aggregate fees (listing and annual fees) per issuer in any given calendar year (which includes and encompasses all classes of securities except derivatives issued by listed companies as part of their capital structure). The cap does not apply to closed-end funds.

[193] Payable once by an issuer upon the original listing of any type of securities.

[194] A foreign company that issues ADRs in the United States would list the ADRs rather than the underlying shares on the NYSE. The NYSE fees set forth on this schedule would then be determined on the basis of the number of ADRs, rather than the number of shares, outstanding and issued in the United States.

2. Initial Listing Fee with Respect to Additional Issues[195]

Up to 75 million shares (or ADRs)	$ 4,800 per million
Over 75 and up to 300 million shares (or ADRs)	$ 3,750 per million
In excess of 300 million shares (or ADRs)	$ 1,900 per million
Minimum Initial Listing Fee	$5,000

3. Continuing Annual Fee[196]

Per million shares (or ADRs)	$930 per million
Minimum Annual Fee	$38,000

B. NASDAQ. The fee structures for the NASDAQ markets are considerably simpler than the fee schedule for the NYSE. NASDAQ charges "entry" or original listing fees and annual fees; there are no supplemental listing fees.

1. NASDAQ Capital Market

Entry Fee.[197] The fee is calculated based on the aggregate number of shares to be listed at the time of initial listing, regardless of class[198], according to the schedule below. This fee does not include a one-time company listing fee of $5,000 representing a non-refundable processing fee.

Up to 15 million shares	$50,000
Over 15 million shares	$75,000

An entry fee of $5,000 is assessed for the subsequent listing of more than 49,999 additional shares in any year of a class of shares that is already listed on the NASDAQ Capital Market. This fee is payable only once per year.

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[195] An additional listing is aggregated with earlier listings for purposes of determining the fee per million shares. A reduced initial listing fee for additional issuances may be payable if a new listing results only from a technical change in an issuer's corporate structure. Listing fees on shares issued in conjunction with stock splits and stock dividends are capped at $150,000 per split or issuance. The additional listing fee is the greater of the fees calculated on a per-share basis and the minimum initial listing fee.

[196] The applicable NYSE fee is the greater of the minimum annual fee and the fee calculated on a per share basis, subject to the fee cap described above. See supra Note 192. The annual fee structure differs for closed-end funds.

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

[198] For foreign private issuers, entry fees are levied only on those shares or ADRs issued and outstanding in the United States.

Annual Fee. The issuer pays an annual fee of $27,500 regardless of the number of total shares outstanding. However, in the case of ADRs, the issuer pays an annual fee of $17,500 for up to 10 million ADRs or $21,000 if it has total ADRs outstanding of more than 10 million.[199]

2. NASDAQ Global Market and NASDAQ Global Select Market

Entry Fee.[200] The fee is calculated based on the aggregate number of shares to be listed at the time of initial listing, regardless of class, according to the schedule below. This fee does not include a one-time company listing fee of $25,000 representing a non-refundable processing fee.

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

An entry fee of $5,000 is assessed for the subsequent listing of more than 49,999 additional shares in any year of a class of shares that is already listed on the NASDAQ Global Market or NASDAQ Global Select Market. This fee is payable only once per year.

Annual Fee. The annual fee is calculated based on total shares outstanding according to the following schedule:

Up to 10 million shares	$35,000
10+ to 50 million shares	$37,500
50+ to 75 million shares	$46,500
75+ to 100 million shares	$68,500
100+ to 150 million shares	$89,000
Over 150 million shares	$99,500

However, for foreign private issuers listing ADRs, the annual fee is calculated based on total ADRs outstanding according to the following schedule:

Up to 10 million ADRs	$30,000
10+ to 50 million ADRs	$37,500
50+ to 75 million ADRs	$42,500
Over 75 million ADRs	$50,000

[199] Annual fees are based on the issuer's total shares outstanding, which, in the case of foreign private issuers, includes only those shares issued and outstanding in the United States.

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

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