U.S. Equity Markets for Foreign Issuers: Public Offerings and Rule 144A Placements of American Depositary Receipts

Peter V. Darrow

Philip J. Niehoff

Michael L. Hermsen

www.mayerbrownrowe.com

MAYER BROWN ROWE & MAW

MAYER, BROWN, ROWE & MAW LLP

Peter V. Darrow	(212) 506-2560 pdarrow@mayerbrownrowe.com
Philip J. Niehoff	(312) 701-7843 pniehoff@mayerbrownrowe.com
Michael L. Hermsen	(312) 701-7960 mhermsen@mayerbrownrowe.com

BERLIN BRUSSELS CHARLOTTE CHICAGO COLOGNE FRANKFURT HONG KONG HOUSTON
LONDON LOS ANGELES NEW YORK PALO ALTO PARIS WASHINGTON, D.C.

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INTRODUCTION – U.S. EQUITY MARKETS FOR FOREIGN ISSUERS

The U.S. equity capital markets are the deepest and most liquid in the world, and as a result have been very attractive to foreign issuers for many years. The advent of globally integrated trading markets for equity securities has facilitated capital formation for foreign issuers, and underscored the value to foreign issuers of raising equity capital through registered offerings in the U.S. capital market. Equity offerings in the United States by foreign issuers dramatically increased throughout the late 1990s and early 2000s, but declined through 2003 as the U.S. economy experienced a recession, during which the U.S. equity markets remained depressed for U.S. domestic issuers as well.

However, the public securities market in the United States has improved dramatically since 2003 for both U.S. and foreign issuers, although anecdotal evidence suggests that the corporate governance reforms and disclosure requirements (and the associated costs) resulting from the enactment of the Sarbanes-Oxley Act of 2002, and the adoption of rules and regulations by the U.S. Securities and Exchange Commission (the "SEC") that implement that Act (collectively, the "Sarbanes-Oxley Act"), have dampened the enthusiasm of foreign issuers for publicly offering securities in the United States. Despite the burdens associated with registered public offerings, numerous foreign companies have found that the U.S.

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capital markets offer access to vast new sources of equity capital and opportunities to broaden their shareholder base, open up new trading markets for their securities and enhance the overall valuation of their equity securities. In addition, registered securities of a foreign company can serve as a "currency" for acquiring a U.S. business.

Foreign issuers have also been active participants in the private U.S. capital markets. This interest has been, in certain measure, attributable to the adoption of Rule 144A by the SEC. Rule 144A establishes a non-exclusive "safe harbor" from the registration requirements of the Securities Act of 1933, as amended (the "Securities Act"), for the resale of securities issued in a non-public offering. As discussed below, Rule 144A has significantly expanded and deepened the liquidity of the U.S. private placement market, making it much easier, less expensive and less burdensome for foreign issuers to raise capital from U.S. institutional investors. Issuers relying upon Rule 144A may avoid compliance with the relatively burdensome obligations involved in the preparation of a Securities Act registration statement. They may also avoid compliance with SEC requirements concerning disclosure, accounting (including reconciliation of financial statements to U.S. generally accepted accounting principles) and ongoing periodic reporting requirements pursuant to the Securities Exchange Act of 1934, as amended (the "Exchange Act"), in addition to the disclosure and other requirements of the Sarbanes-Oxley Act.

A foreign issuer contemplating the issuance of American Depositary Receipts ("ADRs") in the United States must make an initial choice between issuing its securities by means of a public offering, registered with the SEC pursuant to the Securities Act, or by means of a non-public offering, pursuant to a private placement. While there are significant and clear advantages to the relatively liquid Rule 144A market, there are also distinct advantages — and burdens — for a foreign issuer in making a registered public offering of its securities in the United States.

Issuing securities in the United States by means of a public offering requires a foreign company to comply with a variety of U.S. federal and state securities laws and other regulations. First, a public offering of securities requires the preparation and filing of a registration statement with the SEC. Second, companies that have registered securities for public sale in the United States or have securities listed on a U.S. stock exchange (which include The New York Stock Exchange, Inc. ("NYSE"), The American Stock Exchange, Inc. ("AMEX") or The NASDAQ

Stock Market LLC ("NASDAQ")) are subject to the ongoing public reporting requirements under the Exchange Act. Third, each U.S. state also regulates the offering of securities. Finally, U.S. stock exchanges impose rules on listed companies that address a broad range of matters relating to, among other things, the issuance of securities, disclosure of corporate developments, corporate governance and the rights of shareholders.

The purpose of this memorandum is (i) to summarize the requirements under U.S. securities laws that a foreign company (other than a Canadian issuer that elects to comply with the SEC's Multi-Jurisdictional Disclosure System) must comply with in making a registered public offering or Rule 144A placement of its equity securities in the United States, as well as the mechanics of implementing such a public offering or placement; and (ii) to review the relative advantages of registered public offerings and Rule 144A placements as a means for a foreign company to issue ADRs in the United States. This memorandum is not intended to provide a comprehensive overview of the issues arising in public offerings and private placements of ADRs in the United States, or of the complex regulatory structure which governs securities transactions in the United States. Rather, this memorandum is intended to outline the basic features of the applicable U.S. federal securities laws, concentrating on those features and developments which are likely to be most relevant to a foreign company contemplating raising capital in the United States.

CHAPTER I
AMERICAN DEPOSITARY RECEIPTS

A. BACKGROUND

For a variety of reasons discussed below, it is often not feasible or advisable for foreign companies to list their securities directly on U.S. stock exchanges. Therefore, foreign companies commonly offer equity securities in the United States through the issuance of ADRs. ADRs are negotiable receipts registered in the name of the holder that evidence underlying shares of non-U.S. equity securities. ADRs are issued by a U.S. depositary, usually a bank, against the deposit of a foreign company's equity securities with a custodian bank, usually located in the foreign company's home country, that acts as agent for the U.S. depositary bank.

There are several advantages afforded by ADRs:

- ADRs are issued in registered form even if the underlying security exists in bearer form. In addition to being more familiar to U.S. investors, the registered format is required in the United States for exchange listing.
- ADRs avoid physical transfer of shares to the United States and allow U.S.-traded securities to be settled in the manner customary in the U.S. market, rather than the issuer's home market.
- ADRs generally provide for payments with respect to the ADRs, including dividends, to be made in U.S. dollars regardless of the currency in which payments on the underlying securities are made.
- The U.S. depositary can facilitate dissemination of disclosure to U.S. investors.
- Voting of the underlying securities can be facilitated through the U.S. depositary, which usually votes the underlying securities after receiving directions from the ADR holders.

As noted above, foreign companies that have equity securities in bearer form must use ADRs in order to be listed on one of the U.S. securities exchanges since each of the exchanges refuses to list shares that are not held in registered form. In all other cases, the NYSE, AMEX and NASDAQ express a strong preference for the use of ADRs, and will only list directly the shares of foreign private issuers in special circumstances. Even if shares are not to be listed on an exchange, use of an ADR system is both customary and advisable and can make securities of foreign private issuers more attractive to U.S. investors.

B. "SPONSORED" vs. "UNSPONSORED" ADR PROGRAMS

ADR programs are either "sponsored" or "unsponsored." Sponsored ADR programs involve an agreement between a U.S. depositary bank and a foreign private issuer pursuant to which the U.S. depositary bank, among other things, keeps the transfer books, forwards interim and annual reports, sends notices of meetings and pays dividends to the ADR holders. Only sponsored programs can be listed on U.S. stock exchanges, or can be the basis of a U.S. registered public offering. For this and other reasons, sponsored programs are the more common.

An unsponsored program can be established without the cooperation of a foreign private issuer, and is typically established by a U.S. broker-dealer that owns the shares of a foreign issuer and is interested in developing a trading market for those shares. However, it is customary to obtain a letter of non-objection from the foreign private issuer before establishing an unsponsored program involving such issuer's securities. For an unsponsored program to be established, the foreign company must either be a reporting company under the Exchange Act or provide information pursuant to Exchange Act Rule 12g3-2(b), which is discussed below.

C. LEVEL I, II AND III ADR PROGRAMS; RULE 144A ADR PROGRAMS

ADRs are offered pursuant to Level I, II or III programs. In addition, foreign private issuers may issue ADRs pursuant to Rule 144A, discussed below. Level I and Level II programs do not involve a capital raising transaction or the public offering of securities in the United States but are designed to create a trading market for the issuer's equity securities. Under Level I and Level II programs, existing holders of the issuer's securities deposit their securities into the ADR facility. Level I programs do not involve the listing of the ADRs on a U.S. stock exchange and as a result trade through the over-the-counter market in the U.S. As long as the issuer either (i) has fewer than 300 holders of the ADRs resident in the United States, or (ii) provides the information required by Exchange Act Rule 12g3-2(b), the issuer is not required to register the securities under the Exchange Act.

Level II programs, on the other hand, do involve listing the ADRs on a U.S. stock exchange, and require registration of the issuer's securities under the Exchange Act by filing Form 20-F, discussed below.

Level II programs also require the U.S. depositary bank to register the ADRs representing the issuer's securities under the Securities Act by filing Form F-6 (discussed below), but do not require registration under the Securities Act of the underlying securities of the issuer.

Level III programs involve a capital raising transaction and a public offering of the ADRs in the United States. As a result, registration is required under the Securities Act for the ADRs (by having the U.S. depositary bank file a Form F-6 with the SEC) and for the issuer's underlying securities, and registration is also required

under the Exchange Act for the issuer's underlying securities. Level II and Level III programs must be sponsored.

In addition, foreign private issuers may raise capital by issuing ADRs pursuant to Rule 144A, which provides an exemption from the registration requirements of the Securities Act for securities issued in compliance with the Rule. Rule 144A ADRs are issued in an underwritten offering through one or more investment banks, in a fashion substantially similar to Level III programs. However, since both the ADRs and the underlying shares are issued pursuant to an exemption from the registration requirements of the Securities Act, no Form F-1 or Form F-6 is required to be filed with the SEC, and the foreign private issuer will not become subject to the periodic reporting requirements of the Exchange Act (but will nevertheless be required to comply with the requirements of SEC Rule 12g3-2(b), discussed below).

CHAPTER II
PUBLIC OFFERINGS OF ADRS IN THE UNITED STATES

As a general rule, the Securities Act requires a company to file the appropriate registration statement before the company can publicly offer securities in the United States. Before the securities can be sold, the registration statement must become effective, either by SEC declaration, or automatically for well-known, seasoned issuers. Furthermore, such securities may not be distributed for sale or delivery unless accompanied or preceded by a prospectus that meets the requirements of the Securities Act. Use of the registration statement and prospectus is designed to inform investors of the nature and risks of an investment in the company.

In connection with a public offering of Level III ADRs by a foreign company, both the company's securities and the ADRs representing those securities must be registered under the Securities Act, as described below. For a Level II program, only the ADRs must be registered under the Securities Act.

A. REGISTRATION OF THE UNDERLYING SECURITIES UNDER THE SECURITIES ACT

Foreign Private Issuers

Foreign private issuers offering Level III ADRs to the U.S. public must register the shares underlying those ADRs under the Securities Act. A company organized outside of the United States is a "foreign private issuer" unless more than 50% of its outstanding voting stock is directly or indirectly owned of record by residents of the United States and one of the following is true: (i) the majority of its directors or senior management are U.S. citizens or residents; (ii) more than 50% of its assets are located in the United States; or (iii) its business is run principally in the United States. In determining the percentage of its stock held by U.S. residents, a foreign company is required to look through brokers and other nominees holding shares to determine the residency of the beneficial owners of those shares. Foreign companies that do not meet the definition of "foreign private issuer" are subject to the same requirements under U.S. securities laws as U.S. issuers.

Along with being subject to the disclosure requirements applicable to foreign private issuers, which are less demanding than the requirements applicable to U.S. issuers, foreign private issuers are:

- not subject to the proxy rules applicable to U.S. issuers under Section 14 of the Exchange Act;
- not subject to the reporting requirements or the requirement to forfeit short-swing profits when buying or selling securities of the issuer that apply to directors, executive officers and large shareholders of the issuer under Section 16 of the Exchange Act; and
- not subject to the requirements of Regulation FD relating to selective disclosure by the issuer of material information.

Registration Forms: Forms F-1 and F-3

Form F-1 is the form of registration statement typically required of foreign private issuers raising capital in the U.S. markets for the first time. A foreign private issuer that is subject to the reporting requirements and has timely filed all required reports during the preceding 12 months (or such shorter period as it was required to file reports), and that meets certain other requirements, may respond to certain disclosure requirements of Form F-1 by incorporating by reference from its

reports previously filed with the SEC. These issuers may not incorporate by reference to reports to be filed after the effective date of the Form F-1. As a result, these foreign private issuers must file post-effective amendments to update outdated or "stale" information in their registration statements, which the SEC must declare effective.

More seasoned foreign private issuers that have been subject to the reporting requirements of the Exchange Act for at least 12 months and that have timely filed all required reports during the preceding 12 months, subject to certain other requirements, may use Form F-3, a short form registration statement that allows a foreign private issuer to incorporate much of the required information by reference to its Exchange Act reports. Form F-3 also incorporates by reference a foreign private issuer's future Exchange Act reports, keeping the registration statement current or "evergreen" without requiring the time-consuming preparation of post-effective amendments to update the outdated or "stale" information. One of the important requirements for use of Form F-3 in primary offerings (as opposed to secondary offerings by existing shareholders) is that the foreign private issuer must have common equity securities with a market value of at least $75 million outstanding and in the hands of shareholders that are not affiliates[1] of the foreign private issuer. The notion behind this requirement is that information should be sufficiently available to the market regarding issuers with a substantial public "float" and a history of public reporting with the SEC, without requiring the issuer to reproduce voluminous disclosures in the prospectus.

In cases where a foreign private issuer is offering ADRs directly to target shareholders in an exchange offer or as merger consideration, a registration statement on Form F-4 is required. Form F-4 allows correspondingly greater degrees of incorporation by reference if a foreign private issuer would otherwise be eligible to use Form F-3.

The disclosure requirements generally applicable to registration statements are discussed below in "Disclosure in Registered Public Offerings."

Except as specifically noted below, the discussion that follows describes the issuance of securities in the United States by foreign private issuers that are offering securities in the United States for the first time.

1 An "affiliate" of an issuer is a person or entity controlling, controlled by or under common control with the issuer. Securities Act Rule 405.

B. REGISTRATION OF ADRS – FORM F-6

Under Level II and Level III programs, registration under the Securities Act of the ADRs that represent the foreign private issuer's securities is also required. The U.S. depositary bank is responsible for the registration of the ADRs, using Form F-6, which is used only for ADRs. This form is relatively simple and requires no disclosure by the foreign private issuer. Nevertheless, in a sponsored ADR program the form must be signed by the foreign private issuer and the principal executive, financial and accounting officers of the foreign private issuer, by a majority of its board of directors, and by its authorized U.S. representative. This is important because, as discussed in more detail below, very stringent standards apply to persons signing registration statements that can result in their being held liable for any material misstatements contained in, or omissions from, the registration statement.

To be able to use Form F-6 in connection with ADRs, the underlying securities must either be registered under Section 12 of the Exchange Act or be eligible for an exemption from such registration. Exchange Act registration is discussed in greater detail below. Although the ADRs themselves are exempt from the reporting requirements of the Exchange Act, they are not exempt from the anti-fraud requirements of that act (which is discussed below under "The Registration Process – Liability Under the Federal Securities Laws").

One of the other requirements for eligibility to use Form F-6 is that the holder of the ADRs must be entitled to withdraw the deposited securities at any time. Therefore, this is a universal feature of ADR depositary agreements.

C. EXCHANGE ACT REGISTRATION AND REPORTING OBLIGATIONS OF FOREIGN ISSUERS

Introduction

The Exchange Act imposes registration requirements separate from the registration requirements of the Securities Act. Registration of the issuance of securities under the Securities Act does not satisfy the registration requirements of the Exchange Act. A foreign issuer is required to register its entire class of securities under the Exchange Act if (i) the securities or ADRs representing the issuer's securities will be traded on a U.S. exchange or (ii) the securities will be held by

more than 300 holders resident in the United States[2]. In addition, if any securities are registered under the Securities Act, the issuer will be subject to the periodic reporting requirements under the Exchange Act at least through the end of the calendar year in which the registration occurs.

If a foreign private issuer is already subject to the reporting requirements of the Exchange Act and is seeking to register a new class of securities under the Exchange Act, or is concurrently filing a registration statement under the Securities Act, the issuer is eligible to use a Form 8-A registration statement. Form 8-A is a short form document that incorporates by reference certain information from the issuer's Securities Act filing. If a foreign private issuer is not eligible to use Form 8-A, it must prepare and file a registration statement under the Exchange Act on Form 20-F, which requires substantial disclosure and may require several months to complete as a result of SEC review. Form 20-F is also the form used by foreign private issuers to file annual reports with the SEC. The disclosure requirements for Form 20-F are discussed in greater detail below in "Disclosure in Registered Public Offerings."

In the case of a listing on the NYSE, AMEX or NASDAQ, the Exchange Act registration statement will become effective upon (i) the later of receipt by the SEC of certification from the exchange or the filing of the Form 8-A with the SEC (if the securities are not concurrently being registered under the Securities Act), or (ii) the later of receipt by the SEC of certification from the exchange, the filing of the Form 8-A with the SEC or the effectiveness of the Securities Act registration (if the securities are concurrently being registered under the Securities Act).

Periodic Reporting

Form 20-F

If a company has a class of securities registered under the Exchange Act, it is required to file periodic reports with the SEC. Form 20-F is the annual report form used by foreign private issuers. It must be filed not later than six months after the end of the issuer's fiscal year. Typically, the comprehensive information

2 The class of securities must be registered under the Exchange Act if held by more than 500 persons (under Section 12(g) of the Exchange Act), but once registered can only be de-registered if held by less than 300 persons (Exchange Act Rule 12g3-2(a)). In the case of a foreign private issuer, it must have 300 holders resident in the United States before being required to register under the Exchange Act. A foreign private issuer that has 300 or more U.S. resident holders of the securities of such class may be exempt from such registration by Exchange Act Rule 12g3-2(b) if the class of securities is not listed on a U.S. stock exchange.

contained in the registration statement used in connection with a public offering (or set forth in the Form 20-F filed in connection with the company's initial registration under the Exchange Act) is revised and updated to produce the Form 20-F annual report.

As a result of rules adopted by the SEC in 2002, as required by the Sarbanes-Oxley Act, an issuer's Chief Executive Officer and Chief Financial Officer are required to certify, each time the issuer files an Exchange Act report (including, in the case of foreign private issuers, the issuer's Form 20-F), that they have read the report and that, to their knowledge, (i) the financial statements accurately reflect the issuer's financial position; and (ii) the report does not contain any material misstatements or omissions. They also certify that they (i) are responsible for establishing and maintaining the issuer's disclosure controls and procedures and internal control over financial reporting; (ii) have evaluated the effectiveness of those controls and procedures; (iii) have disclosed in the report any change in the issuer's internal control over financial reporting that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting; and (iv) have disclosed to the issuer's auditors and the audit committee of the issuer's board of directors (v) all significant deficiencies and material weaknesses in the design or operation of the issuer's internal control over financial reporting; and (vi) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal control over financial reporting. The Sarbanes-Oxley Act is discussed in detail in Annex A of this memorandum.

Form 6-K

A foreign private issuer is not required to file quarterly or other interim reports with the SEC. However, it is obliged to furnish to the SEC under cover of Form 6-K any significant information (i) required to be disclosed publicly in its country of incorporation or domicile, (ii) filed with and made public by a stock exchange on which the foreign private issuer's securities may be traded, or (iii) distributed by the foreign private issuer to its security holders (either directly or by means of a press release). Information in the foregoing categories must be furnished to the SEC promptly after being made public. Reports on Form 6-K need not be certified by the foreign private issuer's CEO or CFO.

Not all information made public must be furnished to the SEC under cover of Form 6-K. Essentially, all that the SEC requires is information that a foreign pri-

vate issuer deems of material importance to its security holders, such as information relating to the acquisition of assets, the results of a resolution put to the vote of shareholders, a change in management or control, material legal proceedings, or material increases or decreases in outstanding securities or indebtedness.

Rule 12g3-2(b) Exemption from Periodic Reporting

A foreign private issuer that (i) does not have any class of securities listed on a U.S. stock exchange; and (ii) is not required to file Exchange Act reports under Section 15(d) of the Exchange Act, is exempt from Exchange Act registration and reporting if it complies with the information delivery requirements of Rule 12g3-2(b) under the Exchange Act. Although complying with Rule 12g3-2(b) is only one way to satisfy the information availability requirement of Rule 144A, it is the most frequent way for a non-SEC reporting foreign company issuing ADRs pursuant to Rule 144A to satisfy that requirement. To avail itself of the Rule 12g3-2(b) exemption, a foreign private issuer must furnish to the SEC:

- information the foreign private issuer makes public or is required to make public pursuant to its home country's laws;
- information the foreign private issuer files or is required to file with the stock exchange on which its securities are traded (which information is made public by the stock exchange); or
- information the issuer distributes or is required to distribute to its shareholders.

A foreign private issuer is also required to furnish certain information regarding its share ownership, including the number of U.S. holders. At the time a foreign private issuer seeks to avail itself of the exemption provided by Rule 12g3-2(b), such issuer must furnish all such information since the beginning of its last fiscal year. During each subsequent fiscal year, such issuer is required to furnish such information promptly after such information is made public or required to be made public.

Beneficial Ownership Reports

Section 13(d) of the Exchange Act requires that any person who acquires, directly or indirectly, beneficial ownership[3] of more than 5% of any class of equity securities that is registered under the Exchange Act report such beneficial ownership

3 Exchange Act Rule 13d-3 defines "beneficial owner" as any person who, directly or indirectly, has or shares the power to invest or vote the securities.

to the issuer, the exchange (if any) on which the security is listed, if applicable, and the SEC. This rule also applies to any person whose ownership of equity securities exceeds the 5% level at the time the issuer registers under the Exchange Act. Regulation 13D-G of the Exchange Act sets out the form of schedule required to be filed. The applicable schedule usually must be filed within ten days after an acquisition of securities that brings the owner above the 5% level, and must be amended promptly after any material change in the information disclosed in the filing. An increase or decrease in percentage ownership of 1% or more is deemed material for this purpose.

The Sarbanes-Oxley Act

Foreign companies whose ADRs are registered with the SEC pursuant to the Exchange Act are required to comply with the Sarbanes-Oxley Act, which imposes additional disclosure, corporate governance and certification obligations upon companies and their management. Attached as Annex A is a summary of the Sarbanes-Oxley Act and its applicable requirements, which should be reviewed carefully when contemplating a registered offering.

Foreign Corrupt Practices Act

The U.S. securities laws subject all issuers who publicly offer securities or choose to list an existing class of securities on a national securities exchange to the provisions of the Foreign Corrupt Practices Act (the "FCPA"). The FCPA prohibits such issuers and all officers, directors, employees and shareholders acting on behalf of such issuers from offering bribes to any foreign official, foreign political party, party official or candidate for political office for the purpose of influencing any act or decision in order to obtain business. The FCPA also prohibits payments to any person to serve as an agent in an effort to influence the same class of persons. Foreign private issuers found to have violated the anti-bribery provisions of the FCPA are subject to a fine of up to $2 million, and officers, directors, employees, agents and shareholders who are convicted of willful violations of the FCPA are subject to a fine of up to $100,000 and imprisonment for up to five years.

The FCPA also imposes accounting and recordkeeping standards, requiring those who are subject to its provisions (i) to make and keep books, records and accounts that accurately reflect transactions and dispositions of assets of the company; and (ii) to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that (a) transactions are executed in accordance with management's authorization, (b) transactions are properly recorded as to permit

preparation of financial statements and to maintain accountability for assets, (c) access to assets is permitted only with management's authorization, and (d) comparisons between recorded accountability of assets with actual assets are made at reasonable intervals and appropriate action taken with respect to any differences discovered. Regulations adopted under the FCPA prohibit any falsification of records that must be kept and also prohibit a company's officers and directors from making any false or misleading statements or omissions in connection with audits or documents to be filed with the SEC. Willful violations of the recordkeeping and accounting controls provisions of the FCPA may lead to criminal liability.

D. STATE REGULATION

While each of the states within the United States also has securities laws, known as "blue sky" laws, which require the registration of securities publicly offered within the state's borders, state registration can be avoided in most public offerings and private placements. Section 18 of the Securities Act provides that, among other things, offerings of securities that are listed or authorized for listing on the NYSE, AMEX or NASDAQ are exempt from registration under state blue sky laws. Private placements that are exempt from Securities Act registration pursuant to SEC rules or regulation issued under Section 4(2) of the Securities Act (i.e., Rule 506 of Regulation D) are also exempt from registration under state blue sky laws, but a state can still require that issuers make a notice filing with the state and pay a fee. Private placements are discussed in greater detail later in this memorandum in "Exemptions from U.S. Securities Laws – Private Placements."

CHAPTER III
THE REGISTRATION PROCESS

A. DOCUMENTATION IN PUBLIC OFFERINGS

In connection with a registered public offering of ADRs, two main documents must be prepared: the prospectus and the underwriting agreement.

Prospectus

As discussed in detail below under "Disclosure in Registered Public Offerings," a prospectus is the offering document that is delivered to prospective purchasers of

SEC-registered securities and conforms to the requirements of the SEC registration form on which the securities have been registered.

Underwriting Agreement

The underwriting agreement is the contract pursuant to which the underwriters agree to purchase the securities from the issuer. While the form of the underwriting agreement will depend on who the managing underwriter is, the substance of the underwriting agreement is fairly standard. Discussed below are a number of issues which customarily are the subject of close consideration by issuers.

Representations and Indemnities for Material Misstatements or Omissions

The underwriting agreement contains representations and warranties made by the issuer concerning the issuer's due organization, compliance with laws, the veracity of the disclosure in the prospectus and numerous other matters. One issue that is typically the subject of much discussion is the representation, if any, of the selling shareholders (if any shareholders are selling shares in the offering) with respect to the absence of material misstatements in, or omissions from, the registration statement. The underwriters will typically require selling shareholders to represent that there are no material misstatements in or omissions from the registration statement. The selling shareholders may resist such a provision if they are not familiar with the details of the issuer's business (*i.e.*, where the selling shareholders are "silent" investors), have not participated in the preparation of the registration statement, and/or are not participating significantly in the offering (*i.e.*, the number of shares being offered by them is small in comparison to the aggregate number of shares being offered). A related issue is the extent to which the selling shareholders will indemnify the underwriters for liabilities arising out of material misstatements or omissions. If the selling shareholders are required to indemnify the underwriters for liabilities arising out of material misstatements or omissions, they may seek to have their exposure limited (*e.g.*, to the proceeds of the offering which they receive).

"Blackout Period"

The underwriting agreement will typically contain a number of agreements by the issuer. One of these agreements is commonly referred to as the "blackout" provision, pursuant to which the issuer agrees for a specified period of time not to offer, sell, contract to sell or otherwise dispose of any similar securities of the issuer or

of any securities convertible into similar securities of the issuer. The parties may exclude from this provision issuances pursuant to outstanding options, to the conversion of outstanding convertible securities, or to employee compensation plans. The "blackout" period is typically 180 days in the case of an initial public offering of equity securities, but may be longer or shorter.

Payment of Expenses

In the underwriting agreement, the issuer generally agrees to pay certain expenses of the offering. Typically the issuer will agree to pay the fees and expenses of its own counsel and accountants, of the depositary, of the transfer agent and the registrar, the filing fees in connection with the Securities Act and various state securities or "blue sky" registrations and review of the offering by the NASD, and the printing expenses. The underwriters typically pay the fees and expenses of their own counsel in connection with a registered public offering, although this arrangement may be viewed as negotiable by the underwriters.

"Market-out Provisions"

Customarily included among the conditions to closing is a provision commonly referred to as a "market-out provision." This provision will allow the underwriters to choose not to close, or alternatively to terminate, their obligations under the underwriting agreement if any one of a number of events occurs. Among these events are (i) a suspension or limitation in trading in securities generally on the NYSE or the issuer's home exchange; (ii) a general moratorium on banking activities in New York or the financial center of the issuer's home country; (iii) the engagement by the United States or the issuer's home country in hostilities; or (iv) any other change in the securities markets in general or in political, financial or economic conditions which, in the judgment of the managing underwriter, makes it inadvisable or impracticable to proceed with the offering on the terms contemplated in the underwriting agreement. The effect of this clause is to place on the issuer and the selling shareholders the risk of an independent and unforeseen event which adversely effects the underwriters' ability to market the securities. While this provision is often the subject of much discussion, there are few instances in which an underwriter has invoked such a clause to terminate an underwriting commitment.

Indemnification/Contribution

Underwriting agreements include a provision in which the issuer agrees to indemnify the underwriters for losses and costs that the underwriters suffer or incur resulting from material misstatements in, or omissions of material information from, the registration statement. Typically, the issuer does not indemnify for information provided by the underwriters specifically for use in the registration statement – which is usually quite limited. In return, the underwriters agree to indemnify the issuer for any losses that the issuer suffers or costs that it incurs resulting from material misstatements in, or omissions from, the information provided by the underwriters specifically for use in the registration statement.

It is the SEC's view that indemnification provisions are unenforceable because they are against public policy and prohibited by the Securities Act and the Exchange Act. Several U.S. courts have found such provisions unenforceable.

For this reason, underwriting agreements also contain a provision providing for contribution by the issuer and the underwriters for losses suffered and costs incurred in relation to the relative benefits received by each party if the indemnification provision is found to be inapplicable or unenforceable.

B. DUE DILIGENCE

In order to understand better the business of the issuer and to be able to assist in drafting an accurate and meaningful prospectus, the managing underwriter, its counsel, and the issuer's counsel will simultaneously conduct an extensive review of the properties and material agreements of the issuer, including all loan agreements and debt instruments to which the issuer is party, and all material contracts and governmental authorizations. In addition, such parties will also conduct a series of discussions with the issuer's senior management, its financial staff and its outside accountants.

This review also serves to establish a record that the underwriters have made a reasonable investigation upon which their "due diligence" defense against liability can be based. As discussed below, every person, other than the issuer, against whom liability may be asserted under the Securities Act may avoid such liability by showing that he or she had, after reasonable investigation, reasonable grounds to believe and did believe, that there were no material misstatements in or omissions from the registration statement.

In addition to this managing underwriter's review, the underwriters seek to strengthen their "due diligence" defense by requiring delivery to them of opinions and letters from the issuer's counsel and accountants with respect to matters covered by the registration statement. The underwriting agreement will require that the issuer's counsel deliver an opinion as to the issuer's proper formation and authorization to do business, as to the valid issuance of the offered securities, and as to certain other legal matters, including the absence of material litigation, specified in the underwriting agreement.

Because the Sarbanes-Oxley Act has imposed new requirements on reporting companies regarding such things as corporate governance, audit committees and disclosure, underwriters will seek to limit liability by obtaining information from issuers relevant to the reporting obligations of this Act. For example, this may include inquiries into the existence of any financial arrangements between the issuer and its senior management. The underwriting agreement will also require that the issuer's counsel deliver an opinion regarding the adequacy of disclosure in the registration statement.[4] Finally, the issuer will be asked to supply a "comfort letter" – a letter from its independent public accountants verifying various financial data contained in the registration statement.

C. PREPARING THE REGISTRATION STATEMENT

The issuer, its counsel and independent auditors typically have primary responsibility for preparing the first draft of the registration statement, which is then carefully reviewed and commented upon by the managing underwriter and its counsel. When the registration statement, including all relevant exhibits, is completed and assembled, it is filed with the SEC and, where required, with the various state securities commissioners and the NASD. During the period after the registration statement is filed with the SEC, and prior to the registration statement being declared effective (the "pre-effective period"), the preliminary prospectus included in the registration statement is circulated by the underwriters to prospective investors. During this pre-effective period, offers to purchase can be solicited, but not accepted, as legally binding commitments. Also during this period, the

4 Since the absence of material misstatements and omissions is both a question of law and fact, experienced securities counsel will not render an opinion as to the absence of material misstatements in or omissions from the registration statement and prospectus. Rather, they will state that, after performing certain specified procedures, no facts had come to such counsel's attention that caused such counsel to believe that there were any material misstatements in or omissions from the registration statement and prospectus.

managing underwriter will arrange for a series of presentations, commonly referred to as the "roadshow," by the issuer's executive officers to selected institutional investors in various cities. The basic financial terms (other than the public offering price and the price to the underwriters) of the underwriting agreement between the issuer and the managing underwriter, acting on behalf of the underwriting syndicate, are also negotiated in the pre-effective period.

After filing, the SEC registration process can be expected to take approximately 45 to 90 days. The SEC's policy is to issue a letter commenting upon areas of the disclosure in the registration statement deemed insufficient and asking clarifying questions where the SEC staff believes it requires more information. The issuer and its attorneys and accountants then prepare responses and, in rare instances, hold conferences with the SEC staff to discuss any unresolved issues. One or more amendments to the registration statement are usually required and additional comment letters from the SEC are common.

The SEC makes a particular effort to be helpful and flexible when dealing with non-U.S. issuers. Although it will not do so for domestic issuers, the SEC staff has, in the past, shown a willingness to review registration statements of foreign issuers on an expedited basis under some circumstances. Also, it is the staff's policy that first-time foreign private issuers can submit registration statements for an initial public offering on a confidential basis before the document is actually filed and made publicly available. SEC staff members frequently make themselves available by telephone to foreign issuers and their advisors prior to the filing of the registration statement to discuss particular disclosure problems and will consider making accommodations for compelling reasons.

Like U.S. issuers, foreign private issuers are required to file, among other things, Securities Act registration statements and Exchange Act reports electronically through the SEC's Electronic Data Gathering, Analysis and Retrieval, or EDGAR, system. Submissions made to the SEC on a confidential basis, such as a registration statement for a foreign private issuer's initial registered offering, will continue to be made in paper form.

D. EFFECTIVENESS OF THE REGISTRATION STATEMENT; PRICING THE SECURITIES

After the SEC has reviewed the final amendment to the registration statement and all outstanding comments have been resolved, the SEC will declare the registration statement effective.

SEC rules require that the issuer disclose in the registration statement filed with the SEC a good faith estimate of the range of the maximum offering price and maximum number of ADRs to be offered. The negotiation of the financial terms between the issuer and the underwriters (including the determination of the public offering price) will be completed either immediately before or shortly after the registration statement is declared effective. If these negotiations are completed before the registration statement is declared effective, the underwriting agreement will be executed, a final "pricing" amendment to the registration statement will be filed with the SEC, and, immediately after the registration statement is declared effective, the underwriters will complete sales of shares to investors identified during the pre-effective period. If the offering is successful, all sales will be confirmed within hours, or even minutes, of SEC effectiveness.

Rule 430A under the Securities Act permits registration statements to be declared effective that do not include pricing information, so long as the registration statement is otherwise complete in all respects. If Rule 430A is being relied upon, the negotiation of the public offering price and underwriting discount will be completed shortly after the registration statement is declared effective. The underwriting agreement will then be executed and sales confirmed immediately thereafter. When the parties are relying upon Rule 430A, a copy of the final prospectus, reflecting the agreed-upon offering price and underwriting discount, must be filed with the SEC within two business days after the date of determination of the offering price.

An illustrative timetable for a registered public offering of ADRs in the United States is attached as Exhibit I.

E. RESTRICTIONS DURING REGISTRATION

During the period from the time the issuer reaches an understanding with the underwriters or makes a decision to undertake an offering until the registration statement is declared effective and the prospectus delivery obligations have expired (the "registration period"), U.S. securities laws place certain restrictions

on the release of information and on other market activities by the issuer and persons associated with, or acting on behalf of, the issuer. These restrictions apply whether such information is communicated within or outside of the United States. Communications in violation of U.S. securities laws and SEC rules is referred to as "gun jumping."

The severity of the restrictions applicable to an issuer depends upon the size and length of reporting history of the issuer. Those that are "well-known seasoned issuers" may make offers before a registration statement is filed with the SEC.[5] Prior to the filing of a registration statement, it is unlawful for all other issuers to offer to sell or to solicit an offer to buy any security. The term "offer" has been broadly construed by the SEC to include not just express offers by an issuer, but other publicity efforts, which "although not couched in terms of an express offer, may in fact contribute to conditioning the public mind or arousing public interest in the issuer or the securities of the issuer."

It is also unlawful to deliver a prospectus during the registration period relating to any security for which a registration statement has been filed unless the prospectus meets the technical and detailed disclosure requirements prescribed by the Securities Act. "Prospectus" is broadly defined under the Securities Act, and has been interpreted by the SEC to include written communications, including e-mails and other electronic documents, that could arguably encourage the sale of a security during the registration period as part of a selling effort. A quote from an executive of the issuer that appears in a newspaper story or on a radio or television interview can also constitute a "prospectus" in violation of this prohibition. Securities Act rules permit issuers and underwriters to use certain types of written offering materials, called "free writing prospectuses," so long as certain conditions are met, including that the information in the free writing prospectus not conflict with information contained in the registration statement, that in some cases the free writing prospectus be accompanied or preceded by a preliminary

5 A "well-known seasoned issuer" is defined as an issuer that has a worldwide market value of outstanding equity held by nonaffiliates of $700 million or more or has issued during the preceding three years more than $1 billion aggregate principal amount of non-convertible securities (other than common equity) in primary offerings for cash registered under the Securities Act. Certain issuers, such as those that have filed a bankruptcy petition or had such a petition filed against them during the past three years, those that during the past three years were or are shell companies or a blank check companies, or those that have been enjoined from prohibiting the anti-fraud provisions of the federal securities, are not eligible to be a well-known seasoned issuer. Securities Act Rule 405.

prospectus or a final prospectus, and that in some cases the free writing prospectus be filed with the SEC.

The U.S. securities laws do not require a "news blackout" prior to the completion of the offering. However, communications during the registration period to the press, public or shareholders concerning the offering or other non-factual information concerning the business or future prospects of the issuer should be carefully considered, generally discouraged and, in any case, held to a minimum. Such communications may be construed as part of a selling effort to "condition the market" and may result in delays in the offering schedule, and may potentially result in serious civil and criminal liability. Securities Act Rule 163A provides that communications made more than 30 days prior to the filing of a registration statement will generally not be considered an offer of a security so long as the communication does not reference a securities offering, provided that reasonable steps are taken to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing of the registration statement.

Securities Act Rule 134, which applies to communications made after a registration statement has been filed, and Rule 135, which applies to all communications made during the registration period, set forth specific information notices regarding an offering that may be publicly disseminated without running afoul of the U.S. securities laws. The information permitted to be disclosed under these rules is quite limited. Also, Securities Act Rule 135e provides a safe harbor for offshore press activities conducted in connection with an offering by a foreign private issuer or foreign government issuer. Under this safe harbor, a foreign private issuer or foreign government issuer may provide foreign and U.S. journalists with access to offshore press conferences, offshore meetings with representatives of the issuer or press-related materials released offshore without engaging in gun jumping, provided that the conditions of the rule are satisfied. However, any press conference, meeting or press-related materials relating to the offering in any way should be reviewed by counsel.

Issuers must also regulate communications made via the Internet or through their Web sites. During the registration period, issuers should limit both direct and hyper-linked information on their Web sites to prospectuses meeting the requirements of Section 10 of the Securities Act and permissible communications under available safe harbors. The posting of regularly released factual information, such as financial information, is generally permitted. Issuers undertaking an initial

public offering should not establish a Web site contemporaneously with such initial public offering, as the content could be viewed as conditioning the market, without any "ordinary course of business" practice having been established.

In addition, subject to certain exceptions, issuers, underwriters and persons on behalf of whom securities are being distributed are also broadly prohibited, by Regulation M under the Exchange Act, from bidding for or purchasing, or inducing others to bid for or purchase, certain securities until the subject distribution has been completed. The SEC's trading practices rules, including Regulation M, impose a number of restrictions particularly relevant to the activities of underwriters and their affiliates, such as "stabilization," "passive market-making" and the publication of analysts' research reports. A detailed discussion of these regulations is outside the scope of this memorandum.

F. LIABILITY UNDER THE FEDERAL SECURITIES LAWS

Section 11 of the Securities Act

The Securities Act can subject an issuer and its directors and officers and other parties involved in an offering to substantial liability. Section 11 of the Securities Act provides that if any part of a registration statement, when such part became effective under the Securities Act, contained an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements therein not misleading, any person acquiring such a security can sue (i) every person who signed the registration statement,[6] (ii) 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, (iii) 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 (iv) every underwriter. Section 11 contains no requirement that any such person acted with fraudulent intent or that any such misstatement or omission was relied upon in connection with its purchase. In addition, civil penalties are provided for under Section 11 and criminal penalties are provided for under Section 24 of the Securities Act.

6 The Securities Act requires that the registration statement be signed by the issuer, its principal executive officer, its principal financial officer, its comptroller or principal accounting officer, a majority of the members of its board of directors and, in the case of a foreign issuer, by its duly authorized representative in the United States. See Section 6(a) of the Securities Act.

Liability under Section 11 is absolute against the issuer. However, all other identified persons may be able to 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. This is referred to as the "due diligence" defense, discussed above in "The Registration Process – Due Diligence."

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

Section 12(a)(2) of the Securities Act also serves as a basis for liability for participants in a registered public offering of securities. Under Section 12(a)(2), "any person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading . . ." is liable for any investment loss suffered by any purchaser of the security. Liability is determined for Section 12(a)(2) purposes as of the "time of sale," which is at the time the investor agrees to purchase the securities being offered (and before delivery of the final prospectus), not the settlement date.

Section 12(a)(2) applies to "offer[ors] or seller[s]" of securities, which U.S. courts have found to include persons who "solicit purchases of securities, motivated by a desire to serve [their] own financial interest." Accordingly, Section 12(a)(2) has been applied to issuers, underwriters, directors, officers and principal shareholders. Section 12(a)(2) does not require fraudulent intent on the part of the seller, nor must a purchaser prove that it relied on the misstatement or omission, though the purchaser cannot have knowledge of the misstatement or omission at the time of the purchase.

Like Section 11, Section 12(a)(2) provides a defendant with a due diligence defense to a lawsuit, although the standard to establish the defense under Section 12(a)(2) differs from the Section 11 standard. 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."

Section 10(b) of the Exchange Act

Section 10(b) under the Exchange Act and Exchange Act Rule 10b-5 also subject issuers of securities and other participants in a securities offering to liability. Under Exchange Act Rule 10b-5 it is unlawful, "(a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice or course of business that operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

Private litigants are entitled to bring actions under Rule 10b-5 against any person alleged to have engaged in the unlawful conduct specified in the Rule. In addition to the unlawful conduct, the plaintiff must establish that the defendant acted with "scienter," or an intent to defraud, deceive or manipulate. Generally, courts have found recklessness to satisfy the scienter requirement, but not simple negligence or even inexcusable negligence. In a private action alleging a violation of Rule 10b-5, the plaintiff must also prove that it relied on the wrongful conduct and that such wrongful conduct caused the plaintiff's loss. However, a plaintiff need not prove that he or she directly relied on the wrongful conduct to the plaintiff's detriment. Rather, proof of reliance can also be established indirectly pursuant to the "fraud-on-the-market theory." Under the fraud-on-the-market theory, proof of subjective reliance is not required to establish a violation of Rule 10b-5. The courts instead recognize that the wrongful conduct served to artificially inflate the price of the stock, and a plaintiff is permitted to indirectly prove reliance by virtue of his or her dependence on the market to set the stock price. Because the misrepresentation affected the stock price, and the plaintiff bought the stock based on the affected price, the plaintiff indirectly relied on the wrongful conduct that misled the market as a whole.

Section 17 of the Securities Act contains a broad anti-fraud provision, which mirrors closely the language of Rule 10b-5. Unlike Rule 10b-5, however, actions under Section 17 do not require proof of fraudulent intent or recklessness, but may be brought in respect of a person's negligence. Most U.S. courts have held that there is no private right of action under Section 17 – actions may only be brought by the SEC. The persons liable and the remedies available under Section 17 are broadly similar to those under Rule 10b-5.

Because of the scienter, reliance and causation elements, an action under Rule 10b-5 is more difficult to sustain than an action under Section 11 or 12(a)(2) under the Securities Act. However, Section 10(b) and Rule 10b-5 have far broader application than Section 11, which applies only to misstatements or omissions in Securities Act registration statements at the time of effectiveness, and Section 12(a)(2), which applies only to prospectuses used in a registered public offering of securities. Rule 10b-5 can apply to any purchase or sale of a security, including a private placement of securities, or secondary market transactions, including actions or omissions of the issuer, its officers and directors in violation of the rule that cause a decline in the price of the issuer's stock.

The Sarbanes-Oxley Act

As discussed in Annex A, the Sarbanes-Oxley Act imposes both criminal and civil penalties upon companies and their management for non-compliance with that Act, including knowing or willful violations of the certification and other requirements established under the Act.

CHAPTER IV
DISCLOSURE IN REGISTERED PUBLIC OFFERINGS

Disclosure requirements under U.S. securities laws arise from a variety of sources, including specific requirements of the registration statement forms. This section discusses disclosure requirements under the U.S. securities laws for registered public offerings, and outlines various considerations relating to disclosure, including events that trigger an affirmative duty to disclose information.

A. REGISTRATION STATEMENTS AND EXCHANGE ACT REPORTS

The registration forms provide detailed instructions about the kinds of disclosure required in the registration statement and the prospectus. Most SEC registration and disclosure forms cross-reference selected items from two core regulations that describe most of the SEC's specific disclosure requirements. The first of these, Regulation S-K, is the source of most non-financial statement disclosure requirements. The other is Regulation S-X, which is the source of most financial statement disclosure requirements. For foreign private issuers, a third source of disclosures

referred to in the applicable registration forms is Form 20-F. Form 20-F is the form used by foreign private issuers for their annual reports, as well as for the initial registration of a class of securities under the Exchange Act. Form 20-F is used as a repository of disclosure requirements for foreign private issuers, and is cross-referenced by the Securities Act registration statements. Following is a brief summary of the more significant disclosure requirements of Form 20-F. Issuers should carefully read Form 20-F before beginning to prepare the disclosure document.

Information Concerning the Registrant

Items 3 and 4 of the disclosure requirements for Form 20-F provide for the disclosure of information concerning the registrant. Item 3 of Form 20-F, "Key Information," requires the disclosure of selected financial information for the registrant's five most recent financial years, a statement of the registrant's capitalization and indebtedness and risk factors that are significant to the registrant or its industry that would make an investment in the registrant speculative or of high risk. Item 4 is the basis of the "Description of Business" section, and requires the disclosure of significant events in the history and development of the registrant and an overview of the registrant's business. Item 4 specifically requires, generally by operating segment:[7]

- a description of principal products and services provided by the registrant in each of the last three financial years (including any significant new products or services that have been introduced) and the status of development of new products and services to the extent publicly disclosed;
- a description of the principal markets in which the registrant competes;
- a description of the seasonality of the registrant's main business;
- a description of the sources and availability of raw materials (including a description of whether prices of principal raw materials are volatile);
- a description of the marketing channels used by the registrant;
- summary information concerning the registrant's dependence on material patents or licenses, contracts or manufacturing processes;

7 An operating segment is defined as a component of an enterprise (i) that engages in business activities from which it may earn revenues and incur expenses (including revenues and expenses from intra-enterprise transactions), (ii) whose operating results are regularly reviewed by the enterprise's chief operating decision maker in deciding how to allocate resources to the segment and assess its performance and (iii) for which discrete financial information is available. The rules relating to segment reporting are set forth in Financial Accounting Standards Board Statement No. 131, "Disclosures about Segments of an Enterprise and Related Information."

- the basis for any statements regarding the registrant's competitive position; and
- a description of the material effects of government regulations on the registrant's business.

Item 4 also requires a description of the registrant's material tangible fixed assets (including leased property) and any environmental issues that may affect the registrant's utilization of its assets.

Operational and Financial Review and Prospects

Item 5 of Form 20-F, "Operational and Financial Review and Prospects" (referred to by U.S. issuers as "Management's Discussion and Analysis of Financial Condition and Results of Operations," or "MD&A") requires a free-ranging discussion by management of the foreign private issuer's

- results of operations, including reasons for year-to-year changes in line items over a three-year period, plus any interim periods for which financial statements are required, and a description of unusual or infrequent events that affected income and known trends or uncertainties, the impact of inflation and foreign currency fluctuation and any information regarding any governmental, economic, fiscal, monetary or political factors;
- short-term and long-term liquidity and capital resources, including internal and external sources of liquidity, sources and amounts of cash flow (including any legal or economic restrictions on the ability of subsidiaries to transfer funds to the registrant), level of borrowings at the end of the period under review, material capital expenditure commitments and information concerning the company's financial instruments, debt maturity profile and currency and interest rate structure;
- research and development policy, including the amount spent on research and development activities sponsored by the registrant during the last three financial years; and
- significant recent trends in production, sales and inventory, the state of the order book and selling prices and known trends that are reasonably likely to materially impact the registrant's revenue, income from continuing operations, profitability, liquidity or that would cause reported financial information not to be indicative of future operating results or financial condition.

In 2002, the SEC issued an interpretive statement suggesting that companies improve their disclosures in their MD&A with respect to financial information for the fiscal year ended 2001 and periods ending thereafter.[8] The SEC identified four broad areas that it believed needed enhanced disclosure in the MD&A: (i) critical accounting policies; (ii) liquidity and capital resources, including off-balance sheet arrangements; (iii) trading activities involving derivatives and non-exchange traded contracts; and (iv) related-party relationships and transactions.

In 2003 the SEC issued a further interpretive release on the MD&A disclosure requirements, providing the SEC's views on how companies can better comply with existing MD&A requirements.[9]

In the release, the SEC emphasized, as a general theme, that the purpose of the MD&A requirement is to provide a narrative explanation of a company's financial statements that enables investors to see the company through the eyes of management, and to provide the context within which financial information should be analyzed. It is intended to give investors information about the quality and the potential variability of a company's earnings and cash flows so that investors can assess the likelihood that the company's past performance is indicative of its future performance. Another general theme of the release was that the MD&A should not be simply a mechanical recitation of financial statements in narrative form (such as descriptions of the dollar amounts and percentage changes in income or other financial statement line items) or a series of technical responses to MD&A disclosure requirements (such as identifying an accounting principle used without discussing potential uncertainties in applying the accounting principle, or in making material estimates that the accounting principle requires). In essence, the MD&A should tell the story behind the results and share with investors management's thoughts about the future.

The release also makes several specific recommendations for improving MD&A disclosure. In particular, companies should:

- give the greatest prominence to the most important disclosure;

8 See *Interpretation: Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations,* SEC Release Nos. 33-8056; 34-45321; FR-61 (January 22, 2002).

9 See *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations,* SEC Release Nos. 33-8350; 34-48960; FR-72 (December 19, 2003).

- avoid immaterial or duplicative disclosures that can obscure the presentation of important matters;
- consider starting the MD&A with an executive level overview that provides context for the remainder of the MD&A;
- identify and discuss in the MD&A key performance indicators that management uses to manage and evaluate its business, even if the indicators are non-financial in nature;
- focus particularly on identifying and disclosing trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on a company's financial condition or operating performance; and
- be careful not only to disclose factual information that is responsive to MD&A's technical requirements, but also to include an analysis of that information that explains management's view of its implications and significance.

Compensation

Item 6.B of Form 20-F, "Compensation," requires disclosure of the remuneration paid to all directors and members of administrative, supervisory or management bodies during the registrant's last full financial year. Disclosure of compensation is required on an individual basis unless individual disclosure is not required in the registrant's home country and is not otherwise publicly disclosed by the registrant, which is often the case. This item also requires a description of any bonus or profit-sharing plan pursuant to which any such individual was compensated, and a description of any stock options granted to such individuals, including the title and amount of securities covered by the options, the exercise price, the expiration date and any purchase price paid for such options. In addition, the registrant must disclose the total amount set aside or accrued to provide pension, retirement or similar benefits to such individuals.

Other Disclosures Regarding Officers, Directors and Major Shareholders

Item 6 of Form 20-F requires the registrant to disclose details of each director's service contract that provides benefits payable upon termination (or an appropriate negative statement), a description of the composition of the registrant's audit committee and remuneration committee, and the charter or terms of reference under which such committees operate, and information concerning the share and stock option ownership in the registrant of each director and member of the registrant's administrative, supervisory or management bodies.

Exhibits

A foreign private issuer is required to file with the SEC a number of exhibits to its registration statement. These exhibits are not included in the prospectus distributed to investors, but do become publicly available on the SEC's website once filed with the SEC. Such exhibits generally include, among other things, the issuer's constituting documents (*e.g.*, articles of association), indentures and material loan agreements, various opinions of counsel, voting trust agreements, significant contracts and patents, a list of significant subsidiaries and consents of experts and counsel. A foreign private issuer can, however, request that the SEC keep confidential certain commercially sensitive information contained in such exhibits.

Other Material Information

In addition to the information specifically required by the relevant registration statement form, Securities Act Rule 408 requires disclosure of such further material information as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading. The SEC has applied Rule 408 to foreign private issuers to elicit discussion of economic, political and legal factors particular to the foreign private issuer's domicile, including such matters as tax policy, expropriation risks, currency fluctuation and devaluation risks, and problems relating to energy, unemployment and inflation.

B. FINANCIAL INFORMATION AND STATEMENT REQUIREMENTS

Regulation S-X

The SEC's Regulation S-X and Staff Accounting Bulletins govern the precise form and content of financial statements required to be filed under the Securities Act and the Exchange Act, and an issuer's financial statements must comply with the prescribed format. A registration statement on Form F-1, for example, requires the inclusion of, among other financial data:

- five years of selected financial data;
- two years of audited consolidated balance sheets;
- three years of consolidated income statements and changes in financial position;
- the revenue, operating profit or loss, identifiable assets and other financial information attributable to each industry segment for the prior three years; and

- the amounts of revenue, profit or loss and identifiable assets derived from, or located in, the various geographic areas in which the foreign private issuer operates for the prior three years.

In each case, such information may be provided for such shorter period as the foreign private issuer has been in existence. If a registrant's financial statements are prepared in accordance with U.S. generally accepted accounting principles ("U.S. GAAP"), the earliest of the three years may be omitted in an initial registration statement, so long as that information has not previously been filed under the Securities Act or the Exchange Act. In addition, the registrant is not required to provide a balance sheet for the earliest of the three-year periods if that balance sheet is not required by a jurisdiction outside the United States.

The most recent year of audited financial statements may generally not be older than 15 months at the time of the offering or listing. If the registration statement covers the registrant's initial public offering, the audited financial statements shall be no more than 12 months old at the time of the filing of the registration statement. Annual reports on Form 20-F must be filed within six months of the close of the registrant's financial year. A foreign private issuer's financial statements must be reported on by independent certified public accountants meeting the requirements set forth in Regulation S-X.

Unaudited interim financial statements covering the first six months of the registrant's financial year and comparative statements for the same period in the prior financial year are generally required to be provided if audited financial statements included in the registration statement or report are more than nine months old. However, if the registrant has published interim financial information that covers a more current period than the six-month period, the more current financial information must be included. Such information would include revenue and income information even if not published as part of a complete set of financial statements.

Reconciliation of Financial Statements to U.S. GAAP

Ordinarily, Regulation S-X requires that an issuer prepare its financial statements in accordance with U.S. GAAP. However, Rule 4-01 of Regulation S-X permits a foreign private issuer to prepare its financial statements in accordance with the accounting principles accepted in the foreign private issuer's own country, so long as those financial statements are reconciled with U.S. GAAP. In some circumstances the SEC will also provide a similar accommodation to first-time issuers

submitting financial statements prepared in accordance with International Financial Reporting Standards and reconciled with U.S. GAAP.[10]

Items 17 and 18 of Form 20-F provide the rules pursuant to which a foreign private issuer must reconcile financial statements prepared under foreign accounting principles to U.S. GAAP. Pursuant to Item 17, among other things, a foreign private issuer must provide (i) a discussion of the material variations between the accounting principles used in preparing its financial statements and U.S. GAAP, (ii) a quantified reconciliation of the material variances between the net income of the foreign private issuer as presented and the net income according to U.S. GAAP, and (iii) for each balance sheet presented, the amount of each material variation between a reported amount and the amount using U.S. GAAP. Pursuant to Item 18, a foreign private issuer must provide all information required by Item 17 and all other information required by U.S. GAAP and Regulation S-X, unless such requirements specifically do not apply to foreign private issuers. Annual reports on Form 20-F and initial registration under the Exchange Act by a foreign private issuer on Form 20-F may include financial statements that comply with Item 17 or Item 18, at the option of the issuer. Except in limited circumstances, offerings of securities on Forms F-1, F-3 and F-4 must include financial statements that comply with Item 18. Reconciliation of a foreign private issuer's financial statements typically involves a considerable amount of effort.[11]

In view of the complexity of the SEC's rules and regulations regarding financial statements, a foreign private issuer contemplating a registered public offering in the United States should consult with an accounting firm experienced in complying with U.S. federal securities laws as early in the process as is practicable.

C. MATERIALITY STANDARD

Although the regulations and forms under the federal securities laws include many specific disclosure requirements, those specific disclosure requirements are not exhaustive and, even where they do apply, are not always dispositive of disclosure

10 See SEC Release No. 33-8567 (April 12, 2005).

11 Each foreign private issuer subject to Regulation S-X is also required to include with its financial statements a report prepared by its independent accountants reflecting the results of an audit of the company's financial statements. Under Rule 2-02 of Regulation S-X, the accountant's report must include a statement to the effect that the audit was conducted in accordance with auditing standards that are consistent with U.S. GAAP.

issues. While rules of thumb might be drawn from the quantitative materiality standards found in the regulations and forms discussed below, there are limits to such an approach. Both Securities Act Rule 408 and Exchange Act Rule 12b-20 expressly require the inclusion of any additional material information necessary to make the statements required to be made in filings under those acts, in light of the circumstances under which they were made, not misleading. Therefore, it is always necessary to evaluate the materiality of any particular matter on a case-by-case basis and from a qualitative as well as a quantitative point of view.

The SEC has adopted a materiality standard for all purposes under the Securities Act and the Exchange Act through its definitions of the term "material" in Securities Act Rule 405 and Exchange Act Rule 12b-2. These rules provide that:

> *The term "material," when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to* ***purchase*** *the security registered. (Emphasis added.)*

In Staff Accounting Bulletin No. 99 the SEC provided guidance on the materiality standard in the context of preparing and auditing financial statements. The SEC explicitly rejected a purely quantitative test as to whether a misstatement is material. Rather, in recognizing the Supreme Court's formulation of materiality in a 1988 decision, the SEC required an analysis of the facts in the context of the surrounding circumstances, to assess the "total mix" of available information. The SEC also provided several examples as to where a relatively small misstatement could be viewed as material, and stated that multiple misstatements should be viewed individually and in the aggregate.

D. STOCK EXCHANGE REQUIREMENTS

Stock exchange rules also provide a source of disclosure obligations. Section 202.05 of the NYSE Listed Company Manual provides that a listed company is "expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities." The Manual goes on to state that a listed company should "act promptly to dispel unfounded rumors which result in unusual market activity or price variations."

The disclosure requirements of the NYSE and NASDAQ are discussed in greater detail later in this memorandum in "Listing on a National Securities Exchange."

E. DISCLOSURE GENERALLY

The foregoing has dealt principally with disclosure to regulatory bodies, such as the SEC and stock exchanges. However, most disclosure to the public is channeled through press releases or contacts with the financial community. While a foreign private issuer would have no responsibility under U.S. law for what others say about it on their own initiative, faulty information that emanates from the foreign private issuer may be grounds for liability. Furthermore, while foreign private issuers are not subject to the requirements of Regulation FD relating to selective disclosure by the issuer of material information, selective disclosure of material information nonetheless could subject a foreign private issuer to liability. Accordingly, as a general practice, material information should not be disclosed to one person without being simultaneously released to the general financial community.

To supplement a foreign private issuer's system of internal policies for the protection of sensitive corporate information, set forth below are two guidelines designed to assist in compliance with U.S. securities laws in this area.

The first fundamental guideline is that no individual, regardless of position within the company, should purchase or sell stock while in possession of material nonpublic information. This is referred to as "insider trading" and is unlawful. For this purpose, information that has been released to the public, but not yet absorbed by the financial community, should be regarded as nonpublic and as an illegitimate basis for dealing.

Similarly, where there is material information that is not yet ripe for public disclosure, as in the early stages of a significant acquisition, no insider with access to the information should trade in the company's stock until approval has been sought through appropriate channels and, if necessary, counsel has been consulted. Likewise, if an employee of the company obtains inside information from or concerning another public corporation, he should not trade in the securities of that other corporation.

The second fundamental guideline is that each individual who has access to material information should exercise caution in preserving the confidentiality of that information within the company. If anyone becomes aware of a leak of material

information, whether inadvertent or otherwise, that person should report the leak immediately to the person or persons charged with the responsibility for public disclosures. Any insider who "leaks" inside information to a "tippee" may be equally liable with the tippee for the profit of the tippee.

Violation of these guidelines could lead to liability on the part of the individuals for any damages incurred by a dissatisfied shareholder and imprisonment, and a foreign private issuer may be subjected to adverse consequences, such as fines as a result of any such violation.

CHAPTER V
LISTING ON A NATIONAL SECURITIES EXCHANGE

A. NYSE AND AMEX

Both the NYSE and the AMEX have listing requirements designed primarily for foreign private issuers, in addition to the regular listing requirements for U.S. companies that foreign private issuers can also rely upon. Set forth below is a summary of the listing requirements for foreign private issuers for both exchanges:

Distribution	**Non-U.S. Companies**	
	NYSE	**AMEX**
Shareholders	5,000 round-lot shareholders worldwide	400 public shareholders with 1 million shares or 800 share holders with 500,000 shares (if unable to qualify then see Average Trading Volume)
Average Trading Volume	None	2,000 daily (prior six months) if 500,000 publicly-held shares and only 400 public shareholders
Publicly-Held Shares	2.5 million worldwide	500,000 (if more than 800 shareholders), 1 million (if more than 400 shareholders and less than 800 shareholders) or 500,000 (if 2,000 average daily trades and more than 400 shareholders)
Aggregate Market Value of Publicly-Held Shares	$100 million worldwide	$3 million worldwide

Size and Earnings

	NYSE	AMEX
Stockholders' Equity	Not applicable	$4 million worldwide
Valuation/Revenue (Rules Differ for Affiliated Companies) (NYSE)	$500 million global market capitalization, $100 million in revenue (most recent fiscal year) and $100 million aggregate cash flow for last 3 years with $25 million in each of previous 2 years; or $750 million global market capitalization and $75 million in revenue (most recent fiscal year)	Not applicable
Pre-Tax Income	$100 million cumulative in last 3 fiscal years with $25 million in each of the 2 most recent years	$750,000 in latest fiscal year or in two of the last 3 fiscal years.

In addition to the numerical standards, it should be noted that the NYSE will not list ADRs of foreign private issuers subject to foreign exchange or other restrictions against the free exchange into U.S. dollars of dividends or other distributions to shareholders or of the proceeds of sales in the foreign market.

An issuer meeting the requirements for listing its shares on a national securities exchange, such as the AMEX or the NYSE, will also have to comply with the separate reporting requirements and corporate governance obligations of that organization. Attached as Annex B is a detailed summary of the corporate governance listing standards of the NYSE and NASDAQ. As reflected in their listing standards, both exchanges require that an issuer agree to make prompt public disclosure of any information that might reasonably be expected to affect the market price for its listed securities and to act promptly to dispel any unfounded rumors that cause unusual market activity in such securities. Issuers are also required by both exchanges to prepare and distribute to their shareholders annually, in advance of their annual meetings, copies of their financial statements for the most recent fiscal year, in consolidated form.

Other corporate governance requirements include, for example, the NYSE and AMEX requirements that each listed company have at least three independent directors on its board of directors and establish an audit committee comprised of independent directors. The NYSE typically grants waivers on a case-by-case basis for certain of these requirements. Often, waiver requests must be accompanied by an opinion of outside counsel that the practice that the listed company wishes to follow is not prohibited by the laws of the issuer's home country. The AMEX grants waivers in a similar way.

Issuers with securities listed on NYSE or AMEX are also required to satisfy those exchanges' continued listed requirements to maintain the listing of their securities on those exchanges.

B. NASDAQ

NASDAQ is the largest U.S. electronic stock market. It stores and provides up-to-the-second over-the-counter price quotations from a nationwide network of dealers. It is divided into three markets: The NASDAQ Global Select Market, The NASDAQ Global Market and The NASDAQ Capital Market. More substantial NASDAQ issuers may qualify for inclusion in The NASDAQ Global Select Market or the NASDAQ Global Market.

In general, the requirements for listing a security on NASDAQ are more lenient than those required for listing on the NYSE or the AMEX. This is especially significant for smaller foreign private issuers that do not have the seasoned business experience and financial resources necessary for listing on the NYSE or the AMEX and which, without the over-the-counter market, would otherwise enjoy very limited trading markets. Despite these advantages, a foreign acquirer issuing its shares in connection with an exchange offer will probably need to list the offered ADRs on the same major stock exchange or exchanges on which the target's shares were listed prior to the acquisition.

Following are general summaries of the qualification standards for initial listing on each of NASDAQ's three markets. The summaries are based on a listing of common stock or ordinary shares (or ADRs evidencing such shares), and the rules may vary for other classes or types of securities (such as preferred stock or warrants). Also, special rules may apply in the case of an issuer which is a non-

Canadian foreign private issuer. In addition, in the case of non-Canadian foreign private issuers with listed ADRs, it is the underlying shares evidenced by the ADRs which will be considered in determining the qualification for initial inclusion of the ADRs on NASDAQ.

There are also certain qualitative standards that all issuers must comply with relating to corporate governance matters (which are discussed in Annex B), reporting changes in its information, the issuance of additional securities and other matters. In particular, an issuer whose shares (or ADRs) are quoted on NASDAQ must disclose to the public through the press "any material information that would be reasonably expected to affect the value of their securities or influence investors' decisions." NASDAQ expects to be notified of any such disclosure prior to its release to the public, and has published guidelines for the publication of such information.

Issuers with securities quoted on NASDAQ are also required to satisfy NASDAQ's continued listed requirements to maintain the listing of their securities on NASDAQ.

NASDAQ Global Select Market

The NASDAQ Global Select Market has the most stringent listing requirements of NASDAQ's three markets. To qualify for initial listing on the NASDAQ Global Select Market, an issuer must meet both the Financial Requirements and the Liquidity Requirements described below:

Financial Requirements

To qualify for inclusion in the NASDAQ Global Select Market, an issuer (other than a closed-end management investment company) must meet all of the criteria under one of the three financial standards:

NASDAQ Global Select Market Financial Requirements

Requirements	Standard 1	Standard 2	Standard 3
Pre-tax earnings[(a)] (income from continuing operations before income taxes)	Aggregate in prior 3 (fiscal years greater than or equal to $11 million and each of the 2 most recent fiscal years greater than or equal to $2.2 million and each of the prior 3 fiscal years greater than or equal to $0	N/A	N/A
Cash flows[(b)]	N/A	Aggregate in prior 3 fiscal years greater than or equal to $27.5 million and each of the prior 3 fiscal years greater than or equal to $0	N/A
Market capitalization[(c)]	N/A	Average greater than or equal to $550 million over prior 12 months	Average greater than or equal to $850 million over prior 12 months
Revenue	N/A	Previous fiscal year greater than or equal to $110 million	Previous fiscal year greater than or equal to $90 million
Bid price[(d)]	$5.00	$5.00	$5.00
Market makers[(e)]	3	3	4

(a) In calculating income from continuing operations before income taxes, NASDAQ will rely on the issuer's annual financial information as filed with the SEC in the issuer's most recent periodic report and/or registration statement. If an issuer does not have three years of publicly reported financial data, it may qualify 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 will not be considered a fiscal year, even if reported as a stub period in the issuer's publicly reported financial statements.

(b) In calculating cash flows, NASDAQ will rely on the net cash provided by operating activities reported in the statements of cash flows as filed with the SEC in the issuer's most recent periodic report and/or registration statement, excluding changes in working capital or in operating assets and liabilities. If an issuer does not have three years of publicly reported financial data, it may qualify if it has: (i) reported aggregate cash flows of at least $27.5 million; and (ii) positive cash flows in each of the reported fiscal years. A period of less than three months will not be considered a fiscal year, even if reported as a stub period in the issuer's publicly reported financial statements.

(c) In the case of an issuer listing in connection with its initial public offering, compliance with the market capitalization requirements will be based on the issuer's market capitalization at the time of listing.

(d) The bid price requirement is not applicable to a company listed on The NASDAQ Global Market that transfers its listing to The NASDAQ Global Select Market.

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

Liquidity Requirements

In addition to meeting one of the standards specified above, issuers (other than closed-end management investment companies) must meet each of the three liquidity requirements, or the applicable alternatives, in their specific category for initial inclusion on the NASDAQ Global Select Market. The charts below are presented in two separate groups: (i) new company listings; seasoned companies.

New Company Listings Only

Requirements	**Initial Public Offerings and Spin-Off Companies**	**Affiliated Companies[(a)]**	**Companies Emerging from Bankruptcy**
Beneficial Shareholders	2,200	450	450
Publicly-held shares[(b)]	1,250,000	1,250,000	1,250,000
Market value of publicly-held shares	$70 million	$70 million	$110 million
or			***or***
Market value of publicly-held shares and Shareholders' equity			$100 million and $110 million

(a) Companies affiliated with another company listed on The NASDAQ Global Select Market. An issuer is affiliated with another company if that other company, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control of, the issuer. 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.

(b) In computing the number of publicly-held shares, NASDAQ will not consider shares held by an officer, director or 10% shareholder of the issuer.

Seasoned Securities Only

Requirements	Companies Currently Trading Common Stock or Equivalents	Affiliated Companies[a]
Beneficial shareholders *or* Beneficial shareholders and Average monthly trading volume over past 12 months	2,200 *or* 550 and 1.1 million	450
Publicly-held shares[b]	1,250,000	1,250,000
Market value of publicly-held shares *or* Market value of publicly-held shares and Shareholders' equity	$110 million *or* $100 million and $110 million	$70 million

(a) Companies affiliated with another company listed on The NASDAQ Global Select Market. An issuer is affiliated with another company if that other company, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control of, the issuer. 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.

(b) In computing the number of publicly-held shares, NASDAQ will not consider shares held by an officer, director or 10% shareholder of the issuer.

NASDAQ Global Market

The NASDAQ Global Market (formerly known as the NASDAQ National Market) is NASDAQ's middle tier market – its listing standards are not as stringent as those for The NASDAQ Global Select Market, but are more stringent that the listing standards for The NASDAQ Capital Market.

Issuers that choose to list their securities on The NASDAQ Global Market must meet minimum initial inclusion financial requirements. An issuer must meet all of the requirements under at least one of the three listing standards for initial listing.

NASDAQ Global Market Financial Requirements

	Initial Listing		
Requirements	**Standard 1**	**Standard 2**	**Standard 3**
Stockholders' equity	$15 million	$30 million	N/A
Market value of listed securities ***or*** Total assets and Total revenue	N/A	N/A	$75 million [(a)(b)] ***or*** $75 million and $75 million
Income from continuing operations before income taxes (in latest fiscal year ***or*** in 2 of last 3 fiscal years)	$1 million	N/A	N/A
Publicly-held shares[(c)]	1.1 million	1.1 million	1.1 million
Market value of Publicly-held shares	$8 million	$18 million	$20 million
Bid price	$5	$5	$5 [(b)]
Shareholders (round lot holders)[(d)]	400	400	400
Market makers[(e)]	3	3	4
Operating history	N/A	2 years	N/A

(a) For initial listing under Standard 3, an issuer must satisfy one of the following: the market value of listed securities requirement or the total assets and the total revenue requirement. Listed securities is defined as securities quoted on NASDAQ or listed on a national securities exchange.

(b) Seasoned issuers (those issuers already listed or quoted on another marketplace) qualifying only under the market value of listed securities requirement of Standard 3 must meet the market value of listed securities and the bid price requirements for 90 consecutive trading days prior to applying for listing.

(c) Publicly-held shares is defined as total shares outstanding, less any shares held by officers, directors or beneficial owners of 10% or more.

(d) Round lot holders are shareholders of 100 shares or more.

(e) An electronic communications network ("ECN") is not considered a market maker.

NASDAQ Capital Market

The NASDAQ Capital Market (formerly the SmallCap Market) is the last of NASDAQ's three markets and has the least onerous initial listing financial requirements.

NASDAQ Capital Market Financial Requirements

Requirements	Initial Listing
Stockholders' equity[(a)] ***or*** Market value of listed securities[(b)] ***or*** Net income from continuing operations (in the latest fiscal year or in 2 of the last 3 fiscal years)	$5 million ***or*** $50 million ***or*** $750,000
Publicly-held shares[(c)]	1 million
Market value of publicly-held shares[(c)]	$5 million
Bid price[(b)]	$4
Shareholders (round lot holders)[(d)]	300
Market makers[(e)]	3

(a) An issuer must satisfy one of the following to be in compliance: the stockholders' equity requirement the market value of listed securities requirement or the net income requirement. Listed securities is defined as securities quoted on NASDAQ or listed on a national securities exchange.

(b) Seasoned issuers (those issuers already listed or quoted on another marketplace) qualifying only under the market value of listed securities requirement must meet the market value of listed securities and the bid price requirements for 90 consecutive trading days prior to applying for listing.

(c) Publicly-held shares is defined as total shares outstanding, less any shares held by officers, directors or beneficial owners of 10% or more. In the case of ADRs, for initial inclusion, at least 100,000 shares shall be issued.

(d) Round lot holders are shareholders of 100 shares or more.

(e) An electronic communications network ("ECN") is not considered a market maker.

CHAPTER VI
RULE 144A PLACEMENTS

A. BACKGROUND

A common method of selling securities in the United States without registration under the Securities Act is through a "private placement." Under Section 4(2) of the Securities Act, the registration requirements of the Securities Act do not apply to "transactions by an issuer not involving any public offering." In a traditional private placement, an issuer will sell its securities to a small number of sophisticated investors identified by the issuer's investment banker.

In general, securities acquired in a private placement, absent registration under the Securities Act, may be resold only under limited circumstances. Prior to the adoption of Rule 144A, Rule 144 had been the only "safe harbor" by which an investor could resell privately placed securities without registration. Rule 144 permits affiliates of an issuer to begin reselling securities in limited amounts after one year, provided, among other things, that certain public information requirements are met, which could include registration under the Exchange Act. After two years, unrestricted resales may be made under Rule 144 by persons who are not at the time of sale, and have not been for the three months immediately prior to the sale, affiliates of the issuer. Investors that could not meet the Rule 144 safe harbor requirements, generally because of the lack of public information regarding the issuer or because of the minimum two-year holding period, generally resold privately placed securities in private transactions to other sophisticated investors relying on the so-called "Section 4(1-1/2)" exemption.[12] Whether such securities were sold pursuant to Rule 144 or "Section 4(1-1/2)," an opinion of counsel, stating that the sale need not be registered under the Securities Act, was required to be delivered.

Because of the inability to freely resell privately placed securities for a period of time under Rule 144 and the difficulty associated with private resales, privately

12 Section 4(1) of the Securities Act, which exempts transactions by any person other than an issuer, underwriter or dealer and is typically relied upon for secondary sales of securities, is generally inapplicable to sales of privately placed securities. Section 4(2) of the Securities Act, which exempts private placements of securities, is applicable only to offerings by issuers. Numerous courts have held that private resales of securities fall somewhere between the exemptions provided in Section 4(l) and Section 4(2) (hence the name "Section 4(1-1/2)") and need not be registered under the Securities Act.

placed securities were often highly illiquid. Only a small number of investors were willing to assume the risks associated with illiquid securities, and they demanded premiums in the form of discounts (in the case of common equity) or higher rates (in the case of preferred equity or debt securities) for taking such risks. Consequently, issuers often found traditional private placements an expensive way to raise capital.

B. RULE 144A

Rule 144A, adopted by the SEC in April 1990, provides a non-exclusive safe harbor from the registration requirements of the Securities Act for resales of certain securities to "qualified institutional buyers" ("QIBs"). So long as during the initial sale the issuer exercises "reasonable care" that subsequent sales will be made only in compliance with applicable securities laws, it need not police subsequent resales to ensure compliance with applicable securities laws. The expressed intention of the SEC in adopting Rule 144A was to increase the liquidity of privately placed securities by allowing unrestricted resales of such securities among QIBs and to increase access to the U.S. capital markets to foreign issuers. In connection with the adoption of Rule 144A, the NASD created the PORTAL trading system (discussed below) for Rule 144A eligible securities, with the intent of further increasing the liquidity of privately placed securities.

In a "Rule 144A" placement, an issuer will sell, in reliance upon Section 4(2) or another exemption from the registration requirements,[13] its securities to one or more investment banking firms which will then resell, in reliance upon Rule 144A, the securities to a larger number of QIBs. The way in which Rule 144A placements are conducted, from an issuer's standpoint, is very similar to traditional underwritten public offerings.

Rule 144A Criteria

A sale in compliance with Rule 144A must meet four basic criteria: (a) the securities must be offered and sold only to QIBs; (b) the securities must not, when issued, be of the same class as securities listed on a U.S. securities exchange or

13 As noted above, Rule 144A provides an exemption only for resales. Thus, the initial sale by the issuer to the underwriter(s) or purchaser(s) must be made in a transaction that is exempt from the registration requirements of the Securities Act, typically in reliance upon Section 4(2) of the Securities Act or Regulation S, which establishes an exemption from the registration requirements for off-shore offerings of securities to non-U.S. persons.

quoted in a U.S. automated interdealer quotation system; (c) the seller and the prospective purchaser must have the right to obtain certain information about the issuer if such information is not publicly available; and (d) the seller must ensure that the prospective purchaser knows that the seller may rely on Rule 144A.

QIBs

The seller and anyone acting on its behalf reasonably must believe that the purchaser is a QIB.[14] A QIB generally is defined as an institution (such as an insurance company, registered investment company or pension or employee benefit plan), acting for its own account or for the account of other qualified institutional buyers, 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 (including securities issued or guaranteed by the U.S. government). QIBs also include U.S. banks, savings and loan associations, and registered broker-dealers. QIBs may not buy for managed or other fiduciary accounts that are not themselves QIBs.[15]

Eligible Securities

Both debt and equity securities may be sold under Rule 144A, provided that when such securities were issued (as opposed to at the time of the resale) they were not of the same class as securities listed on a national securities exchange or quoted through an interdealer quotation system. ADRs and the underlying securities are treated as being of the same class for this purpose. This limitation prevents trading in side-by-side public and private markets for essentially the same securities. Securities which are traded in the over-the-counter market (*i.e.*, traded in the "pink sheets"), but not quoted through an interdealer quotation system, are not considered publicly traded securities ineligible for Rule 144A resales.

Securities that are convertible into or exchangeable for securities so listed or quoted are eligible for resale under Rule 144A if, at the time of issuance, the effective conversion premium for such convertible or exchangeable securities is ten

14 This reasonable belief may be based upon, among other things, publicly available information, a certificate from an executive officer of the purchaser or information appearing in a recognized securities manual.

15 The 1992 amendments to Rule 144A also (i) expanded the definition of QIB to include collective trust funds and master trust funds (arrangements which are often employed by pension and employee benefit plans to pool funds to facilitate common management), and (ii) recognized as purchases by a QIB insurance company the purchase of securities for separate accounts which are not required to be registered under the U.S. Investment Company Act.

percent or more. Warrants to purchase securities so listed or quoted are eligible for resale under Rule 144A if they are not exercisable for at least three years or if, at the time of issuance, their effective exercise premium is ten percent or more.

Information

The availability of Rule 144A is conditioned upon sellers and prospective purchasers of Rule 144A securities having the right to obtain certain non-public information about the issuer. The right to obtain the information will generally be contained in a covenant in the terms of the security. If the issuer is neither subject to the reporting requirements of the Exchange Act nor exempt from reporting pursuant to Rule 12g3-2(b) under the Exchange Act, under Rule 144A it must make available, upon request, to the holders of any privately placed securities and any prospective purchasers the following information (which must be reasonably current in relation to the date of resale[16]): (i) a very brief statement of the nature of the business of the issuer and the products and services it offers; and (ii) the issuer's most recent balance sheet and profit and loss and retained earnings statement and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited, to the extent reasonably available).

However, investor expectations and market practice have resulted in disclosure by issuers in Rule 144A placements that closely approximate the level of detailed disclosure in registered public offerings.

Buyer's Awareness of Seller's Reliance Upon Rule 144A

A seller of privately placed securities must take reasonable care to ensure that the buyer is aware that the seller may rely on the exemption from the Securities Act's registration requirements afforded by Rule 144A. This requirement may be fulfilled by the use of a special confirmation notice specifying the seller's potential reliance on the Rule's exemption.

16 "Reasonably current" is generally presumed to be satisfied with regard to foreign private issuers if the required information meets the timing requirements of the issuer's home country or principal trading markets.

C. 144A DOCUMENTATION

In the case of a placement of equity securities under Rule 144A, an offering memorandum and a purchase agreement are prepared, which are similar in many respects to the prospectus and underwriting agreement used in registered public offerings. Illustrative process and documentation timetables for a Rule 144A placement of ADRs is attached as Exhibit II.

Offering Memorandum

The offering memorandum is a brochure that contains information relating to the securities being offered (including recent price and dividend data), the use of proceeds, the issuer's business, operations, prospects, management, capital structure and financial performance (including financial statements), the issuer's business environment, the market for the issuer's securities (including the home or any other stock exchange), the arrangements for the purchase and sale of the offered securities, relevant risk factors (including a description of relevant country risk considerations) and any other relevant matters. Because the offering memorandum is not subject to the detailed requirements of U.S. securities laws, the content of the offering memorandum will generally be dictated by anti-fraud considerations, market practice and investor expectations.

Despite being exempt from the registration requirements of U.S. securities laws, the offering will be subject to the anti-fraud provisions discussed earlier in this memorandum. The content of the offering memorandum will in large part depend on the issuer, the type of security offered and the expected market.

Not being subject to the detailed requirements of the U.S. securities laws has a number of advantages. For instance, where an offering is made in multiple jurisdictions, one offering document may be used for both the Rule 144A and the foreign tranche, if appropriate. Furthermore, projected operating results, which generally may not be included in public offering prospectuses, may be included in a Rule 144A offering memorandum.

Purchase Agreement

The purchase agreement is the contract between the issuer and the underwriter setting forth the terms of the issuer's sale and the underwriter's purchase of the

securities. One of the principal effects of Rule 144A has been its influence upon the structure of private placements. Traditional private placements are usually done on a "best efforts" or agency basis, typically with only one or, rarely, two placement agents. Furthermore, private placements of equity securities were generally limited to small start-up companies or tax-advantaged limited partnerships, where a liquid market was not contemplated. With the adoption of Rule 144A, private placements may be structured like traditional public offerings where a group of underwriters, though likely small in number, will commit to purchase all of the offered securities and will offer them for resale, in this case under Rule 144A, to their customers. Liquidity will be enhanced through the ability to resell, under Rule 144A, to a large group of QIBs, in the issuer's home market as well as through the PORTAL system.

In most respects, the purchase agreement will be identical to the underwriting agreement prepared in connection with a public offering of securities. There will be representations, warranties and agreements to be made by the issuer, and there will be legal opinion and accountant's comfort letter delivery requirements. The issuer will also provide indemnification to the underwriters for any liability arising from a material misstatement in, or omission from, the offering memorandum.

Secondary Trading System (PORTAL)

In connection with approving Rule 144A, the SEC also approved the establishment of the NASD system, called PORTAL (Private Offerings, Resales and Trading Through Automated Linkages), a screen-based computer and communications system designed to facilitate the secondary trading of securities that qualify for Rule 144A. PORTAL may be used to disseminate quotations and transaction information; it also provides for clearance and settlement through the PORTAL system or permits participants to make other arrangements for clearance and settlement.[17] Only institutional investors that qualify as QIBs are permitted to trade through the system.

17 SEC Release No. 34-33326 (December 13, 1993).

CHAPTER VII
THE ADVANTAGES OF A REGISTERED PUBLIC OFFERING vs. A RULE 144A PLACEMENT

A. PUBLIC OFFERING ADVANTAGES

The most significant advantage for a foreign issuer selling its equity securities through a registered public offering is the liquidity of the trading market for the securities and related matters.

Securities sold in a registered public offering may be resold, other than by affiliates of the issuer, freely. Thus, unlike in Rule 144A placements, there are no legal impediments to the free resale of the publicly offered securities. This allows two very important advantages over Rule 144A placements. First, the securities may be sold initially and may be resold to individuals. The market for publicly offered securities is thus expanded greatly. As an outgrowth of the fact that registered securities may be freely resold, they are eligible for trading on a national securities exchange and for quotation in an interdealer quotation system. A listing on the NYSE or the AMEX adds to both the liquidity of the issue and to its prestige.

In addition to the advantages of liquidity, listing on a national securities exchange brings with it other advantages. Chief among these advantages is the coverage the stock may receive from securities analysts in the United States. Typically, the securities analysts of the lead managers will follow the company's performance and will issue periodic reports on the company's prospects. Favorable reports may help increase the price of the company's stock, though, of course, unfavorable reports may have the opposite effect. Another advantage in having the company's stock listed on a national securities exchange is the greater ability to use shares of the company's stock (in the form of ADRs) in connection with acquisitions. If a foreign issuer's stock is publicly traded in the United States, a potential seller may be more willing to take the stock as payment because of the ability to resell the stock and because the price of the stock will have been set by a large and liquid market.

B. RULE 144A PLACEMENT ADVANTAGES

Disclosure and Ongoing Reporting Requirements

The most significant advantages of a Rule 144A placement consist of the ability to avoid the SEC's detailed disclosure requirements applicable to offering documents and the ongoing reporting requirements of the Exchange Act; reconciliation of the issuer's financial statements to U.S. GAAP; and the disclosure, corporate governance and auditing requirements of the Sarbanes-Oxley Act. While investor expectations and market practice in Rule 144A placements have resulted in disclosure that closely approximates the level of disclosure in a registered public offering, foreign private issuers are not required to comply with the comprehensive disclosure requirements of Form 20-F in preparing their offering memoranda. Furthermore, issuers may disclose certain information which the SEC generally does not permit to be disclosed, including non-U.S. GAAP-compliant financial information.

Because a Rule 144A offering memorandum is distributed to a fairly discrete group of institutional investors, there is a greater chance to protect the confidentiality of the information disclosed. While it is impossible for the issuer to be absolutely sure that the information contained in the offering memorandum will not be disseminated generally, there is certainly a greater opportunity to maintain confidentiality than there is in connection with a public offering. Furthermore, because the offering memorandum is not subject to the SEC's guidelines, certain information which may be regarded as sensitive (*e.g.*, executive officer compensation) need not be disclosed.

After a public offering, an issuer becomes subject to the periodic reporting requirements of the Exchange Act. As discussed in detail above, under the Exchange Act, foreign private issuers are required to file annual reports with the SEC containing audited financial information, reconciliations to U.S. GAAP, to furnish other information to the SEC and to comply with the applicable provisions of the Sarbanes-Oxley Act. In addition, issuers are required to report certain significant events occurring between periodic filings. All of these obligations are avoided by an issuer relying upon Rule 144A in the distribution of its ADRs.

Timing

Rule 144A placements, as compared with registered public offerings, provide an issuer more control over the timing of the offering, as well as quicker access to the capital markets.

In a public offering, a registration statement meeting the formal requirements of the regulations under the Securities Act must be prepared. This process will take from four to eight weeks, depending upon the availability of information. The registration statement is then submitted to the SEC for review. Registration statements of first-time registrants are typically reviewed. While it is the SEC's policy to provide comments to the registrant within thirty days of the filing of the original registration statement and within ten days of the filing of an amendment, the review process can take longer depending upon the complexity of the registrant's business and the SEC's workload, and may be subject to multiple rounds of comments. While offers may be made and indications of interest may be solicited during the registration process, offers cannot be "confirmed" until the registration statement is declared effective by the SEC. First-time foreign issuers should allow a minimum of 45 to 90 days from the filing of the initial registration statement to the date the SEC declares the registration statement effective.

By comparison, a less detailed offering memorandum may, if appropriate, be prepared in connection with a Rule 144A placement. Even if a detailed offering memorandum is required, potential purchasers in a Rule 144A placement may be confirmed almost immediately after distribution of the offering memorandum, thus saving the substantial time which must be allowed for SEC review.

Expenses

In general, the expenses in connection with a Rule 144A placement will be lower than the expenses in connection with a registered public offering. The statutory filing fee for filings under the Securities Act, as of the date of this memorandum, is $30.70 per million of the proposed maximum aggregate offering price. Thus, the filing fee for a $100,000,000 offering would be $3,070. The SEC filing fee is adjusted annually. In addition to the SEC filing fee, there are filing fees in connection with review by the NASD and the NYSE, AMEX or NASDAQ, which will not be necessary in a Rule 144A placement.

In addition to these fees, there will be listing, accounting and legal fees as well as printing expenses. As a rule, legal fees will be somewhat lower in a Rule 144A placement than in a registered public offering. Because of the need to reconcile an issuer's financial statements to U.S. GAAP in a registered public offering and the need to engage auditor assistance for compliance with the Sarbanes-Oxley Act, accounting fees in registered offerings will be significantly higher than in Rule 144A placements. If, in a public offering, the securities are to be listed on the NYSE or AMEX, the listing fees can be substantial. The fees involved in listing on NASDAQ are less burdensome. By contrast, in connection with a Rule 144A placement, there are no exchange listing fees. Furthermore, because there are a limited number of QIBs, there is no need to print a large number of copies of the offering memorandum in a Rule 144A placement, as is typical in connection with a public offering.

MAYER, BROWN, ROWE & MAW LLP

ANNEX A

THE SARBANES-OXLEY ACT OF 2002

The Sarbanes-Oxley Act of 2002, which was adopted by Congress in response to the collapse of several prominent U.S. companies as a result of financial fraud, applies to both domestic and foreign companies whose securities (including debt securities) are registered with the SEC, and represents a broad expansion of U.S. securities laws in the areas of corporate governance, accounting matters, disclosure, enforcement and other topics. Following adoption of Sarbanes-Oxley in 2002, the SEC released a number of new regulations implementing the provisions of the Act and can be expected to make minor, ongoing adjustments to these new regulations.

A number of the provisions of the Sarbanes-Oxley Act conflict with regulations or customary practices in the home jurisdictions of some foreign issuers. In many such instances, the SEC has been flexible in applying some of these provisions and has stated that it is willing to consider case-by-case exemptions in others. However, careful compliance with the new certification and disclosure requirements is an important consideration for any foreign company contemplating the issuance of high yield bonds with registration rights. The following summarizes the more significant provisions created by Sarbanes-Oxley and the SEC rules and regulations thereunder.

A. NEW CORPORATE GOVERNANCE STANDARDS FOR DIRECTORS AND EXECUTIVE OFFICERS

1. CEO/CFO Certification of Reports

The Sarbanes-Oxley Act contains two certification provisions, one subject to civil penalties and one subject to criminal penalties, that require an issuer's Chief Executive Officer and Chief Financial Officer (or their equivalents, whether or not they hold those titles) to certify, among other things, the accuracy and completeness of their periodic reports filed with the SEC, as well as to the adequacy of the company's internal control over financial reporting and disclosure controls and procedures.[1] For purposes of this certification, "periodic reports" include each annual Form 20-F, but do <u>not</u> include reports on Form 6-K, even if they contain quarterly financial information.

1 Sarbanes-Oxley Sections 302 and 906. SEC Exchange Rules 13a-14 and 15d-14.

2. Senior Management Code of Ethics

Foreign issuers are required to disclose in their periodic reports whether they have adopted a code of ethics applicable to their principal executive officer, principal financial officer and principal accounting officer or comptroller.[2] If an issuer has not adopted an appropriate code of ethics, the issuer must disclose the reasons for not doing so. The code of ethics must include standards reasonably necessary to promote (i) honest and ethical conduct, including the handling of actual or apparent conflicts of interest between personal and professional relationships; (ii) full, fair, accurate, timely and understandable disclosure in SEC reports and other public communications; (iii) compliance with applicable governmental rules; (iv) prompt internal reporting of violations of the code; and (v) accountability for adherence to the code. A foreign issuer must disclose in its Form 20-F any changes to or waivers, including implicit waivers, of its code of ethics during the year covered by the report. Foreign issuers are strongly encouraged (but are not required) to make more prompt disclosure of changes and waivers on a Form 6-K or on their Internet websites.

Foreign issuers will need to consider, among other things, whether to produce a code of ethics that meets that Sarbanes-Oxley requirements and, if so, whether to produce a stand-alone code or to incorporate it within a pre-existing internal code of conduct.

3. Prohibition on Extending or Arranging Personal Loans to Directors and Executive Office

With limited exceptions for some types of loans made in the ordinary course of business by certain types of issuers, such as FDIC-insured banks and brokerage firms, foreign issuers are prohibited from, directly or indirectly, extending, maintaining, renewing or arranging for the extension of personal loans or guaranteeing such loans to their directors or executive officers.[3] Personal loans already existing on July 30, 2002 may continue in effect, provided there is no material modification to any term or any renewal of the loan.

2 Sarbanes-Oxley Section 406. SEC Regulation S-K Item 406. Form 20-F Item 16B.

3 Sarbanes-Oxley Section 402.

4. Forfeiture by CEO and CFO of Certain Bonuses and Profits

If, as a result of misconduct, an issuer must prepare an accounting restatement due to the material non-compliance by the issuer with any financial reporting requirement under the U.S. securities laws, the CEO and CFO are required to reimburse the issuer for: (i) any bonus or other incentive-based or equity-based compensation he or she received from the issuer during the 12-month period following the first public issuance or filing with the SEC of the financial document that did not comply with such financial reporting requirement; and (ii) any profits he or she realized from the sale of securities of the issuer during that same twelve-month period.[4]

5. Prohibition of Improper Influence on Audits

No action may be taken by any director or officer of an issuer (or other person acting under the direction of any of them) to coerce, manipulate, mislead or fraudulently influence any independent auditor of the issuer's financial statements if it could result in rendering the financial statements materially misleading.[5]

6. Prohibition of Service as a Director or Officer

An individual can be barred by court order, at the request of the SEC, from serving as an officer or director of a public company if he or she has violated the general anti-fraud provisions of the U.S. securities laws and his or her activities are found by the court to show him or her to be "unfit."[6] In addition, the SEC, in an administrative cease and desist proceeding, may bar an individual from serving as a director or officer of a public company if, after notice and hearing, it has found that the individual has violated the general anti-fraud provisions of the U.S. securities laws and that the individual's conduct demonstrates unfitness to serve as an officer or director.

7. Pension Fund Blackout Periods

The purchase, sale or other acquisition or transfer of any equity security of a foreign issuer by a director or executive officer is prohibited during a blackout period with respect to defined pension funds if the equity security was acquired or would be acquired in connection with his or her service or

4 Sarbanes-Oxley Section 304.

5 Sarbanes-Oxley Section 303. SEC Exchange Act Rule 13b2-2.

6 Sarbanes-Oxley Sections 305 and 1105.

employment as a director or executive officer.[7] A blackout period means any period of more than three consecutive days during which the ability of not fewer than 50% of the participants or beneficiaries under all individual account plans maintained by the issuer to purchase, sell or otherwise acquire or transfer an interest in any equity security of the issuer held in such plan is temporarily suspended by the issuer or by a fiduciary of the plan. For foreign issuers, the number of U.S. participants affected must represent more than 15% of the issuer's total worldwide workforce on a consolidated basis or 50,000 persons.

B. NEW REQUIREMENTS FOR AUDIT COMMITTEES AND AUDIT SERVICES AND RESTRICTIONS ON NON-AUDIT SERVICES FROM AUDITORS

1. Audit Committee Provisions

a. *Independence*. Each member of the audit committee of a listed company must (i) be unaffiliated with the issuer and its subsidiaries; and (ii) not accept any compensation, directly or indirectly, from the issuer or any subsidiary thereof (including consulting, advisory or other compensatory fees) other than for service as a member of the board of directors or on any board committee.[8] If an issuer does not have an audit committee, the Sarbanes-Oxley Act imposes these requirements on the entire board of directors. The NYSE, AMEX and NASDAQ prohibit the listing of any company that is not in compliance with these audit committee requirements. In addition, there is a general exemption for foreign issuers that have a board of auditors or statutory auditors established pursuant to home country laws or listing requirements, which in turn meet various requirements.

b. *Financial Expert*. Foreign issuers are required to disclose in their annual reports filed with the SEC whether or not their audit committee includes at least one member who is a "financial expert" (and, if not, the reasons), but are not required to have a financial expert on their audit com-

7 Sarbanes-Oxley Section 306. SEC Regulation BTR.

8 Sarbanes-Oxley Section 301. SEC Exchange Act Rule 10A-3.

mittees.[9] Foreign issuers must also disclose in their annual report whether or not any financial expert is "independent," as defined by their current applicable listing standards, or if the foreign issuer is not a listed issuer, under any SEC-approved definition. The SEC has defined "financial expert" to mean a person who has (i) an understanding of GAAP and financial statements; (ii) an ability to assess the general application of such principles in connection with accounting for estimates, accruals and reserves; (iii) experience in preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can be reasonably expected to be raised by the issuer's financial statements, or experience in actively supervising one or more persons engaged in such activities; (iv) an understanding of internal accounting controls and procedures for financial reporting; and (v) an understanding of audit committee functions. The SEC's rules provide that if a foreign issuer's financial statements are presented in accordance with non-U.S. GAAP, then the experience and familiarity of the financial expert is measured in relation to such non-U.S. GAAP.

c. *Responsibilities*. Audit committees of listed issuers are responsible for the appointment, compensation and oversight of the work of the issuer's independent auditor for the purposes of preparing or issuing any audit report (and any related work).[10] In addition, the independent auditor must report directly to the audit committee. In particular, audit committees of listed issuers are responsible for the following:

- **Selecting and Overseeing Independent Auditors.** Audit committees must be directly responsible for the appointment, compensation, retention and oversight of the issuer's accounting firm, including the resolution of disagreements between management and the company's auditor regarding financial reporting.
- **Establishing Complaint Procedures.** The Audit Committee must establish procedures for the receipt, retention and treatment of com-

9 Sarbanes-Oxley Section 407. SEC Regulation S-K Item 407(d)(5). Form 20-F Item 16A.

10 Sarbanes-Oxley Section 301. SEC Exchange Act Rule 10A-3.

plaints that the issuer receives regarding accounting, internal accounting controls or auditing matters, and procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters.

- **Engaging Advisors.** The Audit Committee must have the authority to engage independent counsel and other advisors, as it determines necessary to carry out its duties.
- **Providing Adequate Funding.** The Company must provide appropriate funding, as determined by the Audit Committee, to pay compensation to the independent auditor and any outside advisors so engaged.

d. *Home Country Provisions.* To the extent the foreign issuer's home jurisdiction requires or permits shareholders to ultimately vote on, approve or ratify such requirements, if the foreign issuer provides a recommendation or nomination to shareholders, then the audit committee must be responsible for making the recommendation or nomination.[11]

e. *Procedures for Handling Accounting Complaints; Protection of "Whistle Blowers."* As noted above, the audit committee of listed companies must establish procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters and for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters.[12] The NYSE, AMEX and NASDAQ prohibit the listing of any company that is not in compliance with this requirement. In addition, issuers, and their officers, directors and agents are prohibited from discharging, demoting or otherwise discriminating against any employee who lawfully provides information regarding any conduct the employee reasonably believes constitutes a violation of the U.S. securities laws or financial fraud statutes to any governmental authority, by testimony or otherwise, in any proceeding pending or about to be commenced concerning such a violation or to any person with supervisory authority over the employee or authorized by the issuer to investigate such conduct

11 SEC Exchange Act Rule 10A-3.

12 Sarbanes-Oxley Section 301. SEC Exchange Act Rule 10A-3.

(which includes the Audit Committee and auditors and counsel engaged by the Audit Committee), i.e., so-called "whistle blowers."

2. Regulation of Audit Services

The Sarbanes-Oxley Act imposes restrictions on an issuer's relationship with its auditor in connection with providing audit services.

a. *Employment of Former Personnel of Issuer's Auditor.* An accounting firm is prohibited from providing any audit service to an issuer if the lead partner responsible for the audit of the foreign issuer, the audit partner responsible for reviewing the audit or other member of the audit engagement team accepts a position with the issuer in a financial reporting oversight role during the one-year period preceding the date of the initiation of the audit for the year in which the audit professional became employed by the foreign issuer.[13]

b. *Rotation of Audit Partners.* The lead audit partner responsible for the audit of an issuer and the audit partner responsible for reviewing the audit must change every five years and are subject to a five-year time-out before they can again be involved with providing audit services to the foreign issuer.[14] All other partners involved with the audit engagement of the foreign issuer must change every seven years and are subject to a two-year time-out before they can again be involved with providing audit services to the foreign issuer.

3. Restrictions on Non-Audit Services

The Sarbanes-Oxley Act places significant restrictions on audit firms providing non-audit services to their clients.[15]

a. *Restricted Non-Audit Services.* An auditor providing any of the following services to a client would not be considered "independent" with regard to that client: (i) management functions or human resources; (ii) broker or dealer, investment adviser, or investment banking services; or (iii) legal services and expert services unrelated to the audit.

13 Sarbanes-Oxley Section 206. SEC Regulation S-X Rule 2-01(c)(2).

14 Sarbanes-Oxley Section 203. SEC Regulation S-X Rule 2-01(c)(6).

15 Sarbanes-Oxley Section 201. SEC Regulation S-X Rule 2-01(c)(4)

In addition, providing any of the following services will also impair an auditor's independence, unless it is reasonable to conclude that the results of the services will not be subject to audit procedures during an audit of the client's financial statements: (i) bookkeeping or other services related to the accounting records or financial statements of the issuer; (ii) financial information systems design and implementation; (iii) appraisal or valuation services, fairness opinions, or contribution-in-kind reports; (iv) actuarial services; or (v) internal audit outsourcing services.

In addition, an auditor's independence will be impaired by providing any other services that the Public Company Accounting Oversight Board (the "Oversight Board") determines, by regulation, is impermissible. To date, the Oversight Board has determined that an auditor's independence is impaired if the auditor, or any affiliate of the auditor, receives a contingent fee from the foreign issuer for any service or product or if the auditor is involved in marketing or otherwise opining in favor of aggressive tax shelter schemes or in selling personal tax services to individuals who play a direct role in preparing the financial statements of the foreign issuer.[16]

b. *Preapproval Requirements; Non-Audit Services.* All audit, review and attest services (including providing comfort letters in underwritings) and any permissible non-audit services, such as permissible tax services, may only be provided to an issuer if approved in advance by the audit committee of the issuer or are provided pursuant to pre-approval policies and procedures adopted by the audit committee of the foreign issuer.[17] Consideration and approval of such services may be delegated to an independent director of the audit committee. Any such approvals by delegation must be presented to the audit committee at its next meeting. The percentage of services that are approved pursuant to delegation must be disclosed in the next Form 20-F filed with the SEC. Services other than audit, review and attest services, do not need prior approval if the amount paid for such services meets a *de minimis* standard, the services were not recognized at the time of engagement to be non-audit services and the provision of the services was promptly brought to the attention of the Audit Committee and were approved prior to the com-

16 PCAOB Rules 3521, 3522 and 3523.

17 Sarbanes-Oxley Section 202. SEC Regulation S-X Rule 2-01(c)(7). PCAOB Rule 3524.

pletion of the audit by the Audit Committee, or one or more members of the committee with authority to grant such approvals.

C. EXPANDED COMPANY DISCLOSURES

1. Accuracy of Financial Reports: Material Correcting Adjustments by the Independent Auditor

Each financial report filed with the SEC that contains financial statements that are required to be prepared in accordance with, or reconciled to, GAAP must reflect all "material correcting adjustments" that have been identified by the issuer's independent auditor in accordance with GAAP and SEC rules.[18]

2. Restrictions on Use of Pro Forma Financial Information

Pro forma financial information (i.e., figures that are not prepared in accordance with GAAP, such as "pro forma earnings," "core earnings" or "EBITDA") must be presented in a manner that does not contain an untrue statement of a material fact or omit to state a material fact necessary to render the information not misleading.[19] The presentation of pro forma financial information must include a reconciliation of the pro forma disclosure to the issuer's financial condition and results of operations as prepared in accordance with GAAP. The new rules apply to all pro forma information regardless of whether the information is contained in an SEC filing, in any press release or in some other public disclosure. The rules do not apply to foreign issuers, provided that the foreign issuer is listed on an exchange outside of the United States, the information was released outside of the United States (even if it was simultaneously released in the United States) and the non-GAAP measure is not derived from a number prepared in accordance with, or derived from, a measures prepared in accordance with U.S. GAAP.

3. Off-Balance Sheet Transactions

In each annual report filed with the SEC, issuers must provide specified disclosure of all material off-balance sheet transactions, arrangements,

18 Sarbanes-Oxley Section 401(a).

19 Sarbanes-Oxley Section 401(c). SEC Regulation S-K Item 10 and SEC Regulation G.

obligations (including contingent obligations), and other relationships with unconsolidated entities or persons that may have a material current or future effect on the issuer's financial condition, results of operations, liquidity, capital expenditures, capital resources, or significant components of revenues or expenses.[20]

4. Management Assessment of Internal Controls

A foreign issuer's annual report filed with the SEC must contain an "internal control report" stating that management is responsible for establishing and maintaining an adequate internal control structure and procedures for financial reporting, and assessing the effectiveness of the internal control structure and procedures for financial reporting.[21] A foreign issuer that is a large accelerated filer filing a Form 20-F is required to comply with these requirements for its first fiscal year ending on or after July 15, 2006. A foreign issuer that is an accelerated filer but not a large accelerated filer filing a Form 20-F is required to comply with the requirements for its first fiscal year ending on or after July 15, 2007. A foreign issuer that is not an accelerated filer or a large accelerated filer filing a Form 20-F is required to comply with the requirements for its first fiscal year ending on or after December 15, 2007.

D. INCREASED ENFORCEMENT AND PENALTIES

1. Criminalization of Misconduct

The Sarbanes-Oxley Act imposes criminal penalties for the following misconduct (some of which was already subject to criminal provisions of U.S. Federal securities and other laws):

- knowingly or willfully filing a false CEO/CFO certification under Section 906 of the Sarbanes-Oxley Act;[22]
- knowingly and willfully destroying any audit workpapers;[23]

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20 Sarbanes-Oxley Section 401(b). SEC Regulation S-K Item 303(a)(4). Form 20-F Item 5.E.

21 Sarbanes-Oxley Section 404. SEC Regulation S-K Item 308(a). Form 20-F Item 15.

22 Sarbanes-Oxley Section 906.

23 Sarbanes-Oxley Section 802(b).

- destroying, altering or falsifying records done with the intent to impede, obstruct or influence any governmental investigation or the administration of any Federal governmental function or any bankruptcy proceeding;[24]
- discriminating in the terms and conditions of employment with respect to employees who provide information or assist in investigations of U.S. securities law violations by U.S. Federal regulatory or law enforcement agencies, the U.S. Congress or company personnel with supervisory or investigatory authority or file, testify, participate in, or otherwise assist in proceedings filed or about to be filed involving alleged violations of the U.S. securities laws or SEC regulations or securities fraud;[25] and
- knowingly executing or attempting to execute a scheme or artifice to defraud any person in connection with any security of a public company or obtaining by means of false or fraudulent pretenses, representations or promises, any money or property in connection with the purchase or sale of any security of a public company.[26]

2. Increased Penalties and other Remedies

The Sarbanes-Oxley Act establishes new fines and criminal penalties for securities fraud violations involving accounting irregularities and financial fraud, including sanctions applicable to directors, officers and professionals that have committed, conspired with or "aided and abetted" the commission of violations.[27] Liabilities for judgments or settlements for violating U.S. securities laws or committing securities fraud will be non-dischargeable in bankruptcy.[28]

3. Statute of Limitations

The Sarbanes-Oxley Act extends the applicable statute of limitations for private rights of action for securities fraud to the earlier of (i) two years

24 Sarbanes-Oxley Section 802(a).

25 Sarbanes-Oxley Sections 806 and 1106.

26 Sarbanes-Oxley Section 807.

27 Sarbanes-Oxley Sections 902, 903, 904 and 1106.

28 Sarbanes-Oxley Section 803.

(from the existing one-year period) after discovery of the facts constituting the violation; and (ii) five years (from the existing three-year period) after such violation.[29] However, this extension does not apply to securities fraud cases that were previously cut off by the old statute of limitations but are now within the new statute of limitations.

4. Responsibilities of Counsel

Attorneys appearing before the SEC in the representation of issuers are required to report "evidence of" a material violation of U.S. securities law or breach of fiduciary duty or similar violation by the issuer or any agent thereof to the issuer's chief legal officer and chief executive officer.[30] If the report is not properly responded to through adopting appropriate remedial measures or sanctions for the violations, attorneys must report the evidence to the audit committee (or another committee comprised solely of non-employees of the issuer, sometimes referred to as a "qualified legal compliance committee") or to the full board. The rules apply to all attorneys who are appearing and practicing before the SEC whether or not they are U.S. citizens and they also apply to supervisory and subordinate in-house attorneys, although there is an exception for foreign attorneys appearing before the SEC only in consultation with counsel admitted or licensed to practice in a state or other U.S. jurisdiction who is appearing and practicing before the SEC.

29 Sarbanes-Oxley Section 804.

30 Sarbanes-Oxley Section 307. SEC PART 205.

ANNEX B

CORPORATE GOVERNANCE LISTING STANDARDS

NYSE

Over the last several years, the NYSE has revised its listing standards to require increased minimum standards of corporate governance by listed companies.[31] Pursuant to these requirements, foreign private issuers are generally permitted to follow home country practice in lieu of these corporate governance standards except that foreign private issuers must comply with Rule 10A-3 under the Exchange Act relating to audit committees, the CEO must notify the NYSE in writing promptly after any executive officer becomes aware of any material non-compliance with any applicable provisions of the listing requirements and the listed company must submit an executed Written Affirmation annually to the NYSE and each time a change occurs to the board of directors or any of the board committees subject to the NYSE listing standards.[32] Foreign private issues must generally disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards. This disclosure must be in English and may be made either in the foreign private issuer's annual report distributed to shareholders in the United States or on its website (provided it is accessible from the United States and the annual report discloses that the company's website address and that such information will be contained on the website). The NYSE has stated that only a brief, general summary of the significant differences is required. The following discussion is applicable to US listed companies, but to the extent that a foreign private issuer's practices differ from these requirements, those differences must be described as set forth in the preceding sentence.

Under the listing standards, a majority of the directors of a listed company must consist of independent directors. No director qualifies as independent unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company).[33]

31 SEC Release No. 34-48745.

32 NYSE Rule 303A.11 and NYSE Rules 303A.06 and 303A.12(b).

33 NYSE Rules 303A.01 and 303A.02.

When assessing the materiality of a director's relationship with the listed company, the board of directors should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. For this purpose, material relationships may include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. However, ownership of a significant amount of stock, by itself, is not a bar to a finding of independence.

The basis for the board of director's determination that a relationship is not material must be disclosed in the listed company's annual meeting proxy statement (or, if none, its annual report filed with the SEC). If the board of directors has adopted categorical standards for independence, it must disclose these standards and provide general disclosure of whether a director meets those standards. Any determination of independence for a director who does not meet these standards must be specifically explained.

In addition, the NYSE has adopted certain categories of relationships that would preclude a determination of independence.

Executive Sessions of the Board of Directors

Non-management directors of each NYSE-listed company must meet at regularly scheduled executive sessions, without management, to promote open discussion. Directors who are not independent, but who are not officers of the listed company, may participate in these executive sessions but, at least once a year, the board of directors should schedule an executive session that includes only independent directors.[34]

If one director is chosen to preside at all of the executive sessions, his or her name must be disclosed in the annual meeting proxy statement or, if none, the annual report filed with the SEC. Alternatively, the listed company may disclose the procedure by which a presiding director is selected for each executive session. Also, listed companies must disclose a method for interested parties to communicate directly with the presiding director or with non-management directors as a group.

34 NYSE Rule 303A.03.

Nominating/Corporate Governance Committee

Each listed company must have a nominating/corporate governance committee composed entirely of independent directors.[35] The nominating/corporate governance committee must have a written charter that addresses:

- the committee's purpose and responsibilities, which, at a minimum, must be to identify individuals qualified to become board members, consistent with criteria approved by the board of directors, and to select, or to recommend that the board of directors select, the director nominees for the next annual meeting of shareholders; develop and recommend to the board of directors a set of corporate governance principles applicable to the listed company; and oversee the evaluation of the board of directors and management; and
- an annual performance evaluation of the nominating/corporate governance committee.

In addition, the written charter should address the following items: committee member qualifications; committee member appointment and removal; committee structure and operations; and committee reporting to the board. Finally, the written charter should give the committee sole authority to retain and terminate any search firm to be used to identify director candidates and the sole authority to approve the search firm's fees and other retention terms.

If the listed company is legally required by contract or otherwise to provide third parties with the ability to nominate directors (e.g., through the terms of preferred stock or a shareholders agreement), the selection and nomination of those directors need not be subject to the nominating committee process.

Compensation Committee

Each listed company must also have a compensation committee composed entirely of independent directors.[36] The compensation committee must have a written charter that addresses:

- the committee's purpose and responsibilities, which, at a minimum, must be to have direct responsibility to: (i) review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives and, either as a committee or together

35 NYSE Rule 303A.04.

36 NYSE Rule 303A.05.

with the other independent directors (as directed by the board of directors), determine and approve the CEO's compensation level based on this evaluation; (ii) if not delegated to the compensation committee, make recommendations to the board of directors with respect to non-CEO compensation, incentive-compensation plans and equity-based plans; and (iii) produce a compensation committee report on executive compensation as required by the SEC to be included in the listed company's annual meeting proxy statement or annual report filed with the SEC; and

- an annual performance evaluation of the compensation committee.

In addition, the written charter should address the following items: committee member qualifications; committee member appointment and removal; committee structure and operations; and committee reporting to the board. Finally, if a compensation consultant is to assist in the evaluation of director, CEO or executive officer compensation, the written charter should give the committee sole authority to retain and terminate the consulting firm and the sole authority to approve the search firm's fees and other retention terms.

In determining the long-term incentive component of CEO compensation, the compensation committee should consider the listed company's performance and relative shareholder return, the value of similar incentive awards to CEOs at comparable companies and the awards given to the listed company's CEO in past years.

Audit Committee

In addition to meeting the general independence standards established by the NYSE described below, in accordance with Rule 10A-3 of the Exchange Act and subject to specified exceptions in the case of initial public offerings and foreign private issuers, no member of the audit committee may, other than in his or her capacity as a member of the audit committee, the board of directors or any other board committee:

- accept, directly or indirectly, any consulting, advisory or other compensatory fee from the issuer or any subsidiary[37]; or
- be an affiliated person of the listed company or any subsidiary thereof.

37 Compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan for prior service with the listed company provided that such compensation is not contingent in any way on the continued service.

Each listed company must have an audit committee composed of at least three directors all of whom must be independent.[38] Each member of the audit committee must be financially literate (as that qualification is interpreted by the listed company's board of directors in its business judgment), or must become financially literate within a reasonable period of time after his or her appointment to the audit committee. In addition, at least one member of the audit committee must have accounting or related financial management expertise (as the listed company's board of directors interprets that qualification in its business judgment). If a director qualifies as an audit committee financial expert under SEC requirements, the board of directors may presume that he or she has accounting or related financial management experience.

If an audit committee member simultaneously serves on the audit committee of more than three public companies, and the listed company does not limit the number of audit committees on which its audit committee members can serve, the board of directors must determine that the simultaneous service does not impair the ability of the member to effectively serve on the listed company's audit committee and disclose this determination in the listed company's annual meeting proxy statement or, if none, its annual report filed with the SEC.

The audit committee must have a written charter that addresses:

- the committee's purpose, which, at a minimum, must be to: (i) assist the board of directors' oversight of the integrity of the listed company's financial statements, the listed company's compliance with legal and regulatory requirements, the independent auditors' qualifications and independence, and the performance of the listed company's internal audit function and independent auditors; and (ii) prepare the audit committee report required by the SEC to be included in the listed company's annual meeting proxy statement;
- an annual performance evaluation of the audit committee;
- the duties and responsibilities of the audit committee – which, at a minimum, must include:
- being directly responsible, subject to limited exceptions, for the appointment, compensation, retention and oversight of the work of any independent

38 NYSE Rule 303A.07.

auditor engaged (including resolution of disagreements between management and the independent auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the listed company, and each such independent auditor must report directly to the audit committee;

- the establishment of procedures for the receipt, retention and treatment of complaints received by the listed company regarding accounting, internal accounting controls or auditing matters; and the confidential, anonymous submission by employees of the listed company of concerns regarding questionable accounting or auditing matters;
- the authority to engage independent counsel and other advisers as the committee determines necessary to carry out its duties;
- the ability to receive adequate funding, as determined by the audit committee, for payment of the compensation to any independent auditor engaged for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the listed company, compensation to any advisers employed by the audit committee and ordinary administrative expenses of the audit committee that are necessary or appropriate in carrying out its duties;
- at least annually, obtain and review a report by the independent auditor describing: the firm's internal quality-control procedures; any material issues raised by the most recent internal quality-control review or peer review of the firm or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm and any steps taken to deal with any such issues; and to assess the auditor's independence, all relationships between the independent auditor and the listed company (after reviewing this report, the audit committee will be in a position to evaluate the auditor's qualifications, performance and independence, to consider whether there should be regular rotation of the audit firm and to report its conclusions to the full board of directors);
- discuss the listed company's annual audited financial statements and quarterly financial statements with management and the independent auditor, including the listed company's disclosures under Management's Discussion and Analysis of Financial Condition and Results of Operations;

- discuss the listed company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies, which may be done generally and need not be done in advance of each release or discussion;
- discuss policies with respect to risk assessment and risk management to govern the process by which the listed company's exposure to risk is handled;
- meet separately, periodically, with management, with internal auditors (or persons performing that function) and with independent auditors;
- review with the independent auditor any audit problems or difficulties and management's responses thereto, including any difficulties the auditor encountered in the course of the audit work, including any restrictions on the scope of the independent auditor's activities or on access to requested information, and any significant disagreements with management, any accounting adjustments that were noted or proposed by the auditor but were passed, any communications between the audit team and the audit firm's national office respecting auditing or accounting issues presented by the engagement, any management or internal control letters issued, or proposed to be issued, by the independent auditors, and the responsibilities, budget and staffing of the listed company's internal audit function;
- set clear hiring policies for employees or former employees of the independent auditors; and
- report regularly to the board of directors, in particular regarding any issues that arise with respect to the quality or integrity of the listed company's financial statements, the listed company's compliance with legal or regulatory requirements, the performance and independence of the listed company's independent auditors or the performance of the internal audit function.

The audit committee must also review: (i) major issues regarding accounting principles and financial statement presentations, including any significant changes in the listed company's selection or application of accounting principles, and major issues as to the adequacy of the listed company's internal controls and any special audit steps adopted in light of material control deficiencies; (ii) analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements; (iii) the effect of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the listed com-

pany; and (iv) the type and presentation of information to be included in earnings press releases, paying particular attention to any use of pro forma or adjusted non-GAAP information, as well as review any financial information and earnings guidance provided to analysts and rating agencies.

Finally, each listed company must have an internal audit function.

Shareholder Approval of Equity Compensation Plans

The NYSE rules require that, with certain limited exceptions, shareholders approved all equity-compensation plans and material revisions thereto.[39] An equity compensation plan is a plan or other arrangement that provides for the delivery of equity securities of the listed company to any employee, director or other service provider as compensation for services, other than plans that are made available to shareholders generally, such as a typical dividend reinvestment plan, or plans that merely allow employees, directors or other service providers to elect to buy shares for their current fair market value.

Corporate Governance Guidelines

The NYSE rules require each listed company to adopt and disclose corporate governance guidelines addressing the following:[40]

- director qualification standards, including independence requirements, and any other substantive qualification requirements including any policies limiting the number of boards on which a director may sit and with respect to director tenure, retirement and succession matters;
- director responsibilities, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials;
- director access to management and, as necessary and appropriate, independent advisors;
- director compensation, including general principles for determining the form and amount of director compensation;
- director orientation and continuing education;

39 NYSE Rule 303A.08.

40 NYSE Rule 303A.09.

- management succession, including policies and principles for CEO selection and performance review, as well as policies regarding succession in the event of an emergency or the retirement of the CEO; and
- annual performance evaluation of the board of directors.

Each listed company's website must include its corporate governance guidelines and the charters of its most important committees. Its annual meeting proxy statement or, if none, the annual report filed with the SEC, must state that the foregoing information is available on its website, and that the information is available in print to any shareholder who requests it.

Code of Business Conduct and Ethics

Each listed company must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers.[41] The code of business conduct and ethics must require that any waiver of the code for directors and executive officers be made only by the board of directors or a committee of the board of directors and must be promptly disclosed to shareholders.

Each code of business conduct and ethics must contain compliance standards and procedures that facilitate the effective operation of the code and should address:

- conflicts of interest, including a policy prohibiting conflicts of interest and providing a means for employees, officers and directors to communicate potential conflicts to the listed company;
- corporate opportunities, including a prohibition on employees, officers and directors from personally taking opportunities that are discovered through the use of corporate property, information or position, using corporate property, information or position for personal gain, and competing with the listed company;
- confidentiality of information entrusted to employees, officers and directors by the listed company or its customers, except when disclosure is authorized or legally mandated;
- fair dealing with the listed company's customers, suppliers, competitors and employees;

41 NYSE Rule 303A.10.

- protection and proper use of the listed company's assets;
- compliance with laws, rules and regulations, including insider trading laws; and
- encouraging the reporting of any illegal or unethical behavior, which includes a non-retaliation policy for reports made in good faith.

The listed company's website must include its code of business conduct and ethics. The listed company's annual meeting proxy statement or, if none, the annual report filed with the SEC, must state that the code of business conduct and ethics is available on its website and that the information is available to any shareholder who requests it.

Certifications of Compliance with Listing Standards

The CEO of each listed company must certify to the NYSE each year that he or she is not aware of any violation by the listed company of the NYSE corporate governance listing standards.[42] An interim affirmation is required to be provided to the NYSE each time a change occurs to the board of directors or any of the committees specified in the corporate governance listing standards. The NYSE expects issuers to file the certification with the NYSE within 30 days after its annual meeting of shareholders. This certification and the certifications of the CEO and the CFO required to be filed by the Sarbanes-Oxley Act must be included in the listed company's annual report distributed to shareholders or, if none, its annual report filed with the SEC. However, if the listed company distributes a "glossy" annual report to shareholders which does not include a complete copy of the Form 10-K of Form 20-F as part of the annual report, the listed company can incorporate the certifications of the CEO and CFO required to be filed by the Sarbanes-Oxley Act rather than including them in the annual report to shareholders.

The CEO of each listed company must promptly notify the NYSE in writing after any executive officer becomes aware of any material non-compliance with any applicable provisions of the corporate governance listing standards.

42 NYSE Rule 303A.12.

Violations of Listing Standards

The NYSE may issue a public reprimand letter to any listed company that violates an NYSE listing standard.[43] For companies that repeatedly or flagrantly violate NYSE listing standards, suspension or delisting remain the ultimate penalty.

NASDAQ CORPORATE GOVERNANCE LISTING STANDARDS

NASDAQ's corporate governance rules are set out in NASDAQ Rules 4350, 4351 and 4360. As is the case with the NYSE's corporate governance rules, a foreign private issuer may follow its home country practice in lieu of these new requirements, provided that such an issuer must (i) comply with Rule 10A-3 under the Exchange Act relating to audit committees and their independence; and (ii) notify NASDAQ in writing promptly after any executive officer becomes aware of any material non-compliance with the requirements of NASDAQ Rule 4350. A foreign private issuer that follows a home country practice in lieu of one of the requirements of NASDAQ Rules 4350, 4351 or 4360 must disclose each requirement that it does not follow (and describe the home country practice it follows) in its annual report filed with the SEC or, in the case of a foreign private issuer making its initial public offering in the United States or its first listing on NASDAQ, in its initial registration statement filed with the SEC.

The scope and substance of the NASDAQ's corporate governance requirements are substantially similar to the new corporate governance requirements of the NYSE, addressing director independence, nominating and governance committees, compensation committee and audit committee requirements, the need for a code of ethics and compliance certificates. There are certain differences, however, including that the NASDAQ rules require public disclosures by all companies of audit opinions received by the listed company with a going concern qualification and require ongoing reviews of related party transactions for conflict-of-interest situations and for such transactions to be approved by the audit committee or other independent body of the board of directors. The NASDAQ rules also do not require adoption of corporate governance guidelines as required by the NYSE, although it may be good practice to do so.

43 NYSE Rule 303A.13.

EXHIBIT I

ILLUSTRATIVE TIME SCHEDULE FOR A REGISTERED PUBLIC OFFERING OF AMERICAN DEPOSITARY RECEIPTS BY A FOREIGN PRIVATE ISSUER

Time schedule is indicative for a Level III ADR program. Issuer's program specifics, availability of prior public disclosures made by the issuer (or lack thereof) and regulator's involvement will vary and could affect timing.

Timing	Action
Week One	1. Initial organizational meetings with the Issuer regarding: a. Basic terms and conditions. b. Review of necessary governmental approvals; status of applications and approvals. c. Time schedule and allocation of responsibilities. d. Marketing and syndication strategy (including the road show). e. General form and content of Registration Statement on Form F-1 (the "Registration Statement"), Underwriting Agreement and Deposit Agreement. f. Selection of depositary, financial printer, and local and other legal counsel. g. Selection of stock exchange to which listing application will be made. h. Other U.S. securities law issues. i. Collection of business and financial information for Registration Statement. j. Due diligence examination. k. Corporate/shareholder approvals which are necessary.

2. Work begun on:
   a. Registration Statement (due diligence investigation, discussion regarding financials to be included).
   b. Reconciliation of financial statements to U.S. GAAP.
   c. Underwriting Agreement, Agreement Among Managers and Deposit Agreement.
   d. Stock Exchange Listing Application.
   e. Registration Statement on Form F-6 (“Form F-6”) for registration of ADRs by depositary.
   f. Registration Statement on Form 8-A (“Form 8-A”) for Exchange Act Registration.

Weeks Two and Three

1. Due diligence continues.
2. Continuing work on Registration Statement, Underwriting Agreement and Deposit Agreement.
3. Contact made with the issuer’s independent auditors regarding comfort letter.
4. Contact financial printer.
5. Continuing discussions among managers regarding structure, timing and economics.

Week Four

1. Initial drafts of Registration Statement, Deposit Agreement, Underwriting Agreement and Agreement Among Managers distributed to working group.
2. Preparation of roadshow slides, script, etc.

Weeks Five and Six

1. Drafting and due diligence sessions as necessary.
2. Comments to draft documentation delivered and revised drafts circulated.
3. Preparation of Blue Sky Memorandum.
4. Listing application finalized.

Week Seven	1. Registration Statement filed with SEC, NASD and Blue Sky authorities.
	2. Form 8-A and Form F-6 filed with SEC.
	3. Listing application filed with stock exchange.
Weeks Eight, Nine and Ten	1. Roadshow slides, script, etc. finalized.
	2. Accountants prepare draft comfort letter.
	3. Final authorizations and approvals (governmental, corporate and otherwise) obtained.
	4. Stock exchange listing application approved.
Week Eleven	1. Comments received from SEC on Registration Statement.
	2. Revised draft of Registration Statement distributed to working group.
	3. NASD approval of underwriting arrangements.
Week Twelve	1. Amendment No. 1 to Registration Statement filed with SEC.
	2. Print Preliminary Prospectus.
	3. Road Show commences.
Week Thirteen	1. Road Show continues.
	2. Request effectiveness of Form F-6 Registration Statement.
Week Fourteen	1. Form F-6 Registration Statement declared effective (Form 8-A becomes effective automatically at the same time, provided that all conditions to effectiveness are satisfied).
	2. Price offering.

3. Execution of Underwriting Agreement.
4. Accountants deliver comfort letter.
5. Print Final Prospectus.
6. Execution of Deposit Agreement.
7. Trading on stock exchange commences.
8. File Final Prospectus with SEC.

Week Fifteen

1. Pre-closing meeting held on the day before the closing to review all documents.
2. Closing and payment occurs (three or four business days after the date on which pricing occurred).
3. Closing documents delivered.

Thereafter

1. Publication of tombstone advertisement.
2. Ongoing U.S. SEC informational filings pursuant to Exchange Act must be made by the issuer.

EXHIBIT II

ILLUSTRATIVE TIME SCHEDULE FOR A RULE 144A PLACEMENT OF AMERICAN DEPOSITARY RECEIPTS BY A FOREIGN PRIVATE ISSUER

Time schedule is indicative. Issuer's program specifics and availability of prior public disclosures made by the issuer (or lack thereof) will vary and could affect timing.

Timing	**Action**
Week One	1. Initial organizational meetings with the Issuer regarding: a. Basic terms and conditions. b. Review of necessary governmental approvals; status of applications and approvals. c. Time schedule and allocation of responsibilities. d. Marketing and syndication strategy (including the road show). e. General form and content of Offering Memorandum, Underwriting Agreement and Deposit Agreement. f. Selection of depositary, financial printer, and local and other legal counsel. g. Rule 12g3-2(b) exemption. h. Other U.S. securities law issues. i. Collection of business and financial information for Offering Memorandum. j. Due diligence examination. k. Corporate/shareholder approvals which are necessary.

2. Work begun on:
   a. Offering Memorandum (due diligence investigation, discussion regarding financials to be included).
   b. Underwriting Agreement, Agreement Among Managers and Deposit Agreement.

Weeks Two and Three

1. Due diligence continues.
2. Continuing work on Offering Memorandum, Underwriting Agreement and Deposit Agreement.
3. Contact made with the issuer's independent auditors regarding comfort letter.
4. Drafting letter to SEC requesting Rule 12g3-2(b) exemption.
5. Contact financial printer.
6. Continuing discussions among managers regarding structure, timing and economics.

Week Four

1. Initial drafts of Offering Memorandum, Deposit Agreement, Underwriting Agreement and Agreement Among Managers distributed to working group.
2. Preparation of roadshow slides, script, etc.

Weeks Five and Six

1. Drafting and due diligence sessions as necessary.
2. Comments to draft documentation delivered and revised drafts circulated.
3. Roadshow slides, script, etc., finalized.
4. Preparation of Blue Sky Memorandum.
5. Euroclear, CEDEL and DTC contacted regarding acceptance for their respective book-entry settlement systems.
6. File Rule 12g3-2(b) exemptive application.

Week Seven

1. Preliminary Offering Memorandum printed.
2. Application to PORTAL system filed.
3. Roadshows commence.

Weeks Eight and Nine

1. Roadshows continue.
2. Accountants prepare draft comfort letter.
3. Final authorizations and approvals (governmental, corporate and otherwise) obtained.
4. Draft closing memorandum and related closing certificates circulated.
5. Confirmation from U.S. SEC that the issuer has been added to list of foreign private issuers claiming Rule 12g3-2(b) exemption.
6. Final sign-off from Euroclear, CEDEL, DTC and PORTAL.

End of Week Nine

1. Price offering.
2. Execution of Underwriting Agreement.
3. Accountants deliver comfort letter.
4. Print Final Offering Memorandum.
5. Execution of Deposit Agreement.

End of Week Ten

1. Pre-closing meeting held on the day before the closing to review all documents.
2. Closing and payment occurs (three or four business days after the date on which pricing occurred).
3. Closing documents delivered.

Thereafter

1. Publication of tombstone advertisement.
2. Ongoing U.S. SEC informational filings pursuant to Rule 12g3-2(b) must be made by the issuer.