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Accessing the U.S. Capital Markets:

Select Legal and Practical Considerations for Non-U.S. Companies

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INTRODUCTION

Foreign businesses have historically looked to the United States capital markets as an important source of financing. Although the global financial marketplace has been significantly impacted by financial uncertainty, pandemics, the impacts of severe weather events, and global conflicts, the U.S. market remains one of the most robust and deepest financial markets in the world. While opportunities within local and alternative international markets continue to develop, non-U.S. companies continue to seek access to the U.S. capital markets and its expansive investor base through securities offerings, both public and private, as well as through stock exchange listings and sponsored American depositary receipt programs.

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

U.S. federal securities laws and regulations are based upon two statutes adopted during the Great Depression of the early 20th century: the U.S. Securities Act of 1933 (which generally regulates the offer and sale of securities in the United States) and the U.S. Securities Exchange Act of 1934 (which generally regulates securities trading, reporting obligations of U.S. public companies, and the activities of other market participants, such as broker-dealers. The Securities and Exchange Commission is the U.S. regulatory agency providing oversight for these activities and has, itself, published a comprehensive body of rules, regulations, and interpretative guidance.

This summary does not contain all of the information and considerations required for a successful offering or listing of securities. Non-U.S. companies contemplating an offering or a listing of securities in the United States should retain experienced legal counsel to guide them through the process.

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FOREIGN PRIVATE ISSUERS

What is a Foreign Private Issuer?

Under U.S. securities laws, a company incorporated outside the United States may qualify as a "foreign private issuer," which carries certain registration and disclosure benefits not available to U.S. domestic companies. Companies that do not qualify as foreign private issuers must comply with the same securities law requirements as U.S. domestic companies.

Test of Foreign Private Issuer Status

Whether a company (other than a government) incorporated or organized under the laws of a jurisdiction outside the United States is a foreign private issuer turns on a two-part test. Such a company will *not* be considered a foreign private issuer if (1) U.S. residents beneficially own *a majority* of that issuer's outstanding voting securities *and* (2) any of the following conditions exist:

- the majority of its directors or executive officers who perform a policy making function are U.S. citizens or residents;
- more than 50% of its assets are located in the United States; or
- its business is administered principally in the United States.

In addition to ascertaining the residency of the issuer's direct holders "of record" the company is generally required to "look through" brokers and other nominees holding securities to determine the residency of the beneficial owners of those securities to ascertain what percentage of its outstanding voting securities are indirectly held by U.S. residents.

The foreign private issuer determination is made prior to the confidential submission or public filing of an initial registration statement with the Securities and Exchange Commission ("SEC") and, thereafter, once a year as of the last business day of the issuer's second fiscal quarter. A foreign private issuer whose status has changed may continue to follow the foreign private issuer reporting regime until the end of the applicable fiscal year, which in effect creates a six-month advance notice period to prepare for the more onerous reporting requirements applicable to U.S. domestic issuers. A company that previously did not qualify as a foreign private issuer, but meets the above requirements as of the relevant determination date may *immediately switch* to the less onerous foreign private issuer reporting regime.

Significance of Foreign Private Issuer Status

In an effort to attract more non-U.S. companies to the U.S. market, the U.S. securities laws applicable to foreign private issuers provide a number of accommodations to the regulatory requirements otherwise applicable to U.S. domestic issuers, including the following:

- ***Reporting Requirements*:** foreign private issuers have less burdensome periodic reporting requirements, including more time to file annual reports and the ability to submit interim reports in accordance with home country requirements in lieu of the mandatory Form 10-Q quarterly reports and Form 8-K current reports required to be filed with the SEC by U.S. domestic issuers;
- ***Financial Statement Disclosure*:** foreign private issuers may report in any of (i) International Financial Reporting Standards ("IFRS") as adopted by the International Accounting Standards Board ("IASB"), without U.S. Generally Accepted Accounting Principles ("U.S. GAAP") reconciliation, (ii) non-IASB IFRS with U.S. GAAP reconciliation, (iii) home country GAAP with U.S. GAAP reconciliation or (iv) U.S. GAAP;
- ***Scope of Disclosure*:** foreign private issuers may rely on home country rules for certain technical disclosure requirements (*e.g.*, aggregate executive compensation disclosure rather than the more granular compensation discussion and analysis disclosures required for most U.S. domestic issuers);
- ***Corporate Governance*:** the U.S. national securities exchanges require foreign private issuers to hold an annual shareholders' meeting and have an audit function in compliance with Rule 10A-3 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), but otherwise allow foreign private issuers to follow home country corporate governance practices in most respects rather than complying with the corporate governance listing requirements applicable to domestic U.S. listed companies, subject to disclosing the differences in treatment;

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- ***Exemptions from Certain Disclosures and Filings***: foreign private issuers are not subject to the SEC's insider reporting provisions, the requirement that corporate insiders must forfeit short-swing profits when buying or selling securities of the issuer and certain beneficial ownership reporting requirements;
- ***Proxy Rules***: foreign private issuers are exempt from the U.S. proxy rules (procedures for solicitation of shareholder votes) but must consider any requirements of the stock exchange in which they are listed relating to soliciting proxies from shareholders; and
- ***Selective Disclosure Rules***: foreign private issuers are not subject to the technical requirements of Regulation FD, which mandates public disclosure when an issuer makes selective disclosure of material non-public information to market participants (although "best practices" and potential liability under Rule 10b-5 encourage most issuers to comply in many respects and many non-U.S. jurisdictions have similar rules).

Multijurisdictional Disclosure System

The Multijurisdictional Disclosure System ("MJDS") permits eligible Canadian foreign private issuers to file with the SEC a registration statement containing a prospectus following Canadian disclosure requirements and have it declared immediately effective without SEC review. Designed to facilitate cross-border offerings of securities between the United States and Canada, the MJDS is a reciprocal initiative adopted by the SEC and the Canadian Securities Administrators allowing issuers to meet disclosure obligations in the United States and Canada by complying with their home country's disclosure rules, including review by their home country regulator.

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OVERVIEW OF LEGAL FRAMEWORK

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

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

The Securities and Exchange Commission

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

The Securities Act of 1933

The Securities Act requires that any offering or sale of securities in the United States be registered with the SEC, unless an exemption is available. In the case of non-exempt offerings, the issuer of the securities must file with the SEC a registration statement which includes a prospectus containing extensive disclosures about the company and the securities to be issued. The filed registration statement is publicly available (after any confidential submissions, to the extent permitted, have been made public) and the prospectus forming part of such registration statement is distributed by underwriters to prospective investors.

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

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

For exempt securities, the nature of the security itself rather than the type of offering qualifies them as exempt. Exempt securities include U.S. government or government agency debt, certain municipal bonds, commercial paper (short-term corporate debt), securities issued or guaranteed by U.S. banks and securities issued in eligible exchange offers.

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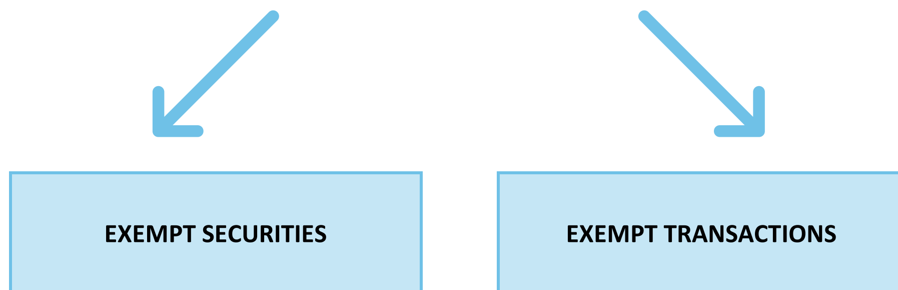
EXEMPTIONS FROM REGISTRATION UNDER THE SECURITIES ACT



Examples:

- U.S. Government debt
- Government agency debt
- Commercial paper
- Securities issued or guaranteed by banks
- Eligible exchange offers with existing holders

Examples:

- Section 4(a)(2) private placements
- Rule 144A offerings
- Regulation S offerings

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

The Securities Exchange Act of 1934

The Exchange Act governs the trading of securities and requires the registration of certain classes of securities. Foreign private issuers that have made a public offering under the Securities Act become subject to the requirements of the Exchange Act, including the periodic filing of reports regarding their business and financial matters with the SEC and compliance with the anti-bribery provisions of the Foreign Corrupt Practices Act (the "FCPA"). Importantly, foreign private issuers are also subject to Section 10(b) of the Exchange Act and SEC Rule 10b-5, which prohibit fraud or manipulation in connection with the purchase and sale of securities.

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

A foreign private issuer may also be required to register a class of equity securities under the Exchange Act depending on the size of the company and the nature of its share ownership. A foreign private issuer generally is required to register a class of equity securities if: (i) it has over $10 million in assets as of the end of its fiscal year, (ii) the class of equity securities is held of record by either 2,000 persons or greater worldwide or 500 persons who are not accredited investors or greater worldwide and (iii) the number of its U.S. resident holders is 300 or more.

This obligation can be triggered without any affirmative conduct by the issuer. However, an exemption from registration is available, as long as a foreign private issuer satisfies the conditions of Rule 12g3-2(b) under the Exchange Act (as discussed below) by providing the same information as provided in the Company's home country.

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Sarbanes-Oxley Act of 2002

In response to various corporate accounting scandals, including those involving Enron and WorldCom, the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act" or "SOX") was enacted on July 30, 2002. The Sarbanes-Oxley Act applies to any "issuer" (including any foreign private issuer), that:

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

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

Trust Indenture Act of 1939

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

Listing Requirements

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

State "Blue Sky" Laws

In addition to U.S. federal securities laws, every state in the United States has its own securities laws, commonly known as "Blue Sky" laws. Most Blue Sky laws typically require registration of securities offered within the state's borders. Securities that are exempt from registration under the Securities Act are generally exempt from registration under Blue Sky laws, although certain disclosures may be required. Further, federal law exempts almost all registered public offerings from state regulation and prohibits state governments from regulating any offerings of securities that will be listed on a U.S. national securities exchange.

Investment Company Act of 1940

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

Passive Foreign Investment Company Rules

An adverse tax regime applies to U.S. tax resident holders of equity securities in so-called "passive foreign investment companies," or PFICs. PFIC status is largely a function of how much gross income of the company is passive or how much of the company's assets produce passive income. While calculations are often complex, the company will be classified as a PFIC if: (i) 75 percent or more of its gross income for the taxable year is passive, or (ii) the value of its assets (generally determined on the basis of a quarterly average) produce or are held for the production of

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passive income is at least 50 percent. For this purpose, passive income generally includes dividends, interest, gains from certain commodities transactions, rents, royalties and the excess of gains over losses from the disposition of assets that produce passive income. Non-U.S. companies offering equity securities in the United States will inevitably face difficulties if they fall within the definition of a PFIC since U.S. shareholders are subject to higher ordinary income tax rates on certain distributions as well as on gains realized upon dispositions, along with an interest charge. This becomes punitive to holders who are U.S. tax residents regardless of their ownership percentage and thus a strong disincentive for them to participate in the offering. A foreign private issuer contemplating an equity offering in the United States should therefore consider whether it might qualify as a PFIC, as PFIC status could potentially become a roadblock to a successful offering.

Financial Industry Regulatory Authority Rules

The Financial Industry Regulatory Authority ("FINRA") is a self-regulatory organization whose primary purpose is to protect investors and maintain the integrity of the marketplace through regulation of the activities of broker dealers. There are specific FINRA rules that apply to the conduct of underwriters and dealers in connection with registered public offerings of securities, including with respect to the level of compensation and conflicts of interest.

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ACCESSING THE U.S. CAPITAL MARKETS

A foreign private issuer can access the U.S. capital markets in various ways. It may seek to raise new capital (or allow existing security holders to sell their securities) by offering equity or debt securities in the United States through a public offering registered with the SEC or through a private offering exempt from SEC-registration. SEC-registered public offerings are open to the general public and allow the securities to trade on a national securities exchange (such as the NYSE or NASDAQ), but are subject to more extensive and complex regulations and information requirements. Private offerings are subject to less regulation and regulatory oversight, but are limited to certain categories of investors and have restricted transferability.

Without raising new capital, a non-U.S. company may wish to broaden its investor base by listing its existing shares on a U.S. national securities exchange. This can be accomplished through the establishment of an American Depositary Receipt ("ADR") program or, in some instances, listing the equity securities directly. Listing existing securities on a U.S. national securities exchange involves registering under the Exchange Act and requires much of the same disclosures, and entails similar consequences, as a registered public offering of securities. Another alternative for companies whose equity securities are already publicly traded in other jurisdictions is to create what is referred to as a "Level 1" ADR program for their existing shares without listing on a U.S. national securities exchange. The establishment of a Level 1 ADR program can be accomplished without much regulatory complexity but Level 1 ADR programs typically have significantly less liquidity than listed ADR programs. See "American Depositary Receipts" below for more information on the different types of ADR programs.

Regardless of the specific method, there are numerous substantive and procedural considerations that a foreign private issuer must analyze and consider with its advisors when thinking about accessing the U.S. capital markets for the first time. Each method has distinct advantages and disadvantages. Although this guide focuses mainly on equity offerings, the requirements for debt offerings are similar. Historically, there has been less necessity to list debt (or "fixed income") securities on a U.S. national securities exchange because trading of debt securities generally occurs over-the-counter among financial intermediaries and large institutional investors. Certain additional considerations applicable to offerings of debt securities are discussed under "Some Considerations Relating to Debt Securities".

Set forth below are brief outlines of other alternatives to standard SEC-registered offerings and other considerations when accessing the U.S. capital markets.

Securities Issued in Acquisitions

Non-U.S. companies considering acquisitions of U.S. companies or of non-U.S. companies with significant U.S. shareholders must analyze the application of the U.S. securities laws to the transaction, especially where the acquiror is using securities as part of the transaction consideration. Similar to a primary offering for cash, the offer and sale of securities of the acquiror to the shareholders of the target company must either be registered with the SEC or benefit from an exemption from registration. If the offering is SEC-registered, the general disclosure requirements for the acquiror entity are substantially similar to those used in registration statements for a primary offering of securities for cash. Some securities offerings in connection with acquisitions can be effected as private offerings or with the benefit of an exemption from registration depending on the extent and nature of the U.S. resident ownership of the target company's securities.

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Reverse Mergers with Shell Companies

A foreign private issuer can access the U.S. capital markets by merging with an existing U.S. public company. In these transactions, commonly referred to as "reverse mergers," an existing public "shell company" — a public reporting company with few or no operations — acquires a private operating company through a merger. Typically, the shareholders of the private company exchange their shares for a large majority of the shares of the public company, thus gaining a controlling interest in the surviving public shell company, and the private company's management takes over the board of directors and management. The assets and business operations of the post-merger surviving public company are primarily, if not solely, those of the former private company. Reverse mergers are often done to facilitate access to the U.S. capital markets, including the liquidity that comes with having stock quoted on a market or listed on a national securities exchange, and have been perceived to be a faster and less expensive method of becoming a public company than an initial public offering ("IPO"). Unlike an IPO, a reverse merger does not raise any new capital for the company and shareholders may not receive any cash for their shares. Although reverse mergers are generally structured in part to avoid the registration requirements under the Securities Act, the SEC does require extensive disclosure about the operating company, either in a proxy statement or a Form F-4, substantially equivalent to the disclosure required in an IPO. There have been instances of fraud and other abuses involving reverse merger companies and the SEC has instituted enforcement proceedings against such companies in the past.

De-SPAC Transactions

Similar to reverse mergers, foreign private issuers have also accessed the U.S. capital markets by merging with a publicly-traded Special Purpose Acquisition Company ("SPAC"), through what is commonly called a "De-SPAC" transaction. A SPAC is a sponsor-backed shell company that raises capital from investors in an offering registered with the SEC for the sole purpose of seeking to merge with a privately-held operating company. SPACs have a limited amount of time to make an acquisition, otherwise they must return the cash to investors. The De-SPAC process has aspects similar to both a public company merger and an IPO, with the SPAC typically required to obtain shareholder approval (via proxy statement) and any shares being issued to target company or existing SPAC shareholders requiring SEC-registration (via registration statement and prospectus). The proxy statement (or combined proxy statement and prospectus) entails disclosure requirements substantially equivalent to the disclosure required in an IPO and will go through multiple rounds of review and comments with the SEC. While previously De-SPAC transactions were commonly viewed as a faster alternative to a traditional IPO, De-SPAC transactions can often take a similar amount of time to consummate as an IPO, and possibly longer due to additional complexity. Concurrent private financing has been more difficult to obtain in recent years and, when coupled with a high redemption rate by existing SPAC investors, creates significant challenges to completing the business combination.

De-SPAC transactions experienced a significant increase in volume beginning in 2020 until the middle of 2022, resulting in increased scrutiny by investors and other market participants, as well as the SEC and other regulators, and ultimately a significant drop in volume from the prior levels. SEC rules adopted in 2024 imposed additional disclosure requirements on participants in De-SPAC transactions, including with respect to the use of financial projections and other matters. Despite the recent rule changes and a decline in investor confidence in De-SPACs, there are still hundreds of existing SPACs that are looking for acquisition targets, which may provide opportunities for some non-U.S. private issuers to access the U.S. public market through this vehicle.

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Direct Listings

Some non-U.S. companies may also consider accessing the U.S. capital markets through a "direct listing." Direct listing transactions allow a private company to go public and have its shares trade on a U.S. national securities exchange without an underwritten IPO. Direct listings provide many of the traditional benefits of a classic IPO, including access to the public markets for future capital raises, and may be relatively less expensive to execute than an IPO due to the lack of underwriters' commissions. One primary motivation for companies utilizing direct listings is to allow existing shareholders, usually employees and early investors, to be able to realize liquidity for their otherwise illiquid stake in the company, through an immediately available public market post-listing often without the lock-up periods typically required by underwriters in a traditional IPO.

Despite certain advantages, direct listings are not a particularly viable path of going public for all companies. A successful direct listing likely requires a well-known, established private company (with a relatively large existing stockholder base) that does not require the underwriter-driven price discovery or marketing efforts undertaken in a traditional IPO. Going public via direct listing also requires an Exchange Act registration statement to be declared effective by the SEC, with disclosure requirements similar to that of an IPO, and can often take a similar amount of time to consummate. While underwriters are not involved in direct listings, the company will often have financial advisors participate in the process who will require the same or similar protections as underwriters in an IPO and will also receive compensation. Upon listing, the company becomes subject to the reporting and governance requirements applicable to publicly-traded companies, including periodic reporting requirements under the Exchange Act and governance requirements of the applicable stock exchange.

Previously, direct listings were only available for secondary sales of stock held by existing shareholders, but recent stock exchange rule changes approved by the SEC allowed for primary offerings in direct listings subject to certain conditions, including that the opening auction price upon listing fall within the price range established by the company in the registration statement. However, there has been a lack of primary direct listings despite the rules permitting them, with market participants often citing the reluctance of companies and advisors to pursue primary direct listings with the specific price range limitations under the current rules. In response to these conceners, both the NYSE and NASDAQ relaxed the pricing limitations by allowing the opening auction price to be up to 20% below or 80% above the price range included in the effective registration statement, subject to certain conditions.

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TRANSACTION TEAM

Below is a brief overview of the parties typically involved in the registration and offering process. In underwritten private offerings exempt from SEC registration, the parties are generally the same and have similar responsibilities. If the issuer is only registering and listing its outstanding equity securities, the issuer generally works only with its local and U.S. counsel and auditors and with the depositary bank and its counsel because no underwriters need to be involved.

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

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SEC-REGISTERED PUBLIC OFFERINGS

In the United States, any offering of a company's securities to the public generally requires the filing of a registration statement with the SEC, which needs to be declared effective by the SEC prior to any actual sales being made. For a company conducting an IPO, the SEC considers the company to be "in registration" from at least the time it reaches an understanding with its managing underwriter(s) regarding the offering through 25 days after the date on which the SEC declares the registration statement effective. During this period, there are significant restrictions on the nature and substance of communications that can be made by the company and the other participants in the offering. The registration process is typically thought of as comprising three distinct periods, which coincide with the restrictions on communications:

- The "Quiet" Period / Pre-Filing Period: begins from the time the Company is first "in registration" until the initial public filing of the registration statement with the SEC.
- The "Waiting" Period / Post-Filing Period: begins from the time the registration statement is publicly filed with the SEC until it is declared effective.
- The Post-Effective Period: up to 25 days after the registration statement is declared effective.

The Quiet Period/Pre-Filing Period

The "quiet period" or the "pre-filing period" refers to the period from the time when the company reaches an understanding with its managing underwriter(s) to pursue a public offering—generally before the time of the initial "all-hands" organizational meeting to discuss the proposed public offering—to the time when the Company *publicly* files the registration statement for its IPO with the SEC. During this period, Section 5(c) of the Securities Act prohibits any activity from offering participants that could be construed as making an "offer" of the company's securities. Since a draft registration statement that has been submitted on a confidential basis is not considered to have been "publicly" filed, counsel will typically require that the quiet period restrictions be adhered to during the confidential submission and review process as well.

During the "quiet period," the underwriters and their counsel will conduct an extensive due diligence review of the company designed to provide a reasonable basis to believe that the registration statement and prospectus do not contain any material misstatements or omissions. The due diligence process generally involves multiple meetings and interviews with company management, counsel, and auditors, as well as a thorough review of the company's organizational and legal documents, contracts, any litigation matters, business plans, projections, and materials or other "back-up" the underwriters will request from the company to support the statements made in the registration statement. The due diligence process serves several purposes, including providing an understanding of the company's business, assets and financial results as well as its contractual rights and commitments, and identifying risk factors related to the issuer and the offering. For the underwriters, the process serves the additional purpose of establishing the basis for their "due diligence" defense for any liability.

Pre-IPO Preparation

In addition to required financial statements, a foreign private issuer planning for an IPO must compile significant amounts of financial and statistical information about its business, markets, strategy and regulatory environment in order for it and its advisors to prepare the disclosures required in the registration statement. Financial statements will need to be prepared in accordance with U.S. GAAP or IFRS (as adopted by the IASB) or reconciled to U.S. GAAP. The company and its advisors will also need to ensure that the company has governance procedures and mechanisms in place to comply with any applicable requirements of SOX and any stock exchange listing standards. Furthermore, many foreign-language documents of the company such as material contracts will be required to be translated into English for filing as exhibits to the registration statement, and certain exhibits may need a confidential treatment request if any of them include sensitive commercial information or are otherwise subject to confidentiality restrictions that are unavoidable. In addition to the U.S. requirements, a foreign private issuer and its advisors must also evaluate and consider any substantive and procedural issues under local law applicable to the company, particularly when there is a concurrent local offering. All of the foregoing requires careful advance planning. The preparation process may take several months and will require close attention by company management.

While the due diligence process is underway, the company's counsel, in cooperation with management, prepares a first draft of the registration statement which other offering participants will review and revise. Several meetings typically follow where the offering document is reviewed and discussed by the group and revisions are made. The discussions regarding the content of the registration statement are an integral part of the due diligence process. SEC rules require various, detailed types of information about the company and its business to be included in the registration statement. The registration statement is also required to contain risk factors about the company, financial statements, and various exhibits such as material contracts, legal and audit opinions, and consents. SEC rules also require that certain portions of the registration statement be drafted in "plain English." Once the draft registration statement is in substantially completed form, it must be provided to the SEC for review to begin the registration process with the SEC. This can be done in the form of a public filing of the registration statement with the SEC, but more commonly begins with a confidential submission to the SEC of a draft registration statement. There can be several rounds of confidential submissions, and the SEC comment process is similar to that involved with public filings.

The SEC will review the registration statement and typically will respond with initial comments and requests for additional information within approximately 30 days. The working group will then revise the registration statement and submit amended registration statements with the SEC, together with a response letter to each round of the SEC's comments. Historically, the SEC has typically endeavored to provide comments on subsequent drafts of registration statements within two weeks, however more recently the SEC has not committed to that turnaround time. Several rounds of amendments are typical in order to address and resolve all of the SEC's comments.

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Confidential Submissions

Foreign private issuers that are registering with the SEC for the first time may submit draft registration statements for review on a confidential basis. On June 29, 2017, the SEC announced that it would accept draft registration statement submissions from all companies for non-public review, thereby expanding a popular Jumpstart Our Business Startups Act benefit previously available only to emerging growth companies.

Confidential submission provides a number of advantages. For example, by making a confidential submission of its draft registration statement, a foreign private issuer that decides not to proceed with an IPO would not have made public competitively sensitive information, such as financial information. Additionally, companies that are publicly listed in their home jurisdiction can mitigate negative consequences if the SEC review results in changes in prior public disclosures. As with publicly filed registration statements, confidential submissions must be substantially complete when submitted to the SEC for review. However, a confidentially submitted draft registration statement does not need to include the consent of auditors or other experts and does not need to be signed by the company, its principal officers and its directors because a confidential submission does not constitute a "filing" under the Securities Act. Furthermore, financial statements that will not be required at the time of the public filing may generally be omitted from the initial submissions.

Any "roadshow" for the offering or effectiveness of the registration statement may not occur until 15 days after the first public filing of the registration statement and all prior confidential submissions are made public.

During the "quiet period," the issuer may not make offers or sales of the securities being registered, subject to certain limited exceptions. The term "offer" is broadly construed by the SEC and care must be taken by all transaction participants to ensure that no activities occur during the "quiet period" that might be deemed to be an offer of the securities to be registered. Publicity constraints are generally discussed and agreed by all transaction participants at the commencement of the process.

Testing the Waters

The company and its underwriters are allowed under the U.S. securities laws to engage in oral and written communications with potential investors that are qualified institutional buyers ("QIBs") or institutional accredited investors regarding a contemplated SEC-registered offering to assess investor interest in the offering. These meetings are commonly called "testing-the-waters" or "TTW" meetings. While TTW meetings can occur before or after confidentially submitting or publicly filing a registration statement, they will typically take place after the confidential submission of the registration statement during the "quiet period." Although binding investment commitments are not permitted to be obtained from investors, TTW meetings can be an important means of gauging whether a public offering is a viable alternative for the company. Any materials used in TTW meetings are subject to liability considerations and accordingly should be thoroughly vetted with counsel to ensure consistency with the due diligence investigation and the prospectus for the offering. TTW materials are typically submitted to the SEC on a confidential basis, upon the request of the SEC staff.

The Waiting Period/Post-Filing Period

The “waiting period” or the “post-filing period” refers to the period between the time of the public filing of the registration statement and the date on which the SEC declares the registration statement effective (i.e., the time when the SEC has completed its review of the contents of the registration statement and clears the issuer to sell securities pursuant to it). During the waiting period, oral offers to investors are permissible under Section 5 but written offers remain heavily restricted. Section 5(b)(1) requires that no prospectus other than one meeting the requirements of Section 10(a) of the Securities Act may be used to make written offers.

The issuer will typically file the registration statement publicly after most SEC comments have been resolved through confidential submissions with the SEC, and the issuer would like to start the “15-day clock” mentioned above prior to when the roadshow can begin. Once all significant SEC comments are resolved and the transaction is otherwise ready to proceed, the underwriters will “launch” the offering and distribute the preliminary prospectus contained in the registration statement to potential investors. The preliminary prospectus is also commonly known as a “red herring,” which includes all required disclosures, including a “bona fide estimate” of the price range for an equity offering, but does not contain the final, actual price of the new securities.

The issuer and the underwriters will then also typically conduct marketing meetings, known as the “roadshow,” where the company’s senior management and representatives from the underwriters will meet with potential investors to explain the company’s business and answer investors’ questions. It is customary in connection with the roadshow that the management of the issuer prepare a video recording of the roadshow, referred to as the “net roadshow.” A benefit of the net roadshow is that it allows investors unable to attend live roadshow meetings to review the roadshow.

Going Effective and the Post-Effective Period

The “post-effective period” refers to the period after the SEC has declared the registration statement effective. After the registration statement has been declared effective by the SEC, the securities can be sold to investors, with sales confirmed by a final prospectus meeting the requirements of Section 10(a) of the Securities Act. The request for declaration of effectiveness is typically timed so that effectiveness corresponds with the end of the marketing efforts when the issuer and the underwriters agree on the final price and offering size and the underwriting agreement is signed. The underwriters then confirm the sales to investors and the issuer’s securities begin trading the following day on a “when issued” basis. On May 28, 2024, the settlement cycle shortened from “T+2” to “T+1”, meaning that the closing will occur the day following the trade (“T”) date.

The SEC provides a safe harbor that allows an issuer to change the size of the deal by 20% in either direction without having to go back to the SEC. However, upsizing or downsizing of an IPO by greater than 20% may cause timing and other considerations as generally that would require the filing of post-effective amendment with the SEC and an analysis as to whether additional disclosure would need to be provided to investors through a free writing prospectus.

Underwriters and other securities dealers have an obligation to deliver a final prospectus for the IPO during a certain period of time following effectiveness, even for secondary market resales. For this and other reasons (e.g., the market’s sensitivity to public disclosures immediately after an offering and related anti-fraud considerations), limitations on publicity typically remain in place during the post-effective period, which is typically 25 days in connection with IPOs of issuers listed on NYSE or NASDAQ.

Publicity during the Registration Period

U.S. federal securities laws require that a company preparing for its IPO carefully monitor and control its communications throughout the public offering process, as well as once it becomes public. As noted above, the Securities Act and SEC rules place significant restrictions on the various types of communications that a company may issue while it is “in registration” in connection with its IPO and failure to comply with such restrictions could delay or prevent the IPO.

During the IPO process, the company may continue to make certain public communications in the normal course of its business as it relates to its products and services and generally may continue to issue press releases with respect to factual business developments, and continue to send stockholder communications, provided that such disclosures (i) are consistent with prior practice; (ii) are in customary

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form; and (iii) do not contain projections, forecasts, predictions, opinions or valuations relating to the company. Rule 169 under the Securities Act provides a non-exclusive "safe harbor" for the release of factual business information (but not forward-looking information) made by non-public companies during the registration process. A similar safe harbor is available under Rule 168 for U.S. public reporting companies that can show a history of making similar public disclosures.

Rule 163A under the Securities Act provides issuers with a non-exclusive safe harbor from the prohibition on pre-filing offers for certain communications made more than 30 days prior to the public filing of a registration statement. The date of the public filing determines the availability of the 30-day safe harbor, even if the issuer had previously submitted a draft registration statement to the SEC for confidential review. Many investment banks and counsel will, as a conservative safeguard, use the date of the draft registration statement rather than public filing date for determination of the 30-day period.

All public communications should be reviewed in advance with counsel to avoid any potentially problematic disclosures or unintended consequences. In addition to those noted above, there are safe harbors allowing certain notices of proposed public offerings containing certain limited information, offshore press releases and conferences, and "free-writing" prospectuses, among others.

Gun-jumping violations during the pre-filing period occur when an issuer or its representatives (including underwriters and broker-dealers) engage in publicity-generating activities that condition the market favorably for a registered public offering. Gun-jumping restrictions and restrictions on such publicity-generating activities during the post-filing period are far-reaching and apply to all forms of communications, from press releases to interviews to communications on websites and social media platforms. The SEC routinely reviews a company's website content and will undertake internet searches for articles and other publicity through social media regarding the company and its proposed offering. It is important to understand the gun-jumping restrictions and such restrictions on publicity during the post-filing period, as well as the limits of the various safe harbor exemptions. Gun-jumping can result in the SEC requiring a company to make recission offers to any purchasers of its securities being offered. From time to time when improper disclosure or conditioning of the market has occurred post-filing, the SEC has imposed delays in the effectiveness of an IPO registration statement and/or required the company to include such disclosures in its prospectus. This "cooling off" period can have a significant adverse effect on an offering where a company faces an unstable market or a crowded calendar of offerings.

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REGISTRATION STATEMENT REQUIREMENTS

The basic disclosure roadmap for foreign private issuers is Form 20-F, which sets forth required disclosures for registered offerings in the United States, as well as for initial listings and annual reports by foreign private issuers. The registration forms for public offerings of securities by foreign private issuers refer extensively to the requirements set forth in Form 20-F. The form is designed to elicit all material information about the company so that investors can make an informed decision as to whether or not to make an investment in the company's securities. The SEC also requires that issuers in certain industries, such as financial services, mining and oil and gas, provide additional disclosures specific to that particular industry. Below is an overview of the general categories of required disclosure.

Company Information

- Identity of directors, senior management, key employees and advisors
- Description of the company's business and properties
- Shareholders and related party transactions
- Material contracts
- Description of share capital and corporate law affecting share ownership

Operating and Financial Review and Prospects

- Management's discussion and analysis ("MD&A")
- Known trends and uncertainties
- Critical accounting estimates
- Results of operations
- Liquidity and capital resources
- Off-balance sheet transactions
- Financial Statements

Other Key Information

- Risk factors
- Capitalization table
- Offer and listing details
- Use of proceeds
- Dividend history and policy
- Dilution table
- Market risk disclosures
- Offer statistics and expected timetable
- Exchange controls
- Taxation - tax consequences to investors
- Plan of distribution

Additional Information

- Disclosure required of material terms of certain securities such as:
  - Debt securities
  - ADRs
  - Warrants and rights
  - Defaults, dividend arrearages and delinquencies
  - Material modifications to the rights of securityholders
- Certifications and exhibits
- Solely for annual reports:
  - "Code of Ethics"
  - Corporate governance discussion regarding differences between U.S. and home country requirements
  - Disclosure controls and procedures
  - Management's report on internal controls over financial reporting

Certain key documents, agreements and certifications are required to be filed as exhibits to the registration statement. These include, among other items, a list of subsidiaries, material contracts, instruments defining rights of the securityholders and legal opinions on the validity of the securities.

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Materiality

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

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

Each registration statement must include, or incorporate by reference, a section called “Operating and Financial Review and Prospects,” which is also referred to as “Management’s Discussion and Analysis of Financial Condition and Results of Operations” or “MD&A.” The MD&A is intended to provide material information relevant to an assessment of the financial condition and results of operations of the registrant, including an evaluation of the amounts and certainty of cash flows from operations and from outside sources. The MD&A should focus on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. The MD&A should provide information that will enhance an investor’s understanding of the registrant's financial condition, cash flows and other changes in financial condition and results of operations and better allow investors to view the registrant from management's perspective.

The principal areas that an MD&A should cover include:

- a discussion of the significant factors materially affecting the issuer’s operating results;
- a discussion of the issuer’s ability to generate and obtain cash to meets its requirements and plans for cash in the next 12 months and in the long-term;
- a description of research and development policies;
- information regarding trends and uncertainties that are reasonably likely to have a material effect on operations, profitability or liquidity or that would cause reported financial information not to be indicative of future operating results or financial condition; and
- information regarding accounting estimates that are reasonably likely to have a material impact on financial condition or operating results, in the case of issuers that do not prepare financial statements in accordance with IFRS (given that an issuer need not repeat information that would be duplicative of information required to be included in IFRS financial statements).

In 2020, the SEC adopted amendments that modernize, simplify and streamline the rules and moved toward a more principles-based approach to MD&A. Nonetheless, drafting of the MD&A section requires careful coordination among the issuer’s financial team, accountants and counsel.

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Environmental, Social & Governance ("ESG")

In recent years, investor demands have prompted companies to provide an increasing level of disclosure regarding their environmental, social and governance initiatives and strategies. Many companies initially included such information in non-SEC filings such as corporate sustainability reports, but more recently the SEC has begun to encourage companies to include such information in required company filings. In March 2024, the SEC adopted rules requiring public companies to provide extensive climate-related disclosures in their registration statements and periodic public filings. Although enforcement of the rules have been voluntarily suspended by the SEC pending the resolution of multiple legal challenges in the federal courts, companies should proactively begin to review any voluntary climate-related disclosure in their SEC filings and other publicly available information in preparation for compliance with the rules when they become effective. As with other SEC disclosure rules, the private market is likely to follow what is required of public companies with respect to ESG disclosures, so both private and public companies should discuss with their advisors the implications of the proposed new climate rules and other ESG disclosures.

Financial Statement Requirements

The financial statement requirements for a foreign private issuer's registration statement are set forth in Form 20-F and in Regulation S-X. Foreign private issuers are generally required to present audited statements of income, changes in shareholders' equity and cash flows for each of the three most recently completed fiscal years and audited statements of financial position for each of the two most recently completed fiscal years (or since the date of incorporation, if a shorter period), unless the company is an emerging growth company as described above. An accommodation in Form 20-F permits a foreign private issuer in its first year of reporting under IFRS (as promulgated by the IASB) to file two years rather than three years of statements of income, changes in shareholders' equity and cash flows. The most recent yearly audited financial statements may be no more than 15 months old at the time of effectiveness of the registration statement (if the registration statement relates to the company's IPO, the audited financial statements may not be more than 12 months old, although it is possible to seek a waiver of this requirement from the SEC).

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

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Parallel Disclosure

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

Financial statements of foreign private issuers may be prepared in accordance with local GAAP, rather than U.S. GAAP, provided that certain net income, principal balance sheet items, and other selected financial data are “reconciled” to U.S. GAAP. Reconciliation shows how financial statements prepared in accordance with another body of accounting principles would look like if they had been prepared in accordance with U.S. GAAP and Regulation S-X. Reconciliation entails both disclosure of the material variations between local GAAP and U.S. GAAP and a numerical quantification of those variations. Items that frequently require discussion and quantification as a result of the reconciliation requirements include the different methods of accounting for business combinations, stock compensation, restructuring charges, impairments and deferred taxes. The reconciliation process normally takes time and effort and the need to do this work should be factored into the timing and cost considerations for a registered offering.

In an attempt to make SEC registration easier and more attractive for non-U.S. issuers, the SEC permits first-time registrants to reconcile differences between U.S. GAAP and home country GAAP in connection with the required financial data for the two most recently completed fiscal years and any subsequent interim periods required to be included in the registration statement. Foreign private issuers preparing their financial statements in accordance with IFRS as adopted by the IASB are not required to reconcile their financial statements to U.S. GAAP.

Information regarding significant business acquisitions must also be disclosed. Whether financial statements for recent and probable acquisitions must be included in the filing depends upon the “significance” of the acquisition, as measured by three criteria: (1) an investment test based on the amount of the issuer’s investment in the acquired business compared to the aggregate worldwide market value of the issuer’s voting and non-voting common equity or total assets of the issuer if it does not have publicly traded securities; (2) an asset test based on the issuer’s share of the total assets of the acquired business compared to the issuer’s consolidated total assets; and (3) a two-component income test which involves meeting the thresholds of both (i) a net income test based on the issuer’s share of pre-tax income from continuing operations of the acquired business compared to the issuer’s consolidated pre-tax income from continuing operations and (ii) a revenue test based on the issuer’s share of total revenue of the acquired business compared to the issuer’s consolidated total revenue. The number of years of audited financial statements and interim financial information that is required to be presented depends on the level of significance of the acquisition. The company must submit audited financial statements for a significant acquisition of a business that was completed more than 75 days before the offering or in certain cases where the acquisition is of the greatest significance. Also, as soon as an acquisition becomes “probable,” the duty to present separate financial statements exists if it’s at the greatest significance level. Further, where a material acquisition has occurred or is probable, pro forma financial information must be included in the registration statement for the most recent fiscal year and the most recent interim period. The necessary financial statements must comply with the requirements of Form 20-F, which may in certain circumstances require further U.S. GAAP reconciliation.

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Determining Financial Information Requirements

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

Special Financial Disclosure Issues

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

Choice of Auditor

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

Non-GAAP Financial Measures

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

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RELIEF FOR EMERGING GROWTH COMPANIES

The Jumpstart Our Business Startups Act (the "JOBS Act") was enacted into law in April 2012 to, among other things, ease and defer certain regulations applicable to the SEC-registered IPO process for "emerging growth companies," including any foreign private issuer that qualifies as an emerging growth company, by providing those companies with an "on-ramp" to an IPO. An emerging growth company has a transition period of up to five years after the pricing of its IPO, depending on revenue, size and public float, to transition to compliance with certain securities regulations. During such transition period, emerging growth companies are exempt from certain of the requirements of being a public company, and benefit from reduced financial statement disclosures and deferral of the auditor attestation on internal controls requirement, among other accommodations. Foreign private issuers that qualify as an emerging growth company may elect to avail themselves of some or all of the benefits available to emerging growth companies.

Definition of Emerging Growth Company

In order to qualify as an emerging growth company pursuant to Section 2(a)(19) of the Securities Act, a company must have annual gross revenues during its most recently completed fiscal year of less than $1.235 billion (indexed to inflation every five years by the SEC). After the initial determination of emerging growth company status (which occurs at the time of a confidential submission or public filing of the company's registration statement), a company will remain an emerging growth company until the earliest of:

- the last day of any fiscal year in which the company had annual gross revenues of $1.235 billion or more;
- the last day of the fiscal year following the fifth anniversary of the date of the first sale of common equity securities of the company pursuant to an effective registration statement under the Securities Act;
- the date on which the company has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or
- the date on which the company is deemed to be a "large accelerated filer" (i.e., at least $700 million in equity held by non-affiliates).

SEC guidance provides that an issuer that was an emerging growth company at the time it submitted a draft registration statement, but ceases to be an emerging growth company thereafter, shall continue to be treated as an emerging growth company through the earlier of (i) the date on which the issuer consummates its initial public offering pursuant to such registration statement or (ii) the end of the one-year period beginning on the date the company ceases to be an emerging growth company.

For prospective emerging growth companies that report in a currency other than U.S. dollars, the company should use the exchange rate for its reporting currency as of the last day of the preceding fiscal year to determine whether it meets the $1.235 billion annual gross revenue threshold.

Reduced Financial Statement Disclosures

An emerging growth company may present only two years (rather than three years) of audited financial statements in the offering document for its initial public offering. An emerging growth company may also present, in its Management's Discussion and Analysis of Financial Condition and Results of Operations section, financial information only with respect to the years for which it provides audited financial statements and any subsequent interim period in its registration statement. Some companies prefer to show their performance and financial trend over a longer period of time and therefore not all emerging growth companies choose to take advantage of this scaled financial disclosure accommodation.

Deferral of Auditor Attestation Requirement

The JOBS Act exempts emerging growth companies from the requirement under SOX Section 404(b) that a company's outside auditors attest to, and report on, the assessment made by the company's management with respect to the company's internal control over financial reporting. In effect, this exemption provides for up to a five-year transition period for emerging growth companies versus the current one-year transition period for newly public companies that do not qualify as emerging growth companies. Although the auditor attestation requirement, which has been one of the most burdensome requirements of SOX, is deferred for emerging growth companies, management of an emerging growth company must

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attest annually to the adequacy of its internal controls over financial reporting, subject to the exemption from this requirement for all newly public companies until their second annual report is filed with the SEC.

Extended Phase-in for New or Revised Financial Accounting Standards

Emerging growth companies may elect not to comply with new or revised financial accounting standards until the date that those standards also apply to private companies. In addition, emerging growth companies are exempt from any PCAOB rules that, if adopted, would mandate audit firm rotation (separate from audit partner rotation already required under SOX auditor independence rules) and an expanded narrative, called auditor discussion and analysis, that would appear as part of any financial statement audit.

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CONSEQUENCES OF REGISTRATION

Following the effectiveness of a registration statement filed with the SEC for a U.S. public offering by a foreign private issuer, or if an issuer otherwise elects to register its securities under, or becomes subject to the reporting requirements of, the Exchange Act, it becomes a "reporting issuer" under the Exchange Act and is subject to a variety of laws and regulations requiring ongoing compliance. As a reporting issuer, a foreign private issuer must comply with the SEC periodic reporting regime, certain requirements of SOX and more extensive obligations under the U.S. Foreign Corrupt Practices Act than those which apply to non-reporting foreign private issuers. In addition, a reporting issuer must comply with the rules promulgated by the exchange on which such foreign private issuer's securities are listed in order to maintain that listing. A reporting foreign private issuer also becomes subject to liability for its public disclosure under the federal securities laws and exposes itself to potential private lawsuits as well as SEC enforcement actions for deficiencies in such disclosure. In addition, shareholders holding 5% or more of a reporting foreign private issuer's equity securities must report changes in their beneficial ownership.

Periodic Reporting Obligations

Annual Reports on Form 20-F

A reporting foreign private issuer must file an annual report with the SEC on Form 20-F within four months after the end of the fiscal year covered by the report. Form 20-F requires, among other things, audited financial statements, risk factors (including in connection with cybersecurity, climate change impacts, geopolitical events, and the use of AI), a description of the issuer's business and information about the issuer's senior management and directors, major shareholders and related party transactions. Further, the issuer must disclose whether it has adopted an insider trading policy and, if not, the reasons why. The policy must be filed as an exhibit to the Form 20-F. Issuers must also describe any prior cybersecurity incidents, the impact on the issuer, and the issuer's processes for assessing, identifying, and managing material risks from cybersecurity threats, including (i) whether and how any such processes have been integrated into the issuer's overall risk management system or processes, (ii) whether the issuer engages consultants, advisors, or other third parties with respect to such processes, and (iii) whether the issuer has a process to oversee and identify associated cybersecurity threats related to the use of third-party service providers. New disclosure rules relating to climate-related risks, including qualitative and quantitative disclosures, were adopted in early 2024 but have been voluntarily suspended by the SEC pending the outcome of litigation challenging the rules' adoption. In addition, the issuer's CEO and CFO must provide certifications mandated by SOX as to any significant material weaknesses or changes in internal control over financial reporting, compliance with the Exchange Act and fair presentation of the information contained in the 20-F. See Appendix A – SOX Summary – CEO/CFO Certifications for more information regarding these certifications.

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Periodic Reports on Form 6-K

Unlike domestic U.S. issuers, foreign private issuers are not required to file quarterly reports or current reports following occurrence of the events set forth on Form 8-K, but are required to furnish (not file) the SEC with reports on Form 6-K containing any material information that the issuer: (1) makes, or is required to make, public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized; (2) files or is required to file with a national securities exchange on which the foreign private issuer's securities are traded and which was made public by that exchange; or (3) distributes, or is required to distribute, to its securityholders. Form 6-K reports must be furnished electronically to the SEC promptly after such information is first made public, but they are not considered "filed" for purposes of the liability provisions of the U.S. securities laws unless the issuer expressly indicates the contents of the Form 6-K are "filed", which issuers often choose to do for certain filings in order to incorporate by reference the contents into currently effective registration statements for disclosure purposes. Some examples of significant developments for which a report on Form 6-K must be prepared are:

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

Selective Disclosure

Whenever a U.S. domestic issuer intentionally discloses material non-public information to "market participants" (generally those persons who do not owe the issuer a duty of confidentiality), the SEC's Regulation FD requires simultaneous general public disclosure of such information. If the issuer unintentionally discloses such information to market participants, Regulation FD requires the issuer to publicly disclose such information promptly after learning of the unintentional disclosure. Companies use press releases and pre-announced, publicly accessible webcasts and conference calls to communicate information to market participants, such as research analysts and investors. While foreign private issuers are expressly not subject to Regulation FD's disclosure requirements, foreign private issuers should avoid selective disclosure of material non-public information to market participants to avoid potential liability. Many non-U.S. jurisdictions also have equivalent rules designed to address this concern. A foreign private issuer can use Form 6-K to make public information that it needs to disseminate and this submission is often accompanied by or contains a press release.

Sarbanes-Oxley

Once a foreign private issuer has an effective registration statement under the Securities Act or becomes subject to Exchange Act reporting requirements, it becomes subject to the requirements of SOX. These requirements include, among others, an assessment by management of the issuer's internal controls over financial reporting, an attestation report of the issuer's independent auditors on management's assessment, executive officer certifications for annual reports on Form 20-F, audit committee independence and disclosure as to whether the issuer has an audit committee financial expert, prohibition on loans to executives and directors and disclosure whether the issuer has adopted a code of ethics, each as described further in Appendix A – Sarbanes-Oxley Summary. However, there are certain phase-in rules which give first-time registrants additional time to meet specified SOX requirements and the listing rules that national securities exchanges have adopted pursuant to SOX. For example, the SOX 404(a) management assessment of internal control over financial reporting ("ICFR") is not required until an issuer's second annual report

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following an IPO. Likewise, a SOX 404(b) auditor attestation report on ICFR is required for an issuer that is either an "accelerated filer" or a "large accelerated filer" (and not an emerging growth company) by its second annual report.

Foreign Corrupt Practices Act (FCPA)

Reporting companies are subject to the FCPA, which prohibits payments or giving things of value (or offers of such) to a foreign official in exchange for beneficial government action (i.e., bribery). The FCPA applies to the conduct of the company and its officers, directors, employees, agents, stockholders or others acting on behalf of the company. The FCPA essentially recognizes that corporate accounting and control deficiencies may encourage improper practices and thus the FCPA sets standards in order to discourage such behavior, including imposing criminal liability upon persons who knowingly circumvent or knowingly fail to implement a system of internal accounting controls (sometimes referred to as a "books and records violation"). The SEC and the U.S. Department of Justice actively pursue enforcement actions under the FCPA, including actions against foreign private issuers. Both companies and individuals can face civil and criminal liability for violations of the FCPA.

Beneficial Ownership Reports

Any person who becomes (through purchase or otherwise) the beneficial owner of more than 5% of a class of equity securities registered under the Exchange Act is required by Section 13(d) of that act and related SEC rules to file with the SEC a statement on Schedule 13D or a shorter form Schedule 13G with fewer reporting requirements, in lieu of a Schedule 13D, if certain requirements are met. Reporting under Section 13(d) is a requirement for the beneficial holder, not the foreign private issuer. Schedule 13D filings must be made electronically within 10 days of the event giving rise to the obligation, while Schedule 13G filings have varying deadlines based on the status of the holder. Schedule 13D contains disclosure on the holdings of the reporting person, the source of funds for the acquisition, any plans of the reporting person regarding control of the issuer and any understandings with others with respect to the securities of the issuer. If any material change from existing disclosure occurs, an amendment must be filed promptly with the SEC, including any material increase or decrease in the percentage of the class of securities beneficially owned.

Recent amendments to the rules governing beneficial ownership reporting accelerate the filing deadlines for the Schedule 13D and Schedule 13G beneficial ownership reports.

Liability

A foreign private issuer may be exposed to potential civil and criminal liability under the U.S. securities laws. Litigation risk is often a concern of non-U.S. companies seeking to access the U.S. public markets due to the potentially greater risk of liability in the United States than in many other jurisdictions as a result of the proclivity of private litigants and their lawyers to sue for damages in the United States and the comprehensive legal liability regime itself. Private rights of action are available to investors under certain provisions of federal securities laws. Furthermore, in the United States, a large group of investors may form a "class action" lawsuit against the issuer and others with procedural advantages that make this type of litigation very appealing in securities fraud actions.

In addition to private litigation, the SEC may bring civil enforcement actions against issuers and other persons for disclosure deficiencies or violation of the registration process in connection with a U.S. public offering. In certain situations, such as fraud or insider trading, the U.S. Department of Justice ("DOJ") may prosecute companies or individuals on criminal charges for violations of U.S. securities laws. States' attorneys general are also empowered to criminally prosecute persons for violations of securities laws at the state level.

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

Section 11 of the Securities Act

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

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

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

- every person who signed the registration statement, including the issuer and members of management;
- every person who was a director of the issuer at the time of the filing of that part of the registration statement, even if the person did not sign the registration statement;
- every expert who, with his consent, has been named in the registration statement as having prepared or certified any portion of the registration statement; and
- every underwriter participating in the offering, which is a term defined broadly by the SEC.

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

Section 11 is a strict liability standard and does not require fraudulent intent or that any misstatement or omission was relied upon in connection with a purchase. Damages under Section 11 are generally limited to the difference between the amount the investor paid and the value of the security at the time the suit is brought (or when sold). However, the defendant will not be liable to the extent it can prove that any portion of the depreciation in the value of the security results from causes other than the misstatement or omission (e.g., a market downturn).

Section 12(a)(1) of the Securities Act

Section 12(a)(1) imposes liability on any person who offers or sells a security in violation of Securities Act registration requirements, which involve, in particular, complex rules regarding the application of private placement exemptions, how and when public offers of securities can be made and what communications are permitted during the offering process. Issuers are subject to strict liability under Section 12(a)(1), which permits the purchaser to rescind its purchase and recover the purchase price (plus interest) or, if the security has been sold, the price paid by the plaintiff less the sales price (plus interest).

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

Section 12(a)(2) expands on Section 11 by imposing liability not only for information contained in the registration statement, but also for a false or misleading statement of material fact in other written and oral communications made in connection with the offer and sale of securities. For the purposes of this section, liability is determined as of the "time of sale," which is the time the investor agrees to purchase the securities being offered, not at the settlement date.

Similar to Section 11, a plaintiff pursuing a Section 12(a)(2) claim is not required to prove that the misstatement or omission by the seller was intentional. The purchaser must demonstrate that it did not have knowledge of the misstatement or omission at the time of the purchase, but is not required to prove reliance on the misstatement or omission.

Like Section 12(a)(1), Section 12(a)(2) permits the purchaser to rescind its purchase and recover the purchase price (plus interest) or, if the security has been sold, the price paid by the plaintiff less the sales price (plus interest). However, as with Section 11, the defendant has a negative causation defense if it can prove that any portion of the depreciation in the value of the security results from causes other than the misstatement or omission.

While U.S. courts have concluded that Section 12(a)(2) does not apply to private placements, initial purchasers in private placement transactions (including offerings made in reliance on Rule 144A) customarily perform due diligence and request comfort on financial and accounting information from auditors and supporting documentation from the issuer on other facts and figures in the offering document in order to mitigate potential liability under other provisions of the federal laws, including claims under Section 10(b) of the Exchange Act, as well as possible state law claims.

Section 15 of the Securities Act and Section 20 of the Exchange Act

Section 15 of the Securities Act and Section 20 of the Exchange Act impose liability on the controlling parties of the persons or entities that are principally liable under Section 11 and Section 12. Such persons are jointly and severally liable with, and to the same extent as, the issuer, unless the controlling person had no knowledge of, or reasonable grounds to believe in, the existence of the facts creating the purported liability of the issuer. Control persons of foreign private issuers should consider potential exposure to liability under Section 15 of the Securities Act and Section 20 of the

Exchange Act when evaluating options for the issuer to access the U.S. capital markets.

Section 10(b) of the Exchange Act

Section 10(b) of the Exchange Act, together with SEC Rule 10b-5, are the general anti-fraud provisions of the federal securities laws that impose liability for false or misleading statements of material fact, or the use of manipulative and deceptive devices, in connection with the sale or purchase of *any* security. Rule 10b-5 has a broad application, covering oral and written statements (whether or not relating to a registration statement or prospectus) and can impose liability on issuers in connection with:

- public offerings of securities;
- private placements; and
- secondary market trading.

U.S. courts and the SEC have taken the position that liability under Section 10(b) and SEC Rule 10b-5 extends in certain circumstances to activity that occurs outside the United States that has an effect on U.S. markets, and the SEC and the DOJ have actively enforced these provisions against non-U.S. companies and residents.

Unlike Section 11 and Section 12 under the Securities Act, a Rule 10b-5 claim requires a showing of "scienter" (i.e., an intent to defraud), that is often difficult for a plaintiff to establish.

Section 17(a) of the Exchange Act

Section 17(a) of the Securities Act is an anti-fraud provision frequently relied upon by the SEC to prosecute securities fraud. It is similar to Section 10(b) and Rule 10b-5 of the Exchange Act in that it makes it unlawful to obtain money or property by means of false or misleading statements or to engage in a fraudulent scheme. Unlike Section 10(b) and Rule 10b-5, however, an entity or individual may be liable under Section 17(a)(1) or (3) for engaging in a fraudulent scheme without a showing of scienter. Most courts have ruled there is no implied private right of action under Section 17.

Section 18 of the Exchange Act

Section 18 provides any person who purchases a security in reliance on a false or misleading statement of material fact made in any application, report or document "filed" under the Exchange Act with a private right of action for damages. While a Section 18 claim requires a causal link between the false or misleading statement and actual loss suffered by the plaintiff, it does not require intent by the issuer. Good faith, however, by the issuer may be a valid defense.

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The Due Diligence Defense

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

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

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LISTING ON A NATIONAL SECURITIES EXCHANGE

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

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

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

Principal National Securities Exchanges

The two principal national securities exchanges in the United States are the NYSE and Nasdaq. Nasdaq operates purely on an electronic trading floor, while the NYSE still retains a physical trading floor for some of its operations. Nasdaq has three listing tiers, each with progressively stringent initial listing standards:

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

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

A third alternative securities exchange in the United States is the NYSE American, formerly known as the American Stock Exchange and acquired by the NYSE in 2008. The majority of trading on the NYSE American is in small cap stocks.

Quantitative Listing Requirements

The NYSE has listing requirements designed specifically for foreign private issuers, in addition to the regular listing requirements for U.S. companies that foreign private issuers can choose to comply with. Nasdaq has three listing tiers: the Nasdaq Capital Market ("NCM"), the Nasdaq Global Market ("NGM") and the Nasdaq Global Select Market ("NGSM"). The NGSM mandates the highest initial listing requirements, while its maintenance requirements are identical to those of the NGM. The NGM has more stringent quantitative listing and maintenance requirements than the NCM. All securities listed on Nasdaq (except securities which are book-entry only) must be eligible for a "direct registration program" operated by a registered clearing agency and are required to participate in an electronic link with a clearing agency registered under the Securities Act to facilitate the electronic transfer of securities held pursuant to such program. A foreign private issuer is subject to this requirement unless it is prohibited from complying by law or regulation in its home country. In such case, a foreign private issuer may follow its home country practice in lieu of this requirement by submitting to Nasdaq a written statement from an independent counsel in such company's home country certifying that the company's practices are not prohibited by the home country's laws and certifying that a law or regulation in the home country prohibits compliance with the direct registration rules.

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

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Continued Listing Requirements

NYSE

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

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

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

Nasdaq

Each of the three listing tiers on Nasdaq has distinct continued listing requirements. These are outlined in detail in Appendix D.

Delisting for Failure to Meet Continued Listing Criteria

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

If either the NYSE or Nasdaq notifies a listed company that the company does not satisfy a continued listing requirement of the exchange, the company is required to publicly disclose such notice (Form 6-K for foreign private issuers). The exchanges have been flexible when an issuer's failure to meet these criteria are due to systemic problems such as an economic crisis, that can severely affect share prices and market capitalizations. In some cases, the exchanges have enacted temporary interim rules that grant relief from certain of the requirements.

Corporate Governance Standards

An issuer meeting the requirements for listing its shares on the NYSE or Nasdaq will also have to comply with the separate reporting requirements and corporate governance obligations of that exchange, including those set forth below.

NYSE

Foreign private issuers listed on the NYSE must comply with certain standards noted below regarding corporate governance as codified in the NYSE's Listed Company Manual. Generally, foreign private issuers are permitted to follow home country practice instead of the provisions of the NYSE Listed Company Manual. However, they must make their U.S. investors aware of the significant ways in which their corporate governance practices differ from those required of U.S. companies under NYSE listing standards, although they are not required to present a detailed, item-by-item analysis of these differences. A foreign private issuer required to file an annual report on Form 20-F must include the statement of significant differences in that annual report; all other foreign private issuers may publish such differences on their internet website (provided that the foreign private issuer discloses that fact in its annual report and provides the website address). Notwithstanding this general accommodation, foreign private issuers must comply with certain requirements including those summarized below:

- The company must maintain an audit committee or similar group under local law that satisfies the exchange's requirements for scope and authority, with membership meeting the independence criteria set forth in Exchange Act Rule 10A-3;
- The company's CEO must promptly notify the NYSE when an executive officer becomes aware of any non-compliance with applicable provisions of the NYSE rules; and
- The company's CEO must certify to the NYSE annually that the company is in compliance with the NYSE's corporate governance rules.

Nasdaq

In conjunction with the application for listing on Nasdaq, each company must complete a Corporate Governance Certification Form, which certifies the company's compliance with, or exemption from, Nasdaq's requirements relating to the audit committees, the director nominating process, the determination of officer compensation, board composition, executive sessions, quorum and code of conduct. Foreign private issuers may follow their home country governance practices in lieu of certain Nasdaq corporate governance requirements, other than the Nasdaq requirements that foreign private issuers must (i) provide prompt notification to Nasdaq in the event of non-compliance with the corporate governance rules, (ii) maintain an audit committee or similar group under local law that meets the exchange's scope and authority criteria and satisfies the applicable independence requirements and other requirements of Exchange Act Rule 10A-3 and (iii) comply with Nasdaq's diverse board representation and board diversity disclosure requirements. A foreign private issuer that elects to follow its home country practice in lieu of the other Nasdaq corporate governance requirements must submit to Nasdaq a written statement from an independent counsel in such company's home country certifying that the company's practices are not prohibited by the home country's laws. A foreign private issuer is also required to make appropriate disclosures in its annual reports filed with the SEC and in its registration statement at the time of the company's original listing in the United States. A foreign private issuer that is not required to file an annual report on Form 20-F may provide these disclosures on its website in addition to, or instead of, providing these disclosures on its registration statement or annual report. The company shall disclose each requirement that it does not follow and include a brief statement of the home country practice the company follows in lieu of these corporate governance requirement(s).

Nasdaq Board Diversity Rule

New Nasdaq board diversity rules, approved by the SEC on August 6, 2021, require Nasdaq listed companies to have a diverse board, or explain why they do not, and to disclose information regarding the diversity of their boards using a prescribed matrix. The diversity requirement follows a "comply or explain" approach and the rules do not mandate any particular board composition, nor does Nasdaq assess the substance of the explanation for any non-compliance. Instead, Nasdaq merely verifies that the company has provided an explanation in the event it does not meet the prescribed diversity objectives.

Unlike many other Nasdaq requirements, the new diversity rules apply to foreign private issuers. However, the rules provide a more flexible framework for foreign private issuers in terms of meeting the diverse board composition requirements. Foreign private issuers must have (or explain why they do not have) at least two board members who are diverse, including at least one director that is female. The second diverse director may be any director that is female, LGBTQ+ or an "underrepresented individual" in their home country jurisdiction based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity. Boards with five or fewer members need only have one diverse member.

The new rules begin to phase-in this year based on the company's listing tier as follows:

- 2022 Form 20-F: Foreign private issuers listed on the NGSM, the NGM or the NCM must have at least one diverse director or explain why they do not;
- 2024 Form 20-F: Foreign private issuers listed on the NGSM or the NGM have at least two diverse directors or explain why they do not; and
- 2025 Form 20-F: Foreign private issuers listed on the NCM must have at least two diverse directors or explain why they do not.

Any foreign private issuer that does not comply with the board diversity objectives must explain the reasons for such non-compliance in its Form 20-F. Alternatively, a foreign private issuer may provide such information on its website, provided that it posts such information concurrently with the filing of its Form 20-F and submits a URL link through the Nasdaq Listing Center within one business day.

In addition, Annual Reports on Form 20-F must disclose statistical information on their directors' voluntary self-identified gender, racial characteristics and LBGTQ+ status in a prescribed matrix format. Recognizing that some jurisdictions may impose laws limiting or prohibiting self-identification questionnaires, Nasdaq prescribed in Nasdaq Corporate Governance Rule 5606 an alternative and more streamlined board diversity matrix for foreign private issuers. For example, rather than list various

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demographic backgrounds, the board diversity matrix for foreign private issuers includes a category entitled "Underrepresented Individual in Home Country Jurisdiction." Nasdaq's objective with this disclosure requirement is to standardize the reporting of board diversity statistics.

The Controlled Company Exemption

Issuers of which more than 50% of the voting power is held by an individual, group or other company are known as "controlled companies." Both Nasdaq and the NYSE have created exemptions for controlled companies from compliance with certain requirements relating to having a majority of independent directors, an independent compensation committee and independent nominating committees and director nominees. These exemptions do not apply to the audit committee requirements.

Companies with Dual Classes of Stock

Controlling shareholders of non-U.S. companies are often concerned about the potential for future dilution of voting control through subsequent equity offerings. Despite the existence in many jurisdictions of mandatory preferential rights to subscribe to a capital increase, some non-U.S. companies either have established or desire to establish a dual class share structure where multiple voting rights are afforded to a certain class of securities, typically those owned by the controlling shareholders. In general terms, both the NYSE and Nasdaq will allow a company, including a foreign private issuer, to list its equity securities with such a structure provided that the structure is in place at the time of the initial listing. The NYSE, for example, will accept any action or issuance relating to the voting rights structure of a non-U.S. company that is in compliance with the NYSE's requirements for U.S. companies or that is not prohibited by the company's home country law. There continues to be significant push-back from investors on dual class share structures and a company wishing to adopt or continue having this structure in its IPO in the United States should raise this issue early on in the planning process.

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THE UNDERWRITING PROCESS

Whether the offering is SEC-registered or made in reliance on Rule 144A, the typical process of underwriting or purchasing securities is quite similar, and the transactions are generally conducted on a "firm commitment" basis, i.e., where the underwriters or initial purchasers commit in the underwriting or purchase agreement to purchase all the securities offered at the specified price and then distribute those securities to investors. In contrast, when companies engage an investment bank on private placements such as Regulation D offerings, the investment bank often participates solely as an advisor or placement agent on a "best efforts" basis and does not commit to underwrite or purchase any securities.

Underwriting Agreements

Underwriting agreements govern the relationship among the underwriters, the issuer and any selling stockholders. Most underwriters have their own form of underwriting agreement, and underwriters' counsel typically takes the lead on drafting the underwriting agreement based on the lead underwriter's form and any applicable precedents.

In addition to the obligations of the underwriters to purchase, and the issuer's (and selling stockholders', if any) obligation to sell, the securities, underwriting agreements contain numerous other provisions, including representations and warranties of the issuer and any selling stockholders, indemnities, covenants, fees and reimbursement of expenses, closing conditions and termination rights of the underwriters. Closing conditions include both the delivery of a "comfort letter" by the issuer's auditors relating to financial statements and disclosure and the delivery of legal opinions and "10b-5" negative assurance letters by external legal counsels.

While the underwriting agreement is not executed until after the roadshow and effectiveness of the registration statement, negotiation of the terms should be substantially concluded well in advance of execution, and ideally prior to marketing the offering. The form of the final agreement (excluding pricing information) is filed as an exhibit to the registration statement. After the agreement is signed, the underwriters are obligated to purchase the securities at closing, subject to certain relatively standard termination rights (or "market outs") related to material adverse events affecting the company or the market.

In addition, the underwriting terms and arrangements for SEC-registered IPOs (as well as other offerings subject to certain exceptions) are subject to guidelines contained in applicable FINRA rules and must be reviewed and approved by FINRA prior to effectiveness of the registration statement. Among other things, the underwriter compensation (which can encompass far more than solely the underwriting spread) must be fair and reasonable, and the relationships between directors, officers and certain securityholders with any FINRA members must be reviewed to determine whether there are any conflicts of interest or other issues. A FINRA questionnaire is typically sent to these persons well in advance of the commencement of the offering in order to determine whether there are any issues that require disclosure or resolution.

"Greenshoe" Option

In equity or equity-linked securities offerings, the underwriters often require an option that entitles them to purchase an additional number of securities (typically up to 15% of the securities in the base offering) at the original purchase price for up to 30 or 45 days after the date of the underwriting agreement. Underwriters typically allocate the entire base deal amount plus the 15% so-called "greenshoe" option amount to investors all at the same time of pricing. For example, in an offering of 1 million shares with a 15% greenshoe option, at the time of pricing the underwriters will sell 1.15 million shares to investors. This leaves the underwriters with a "short" position (using the example above, the underwriters have sold 150,000 shares more than they have agreed to purchase in the offering from the issuer in the underwriting agreement). This short position ultimately must be "covered" or "closed out." If the stock trades above the offering price after pricing, the underwriters would typically exercise the greenshoe option and purchase the shares from the issuer at the initial offering price to cover their short position. In this situation, the issuer receives the additional proceeds, and the underwriter receives the additional underwriters' commission on those proceeds. If the stock begins to trade below the offering price after pricing, the underwriters would typically purchase shares from sellers in the open market at the lower price to cover their short position. This purchasing activity by the underwriters is beneficial since it relieves some of the selling pressure on the stock in the market that is causing the stock price to drop.

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Lock-Up Arrangements

It is also customary, especially in equity and equity-linked offerings, for the underwriters to restrict the issuer from issuing additional securities of the same class (or securities convertible into such securities), and to require the issuer's directors, officers, and major stockholders to agree to "lock-up" the securities they hold for a certain period of time after the offering. In IPOs, this restriction is often required of all or substantially all of the company's stockholders. This period is typically 180 days for IPOs and 30-90 days for "follow-on" equity offerings. The primary goal of lock-ups is to foster an orderly trading market and to avoid a large number of securities coming into the market immediately after the offering and putting significant pressure on the stock price.

Most underwriters have their own form of lock-up agreement and the restrictions are subject to various carve-outs and exceptions. Lock-up discussions should begin early on in the process, particularly as they could raise commercial issues and it also may be challenging to obtain all the required agreements, particularly if there is a large group of shareholders who need to sign these agreements.

Global Offerings

In global offerings where only a portion of the securities are offered in the United States, there may be a separate underwriting agreement among the issuer and the underwriters of any foreign offering. In such a case, the arrangements between the separate underwriting syndicates (including the exercise of any "greenshoe" options) are often handled through an intersyndicate or similar agreement. Where the issuer is also conducting a simultaneous public offering in a different country, there may be structural issues (such as preemptive rights or different underwriting practices) that raise compatibility issues between U.S. and non-U.S. practices/requirements. These issues should be discussed and resolved early in the process as they often involve considerable timing and procedural issues.

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ALTERNATIVES TO ACCESSING THE MARKET POST-IPO

After the IPO process has been completed, a foreign private issuer can conduct follow-on offerings, which can be either offerings of new shares, or a secondary offering by existing shareholders. In addition to the "traditional" follow-on offerings, a foreign private issuer may also elect to access the market through a few alternative transaction structures.

PIPE (Private Investment in Public Equity)

In a PIPE transaction, the securities of the issuer are sold in a private placement transaction to selected institutional and accredited investors. The investors enter into a purchase agreement committing to purchase a specified number of securities at a fixed price. In order for the investors to be able to resell their securities in the market, these transactions commonly involve a requirement that the issuer file a resale registration statement with the SEC covering the resale of the recently acquired securities. One of the main advantages of the PIPE transaction is that disclosure to the public is required only after the investors provide definitive commitments to purchase the securities. On the other hand, it is likely that the securities will be sold at a discount to the then-current market price.

ATM (At-the-Market) Offering

In an ATM offering, the issuer can sell newly-issued securities, or existing securities, at current market prices, through a broker-dealer. The issuer can establish an ATM facility by entering into an equity distribution or sales agreement with one or more sales agents. The ATM facility allows the issuer to take advantage of an increase in the share price, and sell shares on an as-needed basis, without being committed to sell any certain amount of shares, in case the issuer believes that the market terms are not favorable. The main advantage of an ATM offering is that it allows fast and flexible capital raising at current market prices. In practice, ATM offerings are mainly used to raise smaller amounts of capital compared to "traditional" follow-on offerings.

RDO (Registered Direct Offering)

In an RDO transaction, the securities of the issuer are privately and confidentially marketed through a placement agent on a "best efforts" basis to a specific group of institutional and accredited investors. The investors then commit to purchase the securities directly from the issuer. The RDO can be pursued through a shelf-takedown from an existing shelf registration statement, or through a newly filed registration statement. The main advantage of an RDO is that it is usually quicker and less expensive than a "traditional" follow-on offering.

CMPO (Confidentially Marketed Public Offering)

A confidentially marketed public offering, commonly known as a CMPO, is an offering of securities registered on a shelf registration statement in which securities are taken "off the shelf" and sold when favorable market opportunities arise. In a CMPO, typically an underwriter markets a proposed offering of a public company's shares on a confidential basis to a select group of wall-crossed institutional investors before the offering is broadly marketed to the public.

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UNREGISTERED OFFERINGS

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

Private Placements

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

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

Regardless of whether the safe harbor of Regulation D is used as the basis for the exemption, it does provide certain guidance on issues that are relevant even when the safe harbor is not used and contains a definition of "accredited investor," the investor eligibility threshold required for private placements. Accredited investors are defined to include, among other sophisticated investors, certain U.S. financial institutions such as banks, savings and loan associations and broker-dealers, certain entities having assets of over $5 million and natural persons meeting specified income or net worth thresholds. Although traditional private placements are made only to accredited investors, Regulation D allows up to 35 non-accredited investors to participate in an offering provided that these non-accredited investors be delivered an information memorandum that substantially complies with the information required in a registered public offering. For this reason, the Regulation D safe harbor is seldom used by foreign private issuers whose securities tend to interest a more institutional investor base where other exemptions are available, such as a Section 4(a)(2) offering followed by Rule 144A resales, as discussed below.

Although there is no need for SEC registration in a properly structured private offering, there are other restrictions which apply. In particular, resales of the securities are subject to transfer restrictions. Violations of these rules subjects the issuer to the risk of an SEC enforcement action and purchasers of securities in an offering that should have been registered have rescission rights for one year after the violation occurred. There are also rules relating to whether two or more separate offerings are required to be "integrated" into a single offering, thus potentially rendering some exemptions unavailable. The integration rules can create complexity when more than one offering is contemplated or when separate offerings are made within a short time of each other.

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

Rule 144A Offerings

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

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the Section 4(a)(2) exemption discussed above, followed by resales by the initial purchasers to QIBs under the Rule 144A resale exemption.

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

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

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

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

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

Regulation S Offerings

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

An offshore transaction is defined as an offer not made to a person in the United States and either:

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

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

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

Concurrent Offerings

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

Private Offering Process

The offering and distribution process in an underwritten exempt offering resembles that of a public offering, although the disclosure and procedural requirements for these offerings are not set forth in specific SEC regulations. The company generally prepares an offering circular containing much of the same information that is required in a statutory prospectus for a registered public offering.

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

While Regulation S and Rule 144A offerings are exempt from registration, they are still subject to the U.S. federal anti-fraud rules and blue sky laws. It is common for issuers, underwriters and other parties to a private placement to closely mirror the due diligence process for registered offerings when undertaking a private placement of securities, and underwriters typically require the same comfort letters and lawyers' negative assurance letters that are standard in registered offerings. In so-called "Regulation S Only" debt offerings by foreign private issuers, some underwriters may be comfortable with less robust disclosure than would otherwise be required if the offering included U.S. investors, and without the benefit of comfort letters or negative assurance letters, but this is something that should be discussed at the beginning of the process.

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

"Restricted" and "Control" Securities

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

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

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

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PUBLIC VERSUS PRIVATE OFFERINGS: PROS AND CONS

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

Transaction and Compliance Costs

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

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

Litigation Risk

As noted previously, there is a risk of exposure to liability in connection with purchases and sales of securities under the U.S. securities laws; generally the risks are perceived to be higher than is customary under the laws of most other countries. While the SEC itself may bring charges against a company for alleged violations of the U.S. securities laws, a greater and more likely risk is that of shareholder claims. Derivative suits and class action lawsuits may be brought by shareholders against the company. Even if these claims are based on weak or meritless grounds, defending against them may involve a considerable cost to the company.

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

Trading and Liquidity

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

Acquisition Currency

Once a company's equity securities are registered and listed on a national securities exchange, the company can more readily use them as currency to make acquisitions. Target companies and their shareholders are more likely to accept a listed issuer's securities as transaction consideration because of the enhanced liquidity, and often market value, of the issuer's securities afforded by a national securities exchange listing.

Market Exposure and Analyst Coverage

Securities analysts will track a public company's performance and will be more likely to undertake coverage of a company once it is public. Analyst

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coverage of companies whose securities have been privately placed is not as extensive, although these companies are often included in industry-wide reports covering numerous companies, particularly if they are reporting companies in their home country.

Benefits of an Integrated Disclosure System

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

Exchange Offers of Rule 144A Equity Securities by Foreign Private Issuers

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

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

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

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AMERICAN DEPOSITARY RECEIPTS

American Depositary Receipts ("ADRs") are negotiable receipts issued by a U.S. depositary bank. These receipts are evidence of ownership of shares of a non-U.S. company held in custody, either directly or indirectly, by the issuing bank. This mechanism allows a foreign private issuer's equity securities to be traded in the U.S. capital markets. Equity securities of issuers in certain jurisdictions can be listed directly on a U.S. exchange without the need to create ADRs, but do require a U.S. share registrar and transfer agent.

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

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

- they are issued in a registered form, which generally is more familiar to U.S. investors;
- trading and settlement occurs in the manner customary for securities in the United States, enhancing liquidity;
- dividends are paid in U.S. dollars; and
- they are considered U.S. securities and are eligible portfolio investments for certain institutional investors that may not be able to own foreign securities directly or that may have limitations on the amount of such securities they can own.

ADR programs can be sponsored or unsponsored. A sponsored ADR is one established in cooperation with the foreign private issuer; an unsponsored ADR is established by the depositary bank without the issuer's involvement.

Unsponsored ADRs are typically established by a U.S. broker-dealer that owns shares of a foreign private issuer and is interested in developing a trading market for those shares in the United States. Although cooperation is not necessary from the issuer, a letter of non-objection from the issuer is customary.

Unsponsored programs are less desirable because the issuer has no control over the deposit agreement terms, including fees charged to holders, and corporate governance issues sometimes arise, such as the pass-through of voting and other shareholder rights. Regardless of the issuer's involvement, the issuer must be eligible for the exemption under Rule 12g3-2(b), discussed below, in order for the broker-dealer to establish the ADR. This exemption becomes effective for issuers automatically, which is one of the factors that have made unsponsored programs easy to implement. To form a sponsored ADR, the foreign issuer and the depositary bank (the issuer of the depositary receipts that is usually a commercial bank) enter into a deposit agreement setting forth the terms on which the ADRs will be issued, the rights of ADR holders and the duties of each party. Sponsored programs are grouped into four different categories:

Level 1

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

In order to create a Level 1 ADR, the depositary bank must file a short registration statement with the SEC on Form F-6 describing the ADR program. This category of ADR is not allowed to be listed on a U.S. national securities exchange and the issuer does not need to register the underlying securities with the SEC under the Exchange Act as long as it establishes the exemption under Rule 12g3-2(b). Trading in Level 1 ADRs occurs through the OTC market.

Level 2

A Level 2 ADR program is a sponsored program, but does not involve the raising of new capital. However, the ADRs are listed on a U.S. national securities exchange. This requires registration of the issuer's underlying securities under the Exchange Act by filing a registration statement with the SEC on Form 20-F, as

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well as filing the short-form registration statement on Form F-6. Although a Level 2 ADR program can generate interest in the company's shares and provide substantial liquidity, it does subject the issuer to the disclosure and reporting requirements of the Exchange Act as well as SOX. Level 2 ADR programs are often used where the company has operations and employees in the United States, and its shares are listed in the home country or elsewhere outside the United States.

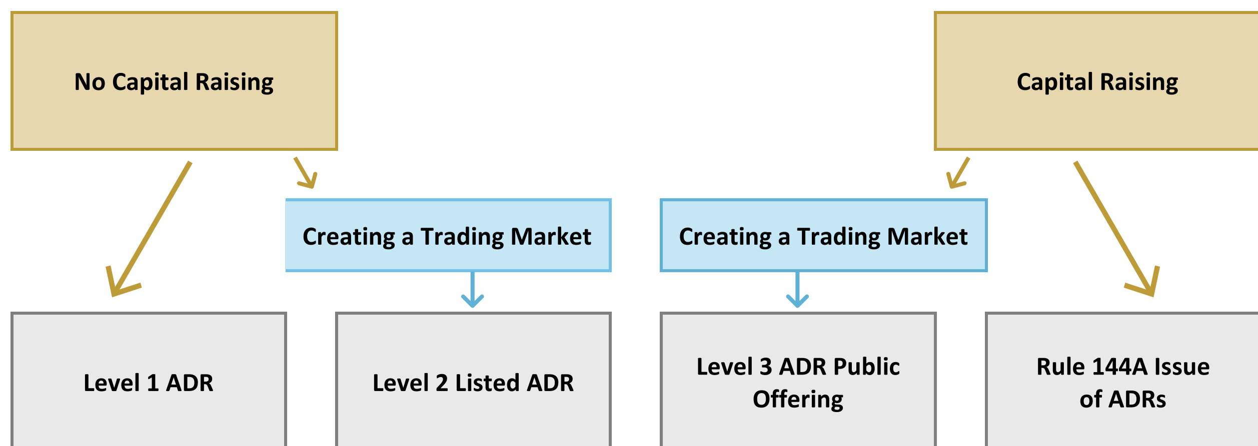
Level 3

A Level 3 ADR program refers to the establishment of a sponsored ADR program in connection with the issuance of new shares to raise capital. The ADRs are listed and traded on a U.S. national securities exchange. Level 3 programs are typically initiated in conjunction with the initial public offering of a foreign private issuer. Form F-1 must be filed under the Securities Act for the initial public offering and the Form F-6 is filed for the ADRs. Similar to a Level 2 ADR program, it subjects the issuer to the disclosure and reporting requirements of the Exchange Act as well as SOX.

Restricted Programs

Rule 144A ADRs involve the raising of new capital, but the ADRs are not listed on a U.S. national securities exchange and no public trading market is created. These restricted ADRs are placed with qualified institutional buyers (QIBs) and trade over the counter.

Types of ADR Programs



Level 1 ADR

Advantages
- Minimal registration requirements on Form F-6
- Exempt from periodic reporting under Exchange Act Rule 12g3-2(b)

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

Level 2 Listed ADR

Advantages
- ADRs are listed on a U.S. exchange

Disadvantages
- Subject to periodic reporting requirements under the Exchange Act
- Compliance with SOX

Level 3 ADR Public Offering

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

Disadvantages
- Registration under the Securities Act and the Exchange Act
- Subject to periodic reporting requirements under the Exchange Act
- Compliance with SOX

Rule 144A Issue of ADRs

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

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

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ADRs vs. Ordinary Shares

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

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THE RULE 12g3-2 EXEMPTIONS

Under Section 12(g) of the Exchange Act, an issuer must register a class of equity securities if it has over $10 million in assets as of the end of its fiscal year and the class of equity securities is held of record by either 2,000 persons or greater worldwide or 500 persons who are not accredited investors or greater worldwide. To reduce the burden on foreign private issuers, the SEC adopted Rule 12g3-2, allowing them to avail themselves of two exemptions from the registration and reporting provisions of the Exchange Act.

The first exemption, Rule 12g3-2(a), exempts foreign private issuers whose equity securities are held by less than 300 U.S. residents even if it has more than 2,000 record holders worldwide or 500 record holders who are not accredited investors worldwide.

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

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

- maintain a listing of the subject class of securities on one or more exchanges in its primary trading market and 55% of the trading volume of such class of securities must take place in either a single or no more than an aggregate of two foreign jurisdictions, where the trading volume in a least one of the two jurisdictions must still be greater than the trading volume for that same class of securities in the United States
- not be required to file or furnish Exchange Act reports; and
- publish, on its website or through another electronic delivery system generally available to the public in its primary trading market, English translations of material items of information it (i) has made public or has been required to make public in its home country, (ii) has filed or been required to file with the principal securities exchange on which its securities are traded and which has been made public and (iii) has distributed or been required to distribute to securityholders, since the first day of its most recently completed fiscal year.

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

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TRANSACTIONS WITH EXISTING U.S. HOLDERS

A foreign private issuer with existing U.S. security holders should consider the U.S. securities law implications prior to initiating transactions with them. The issuance of new securities in transactions such as business combinations, rights offerings and exchange offers necessitate consideration of many of the same issues discussed previously with respect to registered and unregistered offerings. Transactions involving the purchase of existing securities for cash, such as cash tender offers or securities repurchase programs, may also involve securities laws and require filings with the SEC if not structured carefully.

Rights Offerings

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

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

In a registered rights offering, certain procedural rules of the securities exchanges must also be taken into account. Rights offerings require careful planning and analysis and issuers should confer with their advisors because each country has particular requirements.

Tender Offers

Any widespread offers to purchase equity or debt securities can be considered a tender offer under U.S. securities laws. Tender offers are not defined under U.S. securities laws, and the courts rely on a multi-factor test to determine if a tender offer exists. Purchases of securities by the issuer or a third party, even in relatively small amounts, could in certain circumstances be grouped together and may constitute a "creeping" tender offer, subject to the applicable tender offer rules.

The rules vary depending on whether the securities are equity or debt securities. More expansive procedural and disclosure rules apply to equity tender offers (including for convertible debt), particularly if the security is registered with the SEC, than to debt tender offers. Both equity and debt tender offers must generally be open for a minimum of 20 business days, with mandatory extensions if there are changes to certain offering terms. If certain conditions are met, the SEC permits five business day tender offers for non-convertible debt securities. Tender offers are subject to anti-fraud and manipulation liability under Rule 14e-1. Equity tender offers, among other things, require filings with the SEC, either on a Schedule TO or a registration statement on Form S-4 for certain exchange offers.

Some foreign private issuers seek to exclude U.S. holders from debt tender or exchange offers so as to avoid U.S. tender offer rules, but a company contemplating doing so should carefully design publicity and offering procedures so as not to inadvertently trigger the U.S. tender rules.

Because of the complexities and nuances of the tender offer rules, an issuer should always consult with legal counsel prior to seeking to repurchase its securities or embarking on a tender offer.

Exchange Offers

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

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

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

Another important exemption is provided by Section 3(a)(10) of the Securities Act, which is available when securities are issued in exchange for other securities, not for cash, and the fairness of the exchange is approved by a court or a governmental entity. The fairness hearing must be open to everyone to whom securities would be issued in the proposed exchange. This exemption is commonly used by companies in connection with schemes and arrangements under Canadian or U.K. law.

Consent Solicitations

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

Share Repurchase Programs

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

“Going Private” Transactions

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

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SOME CONSIDERATIONS RELATING TO DEBT SECURITIES

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

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

Indenture Qualification

The Trust Indenture Act of 1939, as amended (the "TIA"), requires that indentures that are used in registered public offerings of debt securities, including convertible debt, meet several substantive and procedural requirements. The issuer must file a Form T-3 with the SEC, which is an application for the qualification of the indenture pursuant to the TIA. In unregistered debt offerings, although the TIA qualifications and the Form T-3 filing are generally not required, the form of indentures used in those transactions usually follow the forms used in registered public offers and would likely comply with the TIA provisions.

Negotiating the Indenture

Because debt securities are governed principally by contract law, significant attention must be given to the terms of the securities which are negotiated between the issuer and the underwriter. Although the underwriters advise the issuer on how to maintain operating flexibility and on what is "marketable," they also have an interest in maintaining credibility with potential purchasers. Significant terms include restrictive covenants, events of default, redemption provisions, tax gross-up clauses, and change of control terms. The necessity, as well as the language, of many of these provisions depends to a large extent on whether or not the issuer is considered "investment grade" by the rating agencies. Investment grade companies have very few restrictive covenants while companies below investment grade are generally required to comply with a number of more onerous provisions. Some indentures (particularly in the "high-yield" market) allow for certain restrictions to "fall away" if the issuer's ratings increase to investment grade.

Registration Rights

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

Because a subsequent registration resulted in the need for issuers to comply with SOX and become a reporting company, many foreign issuers decided to forego any benefit of the subsequent SEC registration. Because the holding period under Rule 144 for securities issued in unregistered offerings varies between six months to one year, the need for registration rights has been significantly diminished. Debt offerings by foreign private issuers with registration rights have largely disappeared, except for those companies that are already reporting companies in the United States.

Special Disclosure Issues

Special risk factors are often included in disclosure documents for debt offerings to address the particular concerns related to enforcement of remedies, subordination and other contractual terms that are not present in equity offerings. Also, investors tend to be less concerned about net income and earnings per share and focus more on other metrics, such as earnings before interest, taxes, depreciation and amortization (EBITDA). Offering documents for debt securities contain a "Description of the Notes" section

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describing in detail the terms of the indenture, which also becomes a mechanism for the issuer and the underwriters to negotiate the terms of the securities.

Guarantor Financial Statements

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

Secured Offerings

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

Ratings

Debt offerings often involve ratings from one or more rating agencies. Obtaining the necessary ratings is sometimes a burdensome process that requires the attention of both company management and the underwriters. Although ratings are not legally required to do a registered offering, the rating of a particular issuer or the absence of any rating can dictate the application of certain rules. Some investors may also have investment limits for offerings by issuers with less than a specified ratings level. The ratings application process is largely handled by the underwriters, but often they will require one or sometimes two ratings in order to adequately market the offering.

Tax Issues

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

Investors expect to receive the full amount of debt service owed to them, without deduction of withholding taxes that a jurisdiction may impose on payments made to holders considered non-resident. Investors typically require the issuer to "gross up" interest payments in order to compensate them for any withholding taxes. Foreign private issuers should be aware of this issue and include a provision in the indenture allowing them to redeem the bonds at par if a withholding tax is imposed or the withholding tax rate is increased to a higher rate than the rate in effect at the time of the issuance. In some jurisdictions, structures can be implemented to reduce or eliminate withholding taxes, such as utilizing a "back-to-back" loan structure or a tax-exempt intermediate corporate entity.

Foreign Stock Exchange Listings

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

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to the closing, the issue should be raised early in the process with the underwriters.

Furthermore, a listing on stock exchanges located in the European Union result in the issuer having to comply with various European Union rules, such as the Market Abuse Regulation, which can often become burdensome, particularly for those issuers located in jurisdictions where similar rules do not apply to them.

Issuance of Additional Notes

Indentures generally include provisions that allow issuers to "reopen" notes of the same series by issuing additional notes, either up to an unlimited amount or up to a certain limit. Customary provisions in indentures allow re-openings without the consent of the holders provided certain conditions are satisfied, such as the terms of the additional notes having the same terms as the original notes (same interest rate, same payment dates, same amortization or maturity), the delivery of certificates and legal opinions and compliance with the underlying covenants, principally those related to the incurrence of additional debt. While payment terms (e.g., interest rate) must remain unchanged, the additional notes are likely to be issued at a different "issue price" (e.g., at par, below par or above par) depending on market conditions at the time of the issuance of the additional notes. An offering of additional notes is often handled by the same banks that underwrote the initial issuance of notes and generally involves the preparation of a new offering memorandum, or a supplement to the original offering memorandum, in order to update required disclosures about the issuer and its business.

The additional notes are legally and economically fungible with the original notes and will have the same rights for all purposes, including voting as one single class, and *pari-passu* in priority and seniority. However, it should be noted that certain considerations may come into play if the new notes are issued with an original issue discount (OID). Additional notes issued with OID, while legally and economically fungible, require a separate issued trading number in the settlement systems, such as DTC, which may in practice distort trading of all the notes in the secondary market.

Special attention must be given to interest accrued on the original notes. Buyers of additional notes are generally required to make payment to the issuer of interest accrued from the last interest payment date on the notes, which they will receive back on the immediately following payment date.

Collective Action Clauses

Indentures for registered debt securities must be qualified under the TIA, which generally prohibits clauses that would allow amendments affecting the right of holders to payment to be adopted without the consent of each affected holder, effectively requiring a unanimous vote to adopt amendments affecting payment and other essential terms. Thus, so-called "collective action clauses," which allow amendments to the basic economic terms of bonds with less than a unanimous consent of the holders of the bonds, are not allowed in qualified indentures subject to the TIA. These provisions have never achieved any market acceptance in the United States in the private Rule 144A market (largely governed by New York law), where indentures do not require qualification because of the exemption from registration. By contrast, bonds governed by English law customarily include provisions allowing amendments to the basic economic terms of bonds to be adopted at a duly convened meeting of bondholders which, because of quorum and voting rules, often results in amendments being adopted by a simple majority or less of holders. This can often facilitate corporate restructurings outside of judicial reorganization proceedings. Further, with respect to sovereign debt securities, collective action clauses are common, since there is no bankruptcy or equivalent regime applicable to sovereigns. Therefore, standard clauses have been established by the International Capital Markets Association for such purposes.

Offerings of debt securities in the private Rule 144A market issued under New York law-governed indentures have included clauses allowing amendments to the basic economic terms of the bonds to be adopted with, for example, the affirmative vote of holders of 90% of the outstanding principal amount of the bonds. However, there continues to be some reluctance by underwriters to allow for such clauses in New York law-governed indentures. Collective action clauses in corporate bonds can serve to facilitate restructuring efforts, when necessary, to mitigate the risk of having minority bondholders hold up an amendment favored by a substantial majority of holders.

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DEREGISTRATION

A foreign private issuer that voluntarily seeks to deregister under the Exchange Act and terminate its SEC reporting obligations must comply with Rule 12h-6. The SEC adopted Rule 12h-6 in 2007 to provide a clearer, consistent and easier-to-apply standard by which foreign registrants can terminate their obligations to comply with U.S. reporting rules. This in turn affords foreign registrants more comfort in entering the U.S. markets if a later withdrawal is desired.

Rule 12h-6 sets forth several requirements that foreign private issuers must meet in order to deregister their equity securities. The main condition has two alternatives, each with a quantitative benchmark. In order to deregister, one of two alternative tests must be met, and three additional conditions must be satisfied.

First Alternative
5% Average Daily Trading Volume Test

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

Second Alternative
The 300 Holder Test

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

In addition to satisfying either of the above tests, the following additional conditions must be met:

- The foreign private issuer must have a minimum 12-month Exchange Act reporting history, be current in its reports, and have filed at least one annual report on Form 20-F.
- The foreign private issuer must not have sold equity securities through a registered public offering under the Securities Act in the 12 months prior to deregistration, other than certain exempted securities offerings (such as offerings to the issuer's employees, by selling security holders in a non-underwritten offering, or pursuant to a dividend or interest reinvestment plan).
- The relevant class of securities must have been listed on an exchange in the issuer's primary trading market for at least 12 months prior to deregistration.

In addition, a foreign private issuer needs to follow the delisting procedures of the applicable stock exchange on which its securities are listed in connection with a deregistration.

APPENDIX A: SARBANES-OXLEY SUMMARY

With limited exceptions, SOX generally applies to foreign private issuers and does not distinguish between non-U.S. and U.S. issuers. SOX established the Public Company Accounting Oversight Board (the PCAOB), which oversees accounting firms serving as auditors of public companies, including non-U.S. accounting firms that audit foreign private issuers with securities registered in the United States.

SOX covers an extensive range of issues affecting public companies. While not an exhaustive list, set forth below is a brief summary of important SOX provisions affecting foreign private issuers.

Internal Control over Financial Reporting

Under SOX, an issuer is required to evaluate and maintain adequate internal controls over financial reporting. Internal control over financial reporting is defined as a process designed by, or under the supervision of, the issuer's principal executive and principal financial officers and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles and includes those policies and procedures that: (i) pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer; (ii) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and (iii) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the financial statements.

SOX Section 404(a) requires an assessment by management of the issuer's internal controls over financial reporting, while Section 404(b) requires an attestation report of the issuer's independent auditors on management's assessment. Foreign private issuers that have a market cap greater than $75 million must comply with both Sections 404(a) and 404(b). The SEC has adopted rules to allow a transition period for a newly public registrant to wait until its second annual report to provide management's Section 404(a) assessment and its auditor's Section 404(b) attestation. In addition, foreign private issuers that are neither "large accelerated filers" nor "accelerated filers," and those that are EGCs, are required only to provide management's assessment of internal control under Section 404(a).

CEO/CFO Certifications

SOX also requires an issuer's CEO and CFO to certify each time the issuer files an Exchange Act report that they have read the report and that, to their knowledge (i) the financial statements fairly present the issuer's financial condition and results of operations; and (ii) the report does not contain any material misstatements or omissions. In addition, SOX requires the company's CEO and CFO to certify each periodic report (but not "current" reports) containing financial statements filed by the company, that such report complies with the requirements of Section 13(a) or 15(d) of the Exchange Act, and that the information it contains fairly presents, in all material respects, the financial condition and results of operations of the company. These certifications are sanctioned by criminal liability if the certifying party knowingly or willfully makes false certifications. Foreign private issuers provide these certifications in exhibits to the Annual Report on Form 20-F.

Audit Committees

SOX increased the responsibilities and authority of audit committees and enhanced the membership requirements, and the national securities exchanges adopted listing standards embodying these principles. Except as noted below, each member of the audit committee must be a member of the board of directors and meet stringent independence requirements. Audit committee members must not be an "affiliated person" of the issuer and must not accept any compensation, directly or indirectly, from the company or any of its subsidiaries other than in the capacity of a member of the board of directors.

Under Exchange Act Rule 10A-3, foreign private issuers are entitled to certain limited exemptions from the independence requirements and the structure of the audit committee. For example, many jurisdictions do not require an audit committee as part of the board governance structure. Instead, a board of corporate auditors or other statutory auditors may qualify under

Rule 10A-3. A foreign private issuer relying on exemptions needs to disclose in its annual report its reliance on the exemptions and an assessment of whether this reliance will materially adversely affect the audit committee's ability to act independently and to satisfy any of the other requirements.

SOX requires that each public company's annual report contain a statement as to whether it has at least one "audit committee financial expert" serving on its audit committee and, if so, whether the expert is independent of management. An audit committee financial expert is someone who (i) has an understanding of generally accepted accounting principles and their application; (ii) has experience analyzing financial statements; (iii) understands internal controls over financial reporting; and (iv) understands audit committee functions. In order to qualify, the audit committee financial expert must have gained these qualifications through education and experience in certain positions (i.e., principal financial officer, public accountant, auditor) or other relevant experience. A company that does not have an audit committee financial expert must disclose this fact and explain why it does not.

Auditor Independence

SOX enhances auditor independence and requires additional disclosures to investors about the services provided to companies by the independent accountant. SOX has several requirements for auditor independence, including mandatory rotation by certain partners on the audit engagement team after a certain number of years (five years in the case of the lead partner and concurring partner and seven years in the case of other audit partners), reports by the auditor on certain matters to the company's audit committee and the disclosure of certain information to investors related to audit and non-audit services provided by, and fees paid to, the auditor.

Loans to Executives and Directors

Under SOX, except for a few limited exemptions, it is illegal for an issuer to "extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof)" of the issuer. This covers both direct extensions and indirect extensions of credit, including through subsidiaries.

Code of Ethics

Under SOX, an issuer must design specific provisions, compliance procedures and disciplinary measures to deter wrongdoing and promote honest and ethical conduct. In accordance with this requirement, Form 20-F includes Item 16B, which requires a foreign private issuer to disclose whether it has a code of ethics that applies to its principal executive officers, principal financial officers and principal accounting officers and, if not, the reasons why it has not done so.

Attorney Conduct

Attorneys "appearing and practicing before the SEC in any way in the representation of issuers" must report to the CEO or the chief legal counsel of the issuer any evidence of a material violation of an applicable federal or state securities law, a breach of fiduciary duty, or a similar violation of any federal or state law which is material. "Appearing and practicing…" is broadly defined. An outside foreign local counsel would be exempt from such rules if that attorney is admitted to practice law outside of the United States and does not hold himself or herself out as practicing U.S. law, and who either (a) conducts activities that would constitute appearing and practicing before the SEC only incidentally to the practice of law in a jurisdiction outside the United States, or (b) is appearing and practicing before the SEC only in consultation with counsel admitted to practice law in the United States.

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APPENDIX B: STOCK EXCHANGE QUANTITATIVE LISTING REQUIREMENTS

(1) NYSE LISTING REQUIREMENTS FOR FOREIGN PRIVATE ISSUERS

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

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

If a company's parent or affiliated company is a listed company in good standing and the parent or affiliate retains control of the company or is under common control with the company, then the requirement for aggregate market value of publicly held shares would be $60 million worldwide rather than $100 million worldwide.

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

In addition, a foreign private issuer must have a closing price or, if listing in connection with an IPO or Initial Firm Commitment Underwritten Public Offering, a public offering price per share of at least $4 at the time of listing.

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

1. EARNINGS TEST

(1) Pre-tax earnings from continuing operations and after minority interest, amortization and equity in the earnings or losses of investees, adjusted for certain items, must total at least $100,000,000 in the aggregate for the last three fiscal years (or the last two fiscal years if the company qualifies as an emerging growth company under the JOBS Act), with a minimum of $25,000,000 in each of the most recent two fiscal years.

(2) Additional adjustments available for foreign currency devaluation. Non-operating adjustments when associated with translation adjustments representing a significant devaluation of a country's currency (e.g., the currency of a company's country of domicile devalues by more than 10 percent against the U.S. dollar within a six-month period). Adjustments may not include those associated with normal currency gains or losses.

(3) Reconciliation to U.S. GAAP of the third year back would only be required if the Exchange determines that reconciliation is necessary to demonstrate that the aggregate $100,000,000 threshold is satisfied.

2. VALUATION/REVENUE TEST

Companies listing under this standard may satisfy either (a) the Valuation/Revenue with Cash Flow Test or (b) the Pure Valuation/Revenue Test.

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(a) Valuation/Revenue with Cash Flow Test

(1) at least $500,000,000 in global market capitalization,

(2) at least $100,000,000 in revenues during the most recent 12 month period, and

(3) at least $100,000,000 aggregate cash flows for the last three fiscal years (or the last two fiscal years if the company qualifies as an emerging growth company under the JOBS Act), where each of the two most recent years is reported at a minimum of $25,000,000, on an adjusted basis.

A Company must demonstrate cash flow based on the operating activity section of its cash flow statement. Cash flow represents net income adjusted to (a) reconcile such amounts to cash provided by operating activities, and (b) exclude changes in operating assets and liabilities. With respect to reconciling amounts pursuant to this paragraph, all such amounts are limited to the amount included in the company's income statement.

In the case of companies listing in connection with an IPO or Initial Firm Commitment Underwritten Public Offering, the company's underwriter (or, in the case of a spin-off, the parent company's investment banker or other financial advisor) must provide a written representation that demonstrates the company's ability to meet the $500,000,000 global market capitalization requirement based upon the completion of the offering (or distribution).

Reconciliation to U.S. GAAP of the third fiscal year back would only be required if the Exchange determines that reconciliation is necessary to demonstrate that the $100,000,000 aggregate cash flow threshold is satisfied.

(b) Pure Valuation/Revenue Test

(1) at least $750,000,000 in global market capitalization, and

(2) at least $75,000,000 in revenues during the most recent fiscal year.

In the case of companies listing in connection with an IPO or Initial Firm Commitment Underwritten Public Offering, the company's underwriter (or, in the case of a spin-off, the parent company's investment banker or other financial advisor) must provide a written representation that demonstrates the company's ability to meet the $750,000,000 global market capitalization requirement upon completion of the offering (or distribution). For all other companies, market capitalization valuation will be determined over a six-month average.

3. AFFILIATED COMPANY TEST

(1) at least $500,000,000 in global market capitalization;

(2) at least 12 months of operating history (although a company is not required to have been a separate corporate entity for such period);

(3) the company's parent or affiliated company is a listed company in good standing (as evidenced by written representation from the company or its financial advisor excluding that portion of the balance sheet attributable to the new entity); and

(4) the company's parent or affiliated company retains control of the entity or is under common control with the entity.

In the case of companies listing in connection with an IPO or Initial Firm Commitment Underwritten Public Offering, the company's underwriter (or, in the case of a spin-off, the parent company's investment banker or other financial advisor) must provide a written representation that demonstrates the company's ability to meet the $500,000,000 global market capitalization requirement upon completion of the offering (or distribution).

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"Control" for purposes of the Affiliated Company Test will mean having the ability to exercise significant influence over the operating and financial policies of the listing company, and will be presumed to exist where the parent or affiliated company holds 20% or more of the listing company's voting stock directly or indirectly. Other indicia that may be taken into account when determining whether control exists include board representation, participation in policy making processes, material intercompany transactions, interchange of managerial personnel, and technological dependency. The Affiliated Company Test is taken from and intended to be consistent with generally accepted accounting principles regarding use of the equity method of accounting for an investment in common stock.

SECURITIES EXCHANGE ACT OF 1934

Aside from qualifying under Exchange standards, all corporate securities must be registered under the Securities Exchange Act of 1934 under Section 12(b) before admission to dealings on the Exchange.

SPONSORSHIP BY AN EXCHANGE MEMBER FIRM

Because of the use of bearer shares outside the United States, some non-U.S. companies might have difficulty in demonstrating that they have the required number of shareholders on a worldwide basis. In such cases, sponsorship by an Exchange member firm as to the liquidity and depth of the market for the company's shares may substitute for documentation concerning the number of shareholders. Nevertheless, the Exchange staff must be satisfied that a broad and independent market exists. For companies listing with minimal U.S. distribution, the primary non-U.S. market must provide the liquidity against which U.S. arbitrage transactions can be effected.

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(2) NASDAQ LISTING REQUIREMENTS

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

Nasdaq Capital Market Initial Listing Requirements[1]

Requirements	Equity Standard Listing Rules 5505(a) and 5505(b)(1)	Market Value of Listed Securities Standard Listing Rules 5505(a) and 5505(b)(2)[2]	Net Income Standard Listing Rules 5505(a) and 5505(b)(3)
Stockholders' equity	$5 million	$4 million	$4 million
Market value of unrestricted publicly held shares	$15 million	$15 million	$5 million
Operating history	2 years	N/A	N/A
Market value of listed securities[3]	N/A	$50 million	N/A
Net income from continuing operations (in the latest fiscal year or in two of the last three fiscal years)	N/A	N/A	$750,000
Bid price OR Closing price	$4 $3	$4 $2	$4 $3
Unrestricted publicly held shares[4]	1 million	1 million	1 million
Shareholders (unrestricted round lot holders)[5]	300	300	300
Market makers[6]	3	3	3
Corporate governance[7]	Yes	Yes	Yes

[1] Companies must meet the bid price, unrestricted publicly held shares, unrestricted round lot holders, and market makers requirements as set forth in Rule 5505(a) and at least one of the Standards in Rule 5505(b).

[2] Seasoned companies (those companies already listed or quoted on another marketplace) qualifying only under the Market Value of Listed Securities Standard must meet the market value of listed securities and the bid price requirements for 90 consecutive trading days prior to applying for listing.

[3] The term "listed securities" is defined as "securities listed on Nasdaq or another national securities exchange."

[4] Publicly held shares is defined as total shares outstanding, less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10% of the total shares outstanding of the company. In the case of ADRs, at least 400,000 shall be issued.

[5] Round lot holders are shareholders of 100 shares or more. The number of beneficial holders is considered in addition to holders of record.

[6] An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.

[7] In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series. Certain exemptions from these requirements apply to foreign private issuers.

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Nasdaq Global Market Initial Listing Requirements[1]

Requirements	Income Standard Listing Rules 5405(a) and 5405(b)(1)	Equity Standard Listing Rules 5405(a) and 5405(b)(2)	Market Value Standard Listing Rules 5405(a) and 5405(b)(3)[2]	Total Assets/Total Revenue Standard Listing Rules 5405(a) and 5405(b)(4)
Income from continuing operations before income taxes (in latest fiscal year or in two of last three fiscal years)	$1 million	N/A	N/A	N/A
Stockholders' equity	$15 million	$30 million	N/A	N/A
Market value of listed securities[3]	N/A	N/A	$75 million	N/A
Total assets and Total revenue (in latest fiscal year or in two of last three fiscal years)	N/A	N/A	N/A	$75 million and $75 million
Unrestricted publicly held shares[4]	1.1 million	1.1 million	1.1 million	1.1 million
Market value of unrestricted publicly held shares	$8 million	$18 million	$20 million	$20 million
Bid price	$4	$4	$4[2]	$4
Shareholders (unrestricted round lot holders)[5]	400	400	400	400
Market makers[6]	3	3	4	4
Operating history	N/A	2 years	N/A	N/A
Corporate governance[7]	Yes	Yes	Yes	Yes

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

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Nasdaq Global Select Market Initial Listing Requirements[1]

Requirements	Standard 1: Earnings Listing Rules 5315(e) and 5315(f)(3)(A)	Standard 2: Capitalization with Cash Flow Listing Rules 5315(e) and 5315(f)(3)(B)	Standard 3: Capitalization with Revenue Listing Rules 5315(e) and 5315(f)(3)(C)	Standard 4: Assets with Equity Listing Rules 5315(e) and 5315(f)(3)(D)
Pre-tax earnings[2] (income from continuing operations before income taxes)	Aggregate in prior three fiscal years $11 million and Each of the two most recent fiscal years ≥ $2.2 million and Each of the prior three fiscal years > $0	N/A	N/A	N/A
Cash flows[3]	N/A	Aggregate in prior three fiscal years ≥ $27.5 million and Each of the prior three fiscal years > $0	N/A	N/A

[1] These requirements apply to all companies, other than closed-end management investment companies. A closed-end management investment company, including a business development company, is not required to meet the financial requirements of Rule 5315(f)(3). If the common stock of a company is included in The Nasdaq Global Select Market, any other security of that same company, such as other classes of common or preferred stock, which qualifies for listing on The Nasdaq Global Market shall also be included in The Nasdaq Global Select Market. A company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time, as described in IM-5101-2, is not eligible to list on The NASDAQ Global Select Market.

[2] In calculating income from continuing operations before income taxes for purposes of Rule 5315(f)(3)(A), Nasdaq will rely on a company's financial information as filed with the Securities and Exchange Commission (SEC) in the company's most recent periodic report and/or registration statement. If a company does not have three years of publicly reported financial data, it may qualify under Rule 5315(f)(3)(A) if it has: (i) reported aggregate income from continuing operations before income taxes of at least $11 million and (ii) positive income from continuing operations before income taxes in each of the reported fiscal years. A period of less than three months shall not be considered a fiscal year, even if reported as a stub period in the company's publicly reported financial statements.

[3] In calculating cash flows for purposes of Rule 5315(f)(3)(B), Nasdaq will rely on the net cash provided by operating activities reported in the company's financial information, as filed with the SEC in the company's most recent periodic report and/or registration statement, excluding changes in working capital or in operating assets and liabilities. A period of less than three months shall not be considered a fiscal year, even if reported as a stub period in the company's publicly reported financial statements.

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Requirements	Standard 1: Earnings Listing Rules 5315(e) and 5315(f)(3)(A)	Standard 2: Capitalization with Cash Flow Listing Rules 5315(e) and 5315(f)(3)(B)	Standard 3: Capitalization with Revenue Listing Rules 5315(e) and 5315(f)(3)(C)	Standard 4: Assets with Equity Listing Rules 5315(e) and 5315(f)(3)(D)
Market capitalization[4]	N/A	Average ≥ $550 million over prior 12 months	Average ≥ $850 million over prior 12 months	≥$160 million
Revenue	N/A	Previous fiscal year ≥ $110 million	Previous fiscal year ≥ $90 million	N/A
Total assets	N/A	N/A	N/A	≥$80 million in the most recently completed fiscal year
Stockholders' equity	N/A	N/A	N/A	≥$55 million
Bid price	$4	$4	$4	$4
Market makers[5]	3 or 4	3 or 4	3 or 4	3 or 4
Corporate governance[6]	Yes	Yes	Yes	Yes

[4] In the case of a company listing in connection with its initial public offering, compliance with the market capitalization requirements of Rules 5315(f)(3)(B), (C) and (D) will be based on the company's market capitalization at the time of listing.

[5] A company that also satisfies the requirements of Rule 5405(b)(1) or 5405(b)(2) is required to have three market makers. Otherwise, the company is required to have four market makers. An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.

[6] In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series. Certain exemptions from these requirements apply to foreign private issuers.

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Nasdaq Global Select Market Initial Listing Requirements (Liquidity Requirements)

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

[1] Companies affiliated with another company listed on The Nasdaq Global Select Market. For purposes of Rule 5315, a company is affiliated with another company if that other company, directly or indirectly though one or more intermediaries, controls, is controlled by, or is under common control of the company. For purposes of these rules, control means having the ability to exercise significant influence. Ability to exercise significant influence will be presumed to exist where the parent or affiliated company directly or indirectly owns 20% or more of the other company's voting securities, and also can be indicated by representation on the board of directors, participation in policy making processes, material intercompany transactions, interchange of managerial personnel, or technological dependency.

[2] Round lot and total shareholders include both beneficial holders and holders of record.

[3] Publicly held shares is defined as total shares outstanding, less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10% of the total shares outstanding of the company.

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APPENDIX C: NYSE CONTINUED LISTING STANDARDS

In order to maintain its listing on the NYSE, a company must maintain minimum distribution levels, minimum financial standards and a minimum price.

Minimum Distribution Requirements	Minimum Financial Standards	Minimum Price
Company below compliance if: • Total number of stockholders is less than 400; • Total number of stockholders is less than 1,200 and average monthly trading volume for the most recent 12 months is less than 100,000 shares; or • Number of publicly-held shares is less than 600,000.	Company below compliance if: • average global market capitalization over a consecutive 30 trading-day period is less than $50,000,000; and • at the same time, total stockholders' equity is less than $50,000,000. In addition, an issuer that falls below an average global market capitalization of $15,000,000 over a consecutive 30 trading-day period will be subject to prompt suspension and delisting procedures.	Company below compliance if: • average closing price of its listed security is less than $1.00 over a consecutive 30 trading-day period. • A company has six months to bring its share price and 30 trading-day average share price above $1.00 and must (i) notify the NYSE within 10 business days of its intent to cure this deficiency and (ii) in the case of a foreign private issuer, issue a press release within 30 days.

An issuer may also be suject to delisting in a number of other circumstances at the sole discretion of the NYSE, including, among other things, in the event of:

- a substantial reduction in operating assets and/or scope of operations;
- certain insolvency situations;
- failure to maintain an audit committee,
- the failure to make timely, adequate and accurate disclosures of information to its shareholders; and
- the failure to observe good accounting practices in reporting earnings and financial position.

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APPENDIX D: NASDAQ CONTINUED LISTING REQUIREMENTS

Nasdaq Capital Market Continued Listing Requirements

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

Requirements	Equity Standard Listing Rules 5550(a) and 5550(b)(1)	Market Value of Listed Securities Standard Listing Rules 5550(a) and 5550(b)(2)	Net Income Standard Listing Rules 5550(a) and 5550(b)(3)
Stockholders' equity	$2.5 million	N/A	N/A
Market value of listed securities[1]	N/A	$35 million	N/A
Net income from continuing operations (in the latest fiscal year or in two of the last three fiscal years)	N/A	N/A	$500,000
Publicly held shares[2]	500,000	500,000	500,000
Market value of publicly held securities	$1 million	$1 million	$1 million
Bid price	$1	$1	$1
Public holders[3]	300	300	300
Market makers[4]	2	2	2
Corporate governance[5]	Yes	Yes	Yes

[1] The term "listed securities" is defined to mean "securities listed on Nasdaq or another national securities exchange."

[2] Publicly held shares is defined as total shares outstanding less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10% of the total shares outstanding.

[3] Public holders of a security include both beneficial holders and holders of record, but does not include any holder who is directly or indirectly an executive officer, director, or the beneficial holder of more than 10% of the total shares outstanding.

[4] An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.

[5] In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series. Certain exemptions from these requirements apply to foreign private issuers

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Nasdaq Global Select Market and Nasdaq Global Market Continued Listing Requirements

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

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

[1] The term "listed securities" is defined to mean "securities listed on Nasdaq or another national securities exchange."

[2] Publicly held shares is defined as total shares outstanding less any shares held directly or indirectly by officers, directors or any person who is the beneficial owner of more than 10% of the total shares outstanding.

[3] An electronic communications network (ECN) is not considered a market maker for the purpose of these rules.

[4] In addition to the above quantitative requirements, companies must comply with all corporate governance requirements as set forth in the Rule 5600 Series. Certain exemptions from these requirements apply to foreign private issuers.

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An Integrated Approach: We provide integrated legal services for clients worldwide. We offer multidisciplinary teams that have a history of working together with the strategic business, legal, and political experience required to address the increasingly complex needs of companies and investors today.

A Commitment to Excellence: We are committed to delivering the highest quality legal services to our clients.

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Firm Reach: Our offices and lawyers are in key commercial centers in the United States, Latin America, Europe, Asia, and the Middle East, offering our clients both an intensely local and truly global reach.

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