Here's the deal:

- Regulation S provides an exclusion from the Section 5 registration requirements of the Securities Act of 1933, as amended (the "Securities Act"), for offerings made outside the United States by both U.S. and foreign issuers.
- Regulation S is available only for "offers and sales of securities outside the United States" made in good faith and not as a means of circumventing the Securities Act registration requirements.
- The availability of the Regulation S issuer and resale safe harbors are contingent on two general conditions:
    - the offer or sale must be made in an offshore transaction; and
    - no "directed selling efforts" may be made by the issuer, a distributor, any of their respective affiliates, or any person acting on their behalf.
- The Regulation S safe harbors are non-exclusive, meaning that an issuer may also rely on another applicable exemption from registration.

What's the Deal? - What is Regulation S?

Regulation S provides an exclusion from the Section 5 registration requirements of the Securities Act for offers made outside the United States by both U.S. and foreign issuers to non-U.S. persons. A securities offering, whether private or public, made by an issuer outside of the United States in reliance on Regulation S is not required to be registered under the Securities Act. Regulation S provides safe harbors that are non-exclusive; as a result, an issuer that relies on Regulation S also may claim the availability of another applicable exemption from registration. Regulation S is available for offerings of both equity and debt securities.

Regulation S is available only for "offers and sales of securities outside the United States" made in good faith and not as a means of circumventing the Securities Act registration requirements. The availability of the issuer (Rule 903) and the resale (Rule 904) safe harbors is contingent on two general conditions:

- The offer or sale must be made in an offshore transaction; and
- No "directed selling efforts" may be made by the issuer, a distributor, any of their respective affiliates, or any person acting on their behalf.

Entities that may rely on Regulation S

The following entities may rely on Regulation S:

- U.S. issuers – both reporting and non-reporting issuers may rely on the Rule 901 general statement or the Rule 903 issuer safe harbor;
- Foreign issuers – both reporting and non-reporting foreign issuers may rely on the Rule 901 general statement or the Rule 903 issuer safe harbor;

- Distributors (underwriters and broker-dealers) – both U.S. and foreign financial intermediaries may rely on the Rule 901 general statement or the Rule 903 issuer safe harbor;
- Affiliates of the issuer – both U.S. and foreign;
- Any persons acting on the behalf of the aforementioned persons;
- Non-U.S. resident purchasers (including dealers) who are not offering participants may rely on the Rule 901 general statement or the Rule 904 resale safe harbor to transfer securities purchased in a Regulation S offering; and
- U.S. residents (including dealers) who are not offering participants may rely on the Rule 901 general statement or the Rule 904 resale safe harbors in connection with purchases of securities on the trading floor of an established foreign securities exchange that is located outside the United States or through the facilities of a designated offshore securities market.

Types of issuers who may not rely on Regulation S

Regulation S is not available for the offer and sale of securities issued by open-end investment companies, unit investment trusts registered or required to be registered under the Investment Company Act of 1940 (the "1940 Act"), or closed-end investment companies required to be registered, but not registered, under the 1940 Act.

Requirements that must be met in order to rely on Regulation S

Market participants may rely on the issuer and resale safe harbors of Regulation S only if (1) the offer or sale is made as part of an "offshore transaction" and (2) none of the parties make any "directed selling efforts" in the United States. The "parties" in an initial issuance, under Rule 903, would be the issuer, a distributor, any of their respective affiliates or any person acting on behalf of any of the foregoing. In a resale transaction under Rule 904, the "parties" would be any person other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), and any person acting on behalf of any of the foregoing. In addition, offerings made in reliance on Rule 903 are subject to additional restrictions that are connected with the level of risk that securities in a particular type of transaction will flow back into the United States.

Rule 903 prescribes three categories of transactions (summarized below) based on the type of securities being offered and sold, whether the issuer is domestic or foreign, whether the issuer is a reporting issuer under the Exchange Act and whether there is a "substantial U.S. market interest," or "SUSMI."

"Category 1" transactions are those in which the securities are least likely to flow back into the United States. Therefore, the only restrictions are that the transaction must be an "offshore transaction" and that there be no "directed selling efforts" in the United States.

"Category 2" and "Category 3" transactions are subject to an increasing number of offering and transactional restrictions for the duration of the applicable "distribution compliance period." A "distribution compliance period" is the period following the offering when any offers or sales of Category 2 or 3 securities must be made in compliance with the requirements of Regulation S in order to prevent the flow back of the offered securities into the United States. The period ranges from 40 days to six months for reporting issuers or one year for equity securities of non-reporting issuers.

Types of transactions that may be conducted under Regulation S

There are several types of Regulation S offerings that U.S. or foreign issuers may conduct:

- A standalone Regulation S offering, in which the issuer conducts an offering of debt or equity securities solely in one or more non-U.S. countries;
- A combined Regulation S offering outside the United States and Rule 144A offering inside the United States; and
- Regulation S continuous offering programs for debt securities, including various types of medium-term note programs (these continuous offering programs may be combined with an issuance of securities to qualified institutional buyers ("QIBs") in the United States under Rule 144A).

Regulation S also permits two other types of offerings: (1) offerings made under specified conditions pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States and in accordance with that country's practices and documentation; and (2) offerings of foreign government securities.

The Regulation S tranche of any offering refers only to the part of the offering in which the offering participants must comply with Regulation S in order to benefit from the safe harbor. The offering itself also must comply with the requirements of the applicable non-U.S. jurisdictions and the requirements of any foreign securities exchange or other listing authority. A Regulation S-compliant offering could be combined with a registered public offering in the United States or an offering exempt from registration in the United States, as well as be structured as a public or private offering in one or more non-U.S. jurisdictions.

Concurrent exempt or excluded offerings with Regulation S transactions

A contemporaneous registered offering or exempt private placement in the United States will not be integrated with an offshore offering that otherwise complies with Regulation S for the purpose of determining whether Rule 903's general requirement is met. In fact, Regulation S contemplates that a private placement in the United States may be made simultaneously with an offshore public offering in reliance on the issuer safe harbor. Offshore offerings and sales of securities made in reliance on Regulation S do not preclude the resale of those same securities made in reliance on Rule 144A or Regulation D, even if the resale occurs during the distribution compliance period. Conversely, in determining whether the requirements for a Section 4(a)(2) exempt private placement are met, offshore transactions made in compliance with Regulation S will not be integrated with domestic offerings that are otherwise exempt from registration under the Securities Act.

The distribution compliance periods applicable to the sale of Regulation S securities

Securities cannot be offered or sold to a U.S. person during the distribution compliance period unless the transaction is registered under the Securities Act or exempt from registration. There is no distribution compliance period in connection with securities sold in a Category 1 transaction.

The distribution compliance period for Category 2 transactions involving both equity and debt securities and for Category 3 transactions involving debt securities is 40 days. The distribution compliance period

for Category 3 offerings of equity securities is six months, if the issuer is a reporting company, and one year otherwise.

The distribution compliance period normally begins on the later of:

- the date on which the securities were first offered to persons other than distributors in reliance upon Regulation S; or
- the date of closing of the offering.

All offers and sales by a distributor of an unsold allotment are considered to be made during the distribution compliance period.

Measurement of the distribution compliance period by the type of security

Distribution compliance periods for continuous offerings of medium-term notes, warrants, convertible securities, and American depositary receipts ("ADRs") are measured differently:

Medium-Term Notes

The distribution compliance period for a continuous offering begins at the completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions. For continuous offering programs, such as medium-term note programs, the distribution compliance period is determined on a tranche-by-tranche basis. As to any tranche, the distribution compliance period begins when the manager for the offering certifies the completion of the distribution of that tranche.

Warrants

Securities underlying warrants are considered to be subject to a continuous distribution as long as the warrants remain outstanding, provided that the legending and certification requirements of Rule 903(b)(5), which are designed to limit the exercise of warrants by U.S. persons, are satisfied. The distribution compliance period will commence upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person performing similar functions.

Convertible Securities

For convertible securities, both the convertible security and the underlying security are treated in the same manner. The distribution compliance period for both the convertible and the underlying security typically commences on the later of: (1) the date on which the offering of the convertible security closes or (2) the date on which the convertible security was first offered to persons other than distributors in reliance on Regulation S. If, however, conversion of the convertible security is not exempt under section 3(a)(9) of the Securities Act, the convertible security will be treated in the same manner as a warrant.

ADRs

U.S. depositary banks issue ADRs and each represents one or more shares, or a fraction of a share, of a foreign issuer. ADRs allow foreign equity securities to be traded on U.S. stock exchanges. By owning an ADR, an investor has the right to obtain the foreign share that the ADR represents, although most U.S. investors find it is easier to own just the ADR. An American depositary share ("ADS"), on the other hand, is the actual underlying foreign share that an ADR represents. The issuance of ADRs in exchange for the underlying foreign shares or the withdrawal of deposited ADRs during the distribution compliance period is not precluded by Regulation S.

Eligible transactions: What is an "offshore transaction"?

An offer or sale of securities is made in an "offshore transaction" if (i) the offer is not made to a person in the United States (other than a distributor) and (ii) either (1) at the time the buy order is originated, the buyer is physically located outside the United States or the seller and any person acting on his behalf has a reasonable belief that the buyer is outside the United States, or (2) the transaction is for purposes of Rule 903, executed on a physical trading floor of an established foreign securities exchange, or for purposes of Rule 904, executed on a "designated offshore securities market" and the seller is not aware that the transaction has been pre-arranged with a U.S. purchaser.

An offering participant may establish a "reasonable belief" that the buyer is outside the United States based on any number of approaches. For purposes of the Rule 903 issuer safe harbor, it is sufficient if the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange. For purposes of the Rule 904 resale safe harbor, it is sufficient if the transaction is executed in, on or through the facilities of a "designated offshore securities market" and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

Notwithstanding these provisions, offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, are not deemed to be made in offshore transactions. Conversely, offers and sales to persons excluded from the definition of "U.S. person" because they are international organizations (*e.g.,* the United Nations) or their affiliates, or with persons holding accounts excluded from the definition of U.S. person because they manage those accounts on behalf of non-U.S. persons, are deemed to be made in "offshore transactions."

Eligible transactions: What are "directed selling efforts"?

"Directed selling efforts" is defined as "any activity undertaken for the purpose of, or that could be reasonably expected to result in, conditioning the U.S. market for the relevant securities." This applies during the offering period as well as during any distribution compliance period. Selling efforts could still be initiated from the United States, provided that these efforts are directed or effected abroad.

The following activities constitute "directed selling efforts" targeted at U.S. persons:

- advertising the offering in publications with a "general circulation" in the United States (which includes any publication printed primarily for distribution in the United States or that has had on average a circulation of at least 15,000 copies per issue within the prior twelve months);
- mailing printed materials to U.S. investors;
- conducting promotional seminars in the United States;
- placing advertisements with radio or television stations that broadcast in the United States; and
- making offers directed at identifiable groups of U.S. citizens in a foreign country, such as members of the U.S. military.

Certain communications and advertisements are excluded from the definition of "directed selling efforts", including:

- Any advertisement required to be published by U.S. or foreign laws, regulatory or self-regulatory authorities, such as a stock exchange, where the advertisement contains no more information than that legally required and includes a restrictive legend stating that the securities have not been registered under the Securities Act and sales in the United States and to U.S. persons are restricted;
- A communication with persons, including U.S. managers or investment advisers, who are acting on behalf of an account which is a non-U.S. person (defined in Rule 902(k) as persons excluded from the definition of U.S. person);
- A tombstone advertisement in a publication having less than 20% of its worldwide circulation in the United States that contains the applicable restrictive legend and limited information about the issuer, managing underwriters, sales commencement and conclusion dates, and both qualitative and quantitative details about the securities being sold;
- Bona fide visits and tours of real estate facilities in the United States by prospective investors;
- Quotations of a foreign broker-dealer distributed by a third-party system that primarily distributes this information in foreign countries, provided that no security transaction can be executed through the system between broker-dealers and persons in the United States, and no communication with U.S. persons is initiated;
- A notice in accordance with Rule 135 or Rule 135c of the Securities Act that an issuer intends to make a registered or unregistered offering of its securities;
- Providing journalists with access to issuer meetings held outside the United States, or providing written press or press-related materials released outside the United States in compliance with Rule 135e of the Securities Act;
- Isolated limited contact within the United States (*i.e.,* minor, inadvertent contact within the United States);
- Routine activities conducted in the United States unrelated to selling efforts, including normal communications to shareholders; and
- Publication and distribution of research reports by a broker or dealer under Rule 138(c) or Rule 139(b) of the Securities Act.

Rule 135c-compliant press releases and Regulation S offerings

It is permissible for Issuers to use a Rule 135c-compliant press release to announce a Regulation S offering. Under Rule 135c of the Securities Act, an announcement that an issuer proposes to make, is making or has made an unregistered offering will not be deemed to be an offer of securities, for purposes of Section 5 of the Securities Act, if, among other things, the announcement contains certain limited information regarding the offering (*e.g.,* the name of the issuer, the basic terms and size of the offering, the timing of the offering, a brief statement of the manner and purpose of the offering and statements that the securities have not been registered) and is not used for the purpose of conditioning the market in the United States for the offered securities. A press release that complies with Rule 135c is not a "directed selling effort" and therefore will not affect the availability of the Regulation S safe harbor.

In addition, for Regulation S offerings with a Rule 144A tranche, the SEC has clarified that general solicitation and general advertising in connection with a Rule 144A offering will not be viewed as "directed

selling efforts" in connection with a concurrent Regulation S offering. This is particularly relevant because general solicitation and general advertising are now permitted for Rule 144A offerings (so long as the securities are sold to a QIB or to a purchaser that the seller and any person acting on the seller's behalf reasonably believes is a QIB). Therefore, issuers may broadly disseminate a press release regarding a proposed or completed Rule 144A offering without the prior restrictions on the types of permitted information under Rule 135c.

Offering participants should be mindful that Rule 135c is a non-exclusive safe harbor, and offering-related press releases may comply with a different safe harbor, such as Rule 135e under the Securities Act in respect of any offshore activities for any Regulation S tranche. Under Rule 135e, foreign issuers, selling security holders or their representatives will not be deemed to offer any security for sale, for purposes of Section 5 of the Securities Act, by virtue of providing any journalist with access to any of the following:

- Its press conferences held outside of the United States;
- Meetings with the issuer or selling security holder representatives conducted outside of the United States; or
- Written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if:
    - The present or proposed offering is not being, or to be, conducted solely in the United States;
    - Access is provided to both U.S. and foreign journalists; and
    - Any written press-related materials pertaining to transactions in which any of the securities will be or are being offered in the United States satisfy the requirements of Rule 135e(b) with respect to legends and certain other information.

What is a "U.S. person"?

A U.S. person includes:

- any natural person resident in the United States;
- any partnership or corporation organized or incorporated under the laws of the United States;
- any estate of which any executor or administrator is a U.S. person;
- any trust of which any trustee is a U.S. person;
- any agency or branch of a U.S. person located outside the United States;
- any non-discretionary or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;
- any discretionary or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated or, if an individual, resident in the United States; and
- any partnership or corporation if (1) organized or incorporated under the laws of any foreign jurisdiction and (2) formed by a U.S. person principally for the purpose of investing in securities not registered under the Securities Act, unless it is organized or incorporated and owned by

accredited investors under Rule 501(a) of the Securities Act who are not natural persons, estates, or trusts.

The following are explicitly excluded from the definition of "U.S. person":

- any discretionary or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated or, if an individual, resident in the United States;
- any estate of which any professional fiduciary acting as executor or administrator is a U.S. person, if (1) an executor or administrator who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate, and (2) the estate is governed by foreign law;
- any trust of which any professional fiduciary acting as trustee is a U.S. person, if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settler if the trust is revocable) is a U.S. person;
- an employee benefit plan established and administered in accordance with the laws, customary practices, and documentation of a country other than the United States;
- any agency or branch of a U.S. person located outside the United States if (1) the agency or branch operates for valid business reasons; and (2) the agency or branch is engaged in the business of insurance or banking, and is subject to substantive insurance or banking regulation in the jurisdiction where it is located; and
- such international organizations (and their agencies, affiliates and pension plans) as the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, and the United Nations.

Information requirements under Regulation S

Reasonable steps that a reseller must take to make the buyer aware that the reseller may rely on Regulation S in connection with the resale.

Offering Memorandum

If the offering is a standalone Regulation S offering (or a Regulation S tranche of a combined Rule 144A/Regulation S offering), and the securities are either Category 2 or Category 3, the offering memorandum and any other offering materials and documents (other than press releases) used in connection with offers and sales prior to the expiration of the applicable distribution compliance period must include:

- Statements to the effect that the securities have not been registered under the Securities Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are registered under the Securities Act, or an exemption from such registration requirements is available; and
- For equity securities of domestic issuers, an additional statement that hedging transactions involving those securities may not be conducted unless in compliance with the Securities Act.

In addition, for Category 3 equity securities:

- The offer or sale, if made prior to the expiration of the one-year distribution compliance period (six months for a reporting issuer), may not be made to a U.S. person, or for the account or benefit of a U.S. person (other than a distributor); and
- The offer or sale, if made prior to the expiration of the applicable one-year or six-month distribution compliance period, is made pursuant to the following conditions:
    - the purchaser (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Securities Act; and
    - the purchaser agrees to resell such securities only in accordance with the provisions of Regulation S, pursuant to registration under the Securities Act, or pursuant to an available exemption from registration; and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the Securities Act.

The purchaser's certifications are described in the offering memorandum and in most cases, a purchaser is deemed to have made such representations when it purchases beneficial interests in the Regulation S global security.

The offering memorandum for a combined Rule 144A/Regulation S offering usually contains extensive disclosure regarding resale limitations and transfer restrictions. If the securities will be held in book-entry format, as is customary, the disclosure also will include information regarding:

- The book-entry process and the forms of global securities;
- The delivery of the securities;
- The depositary procedures of The Depository Trust Company, Euroclear and Clearstream as holders of the book-entry certificates, particularly with respect to payments and any voting rights relating to the securities;
- The exchange of global notes for certificated notes, which is required under specified circumstances, and generally the prohibition on the exchange of certificated notes for beneficial interests in the global notes;
- Exchanges between the Rule 144A security and any Regulation S security;
- Same-day settlement and payment procedures; and
- Any registration rights, including discussion of any registered exchange offer.

Legend

Pursuant to the requirements of Regulation S, the certificates for a domestic issuer's securities must contain a legend to the effect that transfer is prohibited except in accordance with the provisions of Regulation S, pursuant to registration under the Securities Act, or pursuant to an available exemption from registration; and that hedging transactions involving those securities may not be conducted unless in compliance with the Securities Act.

Regulation S requires such issuers, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of Regulation S, pursuant to registration under the Securities Act, or pursuant to an available exemption from registration. However, the SEC recognized that securities of foreign issuers are often issued in bearer form and that foreign law may prevent the issuer for refusing to register securities transfers. Therefore, in such cases, it is permissible under Regulation S for an issuer to implement "other reasonable procedures" to prevent any transfer of the securities not made in accordance with the provisions of Regulation S.

Confirmation

Furthermore, Regulation S requires each distributor selling securities to a distributor, a dealer, or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day distribution compliance period in the case of debt securities, or the applicable one-year or six-month distribution compliance period in the case of equity securities, to send a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

Conducting a Regulation S transaction: Overview of the three categories of transactions under Regulation S

Category 1 Transactions

Category 1 transactions include offerings of:

- Securities by foreign issuers who reasonably believe at the commencement of the offering that there is no SUSMI in certain securities;
- Securities by either a "foreign issuer" or, in the case of non-convertible debt securities, a U.S. issuer, in an "overseas directed offering";
- Securities backed by the full faith and credit of a foreign government; and
- Securities by foreign issuers pursuant to an employee benefit plan established under foreign law.

Category 2 Transactions

Category 2 transactions include offerings of:

- Equity securities of a reporting foreign issuer;
- Debt securities of a reporting U.S. or foreign issuer; and
- Debt securities of a non-reporting foreign issuer.

Category 3 Transactions

Category 3 is the residual safe harbor because it applies to all transactions not eligible for the Category 1 or Category 2 safe harbors. Category 3 transactions include:

- Debt or equity offerings by non-reporting U.S. issuers;
- Equity offerings by U.S. reporting issuers; and

- Equity offerings by non-reporting foreign issuers for which there is a substantial U.S. market interest.

The structure of a Regulation S transaction

Debt Securities

1. Category 1 Safe Harbor

This issuer safe harbor is available for debt offerings if a foreign issuer reasonably believes at the commencement of the offering that there is no SUSMI in the debt securities. A SUSMI in debt securities exists if:

- The issuer's debt securities are held of record by 300 or more U.S. persons, and
- U.S. persons hold of record at least 20% and at least $1 billion or more of the principal amount of debt securities, plus the greater of the liquidation preference or par value of non-participating preferred stock, and the principal amount or balance of asset-backed securities.

If there is no SUSMI in a foreign issuer's debt securities, the issuer is only required to comply with the general Regulation S requirements. For Category 1 transactions, there is no distribution compliance period during which time the securities may not be resold. However, issuers engaging in a Category 1 transaction that includes a Rule 144A tranche may choose to impose a 40-day distribution compliance period.

Alternatively, foreign issuers of debt securities (and U.S. issuers of non-convertible debt securities) may rely on the Category 1 safe harbor if the transaction qualifies as an overseas directed offering. An offering of non-convertible debt securities of a U.S. issuer must similarly be directed into a foreign country in accordance with that country's local laws and customary practices, and the securities must be non-U.S. dollar denominated or linked securities in order to qualify as an overseas directed offering. In addition, foreign issuers offering debt securities backed by the full faith and credit of a foreign government or that are offered pursuant to an employee benefit plan may rely on the Category 1 safe harbor, provided that the offers and sales are made as part of an offshore transaction and no directed selling efforts are made.

2. Category 2 Safe Harbor

This issuer safe harbor is available to both reporting and non-reporting non-U.S. issuers and reporting U.S. issuers of debt securities, subject to compliance with the offering and transactional restrictions for the applicable distribution compliance period. All Category 2 securities are subject to a 40-day distribution compliance period.

The issuer (as well as its affiliates and any distribution participants) must adhere to the following offering restrictions:

- Each distributor must agree in writing to the following:
    - all offers and sales of the securities prior to the expiration of a forty-day distribution compliance period must be made in accordance with Rule 903, pursuant to registration under the Securities Act or to an exemption from registration; and

- for any offers and sales of equity securities of U.S. issuers, not to engage in hedging transactions with respect to such securities prior to the expiration of the distribution compliance period, unless in compliance with the Securities Act;

- All offering materials and documents (except press releases) used in connection with offers and sales of the securities prior to the expiration of the distribution compliance period must include legends in specified places in the prospectus or offering circular and in advertisements disclosing that the securities have not been registered under the Securities Act and may not be offered or sold in the United States or to U.S. persons (except distributors) absent registration under the Securities Act or in reliance on an exemption from registration; and
- The offering materials and documents relating to equity securities of U.S. issuers must state that hedging transactions involving such securities may not be conducted unless in compliance with the Securities Act.

An issuer must also comply with the following transactional restrictions:

- No offer or sale is made during the distribution compliance period to (or for the account or benefit of) a U.S. person, except for distributors; and
- Each distributor selling securities to a distributor, a dealer, or a person receiving a selling concession, fee or other remuneration with respect to the securities sold, prior to the expiration of the distribution compliance period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales.

Non-compliance with the offering restrictions renders the safe harbor unavailable to all distribution participants. By contrast, noncompliance with the transactional restrictions renders the safe harbor unavailable only for the party (and its affiliates and persons acting on their behalf) that failed to comply with the restrictions.

3. Category 3 Safe Harbor

This issuer safe harbor is available to non-reporting U.S. issuers of debt securities, provided that the debt securities are not offered or sold to (or for the benefit of) a U.S. person (other than a distributor) during the 40-day distribution compliance period, except pursuant to the registration requirements of the Securities Act or an exemption from registration. Issuers must comply with the offering and transactional restrictions applicable to Category 2 offerings and the following three additional transactional restrictions during the distribution compliance period:

- The securities may not be offered or sold to (or for the account or benefit of) a U.S. person other than a distributor;
- The securities must be represented by a temporary global security that cannot be exchanged for definitive securities (1) by distributors until the end of the distribution compliance period and (2) for persons other than distributors, until certification of beneficial ownership of the securities by non-U.S. persons (or by any U.S. person who purchased the securities in an exempt transaction); and
- Any distributor selling securities to another distributor or to a dealer or any person receiving a selling concession or similar compensation must send confirmation to the purchaser before the

end of the distribution compliance period stating that the purchaser is subject to the same restrictions on offers and sales applicable to a distributor.

Equity Securities

The provisions of the issuer safe harbor that are specific to offerings of equity securities are summarized below.

Category 1 Safe Harbor

The Category 1 safe harbor is available for equity offerings if a foreign issuer reasonably believes at the beginning of the offering that there is no SUSMI in the equity securities. A SUSMI in equity securities exists if, during the shorter of the issuer's prior fiscal year or the period since incorporation, either:

- The U.S. securities exchanges and inter-dealer quotation systems in the aggregate, constituted the single largest market for a class of the issuer's securities; or
- At least 20% of all trading in a class of the issuer's securities occurred on the facilities of U.S. securities exchanges and inter-dealer quotation systems, and less than 55% of such trading occurred on the facilities of the securities markets of a single foreign country.

If there is no SUSMI in a foreign issuer's equity securities, the issuer need only comply with the general Regulation S requirements to make offers and sales.

Category 2 Safe Harbor

The Category 2 safe harbor is only available for equity offerings by a reporting foreign issuer. Even if there is a SUSMI in the securities, reporting foreign issuers who implement the Category 2 offering and transactional restrictions for the distribution compliance period may rely on the safe harbor.

Category 3 Safe Harbor

The Category 3 safe harbor is available to any issuer of equity securities who, for the duration of a distribution compliance period of one year (or six months, if the issuer is a reporting company), implements and complies with the Category 2 offering and transactional restrictions and the following additional restrictions:

- The purchaser of the securities (except a distributor) must either certify (1) that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or (2) that it is a U.S. person who purchased securities in a transaction under an applicable exemption from registration under the Securities Act;
- The purchaser of the securities must agree to resell the securities only in accordance with Regulation S, pursuant to the registration requirements of the Securities Act or in reliance on an exemption from registration;
- The purchaser of the securities must agree not to engage in hedging transactions unless in compliance with the Securities Act;
- The securities of a U.S. issuer must contain a legend stating that (1) the transfer of the securities is prohibited unless made in accordance with Regulation S, pursuant to the registration requirements of the Securities Act or in reliance on an exemption from registration and (2)

hedging transactions involving those securities must be made only in compliance with the Securities Act;

- The issuer must be required by contract or by its charter, bylaws or similar document to refuse to register any transfer made in violation of Regulation S unless the securities are in bearer form or foreign law prevents the issuer from refusing to register transfers. In the latter two instances, the issuer must implement other reasonable procedures in order to prevent any transfer of securities not made in accordance with Regulation S. For example, an issuer may include a legend on the securities stating that transfers not made in accordance with Regulation S, the registration requirements of the Securities Act or in reliance on an exemption from registration, are prohibited; and
- Any distributor selling securities to another distributor or to a dealer or any person receiving a selling concession or similar compensation must send confirmation to the purchaser before the end of the distribution compliance period stating that the purchaser is subject to the same restrictions on offers and sales applicable to a distributor.

Documentation in a Regulation S debt offering

In most circumstances, Regulation S offerings are combined with Rule 144A offerings. The documentation typically used in both debt and equity Rule 144A transactions, with or without a Regulation S tranche, is similar to that used in registered offerings, including:

- An offering memorandum (similar to a prospectus), which must bear legends stating that the securities have not been registered under the Securities Act and may not be offered or sold in the United States or to a U.S. person, absent registration under the Securities Act or in reliance on an exemption therefrom. Moreover, for equity securities offered by U.S. issuers, the legends must also state that hedging transactions may not be conducted except in compliance with the Securities Act. These legends must appear both on (or inside) the cover page and in the underwriting section of any offering memorandum used in connection with the offer or sale of securities (if the legend is on the front page of the offering memorandum, it may be printed in summary form). Furthermore, due to the complexity of clearance and settlement procedures in global offerings, an offering memorandum usually includes extensive clearance and settlement discussions.
- A purchase agreement between the issuer and the initial purchasers, which is similar to an underwriting agreement. This agreement will include standard representations and warranties related to the issuer, the securities offered, the business and other representations designed to supplement the due diligence initial purchasers' investigation. Furthermore, the agreement will include representations, warranties and covenants specific to the Rule 144A/Regulation S offering, including: (i) the issuer will not use "directed selling efforts" as defined under Regulation S, and if the securities offered are Category 2 or 3 securities, it has implemented the required Regulation S offering restrictions; (ii) the issuer has not engaged in general solicitation or general advertising (unless the issuer chooses to use general solicitation or general advertising, which are now permitted for Rule 144A offerings so long as the securities are sold to a QIB or to a purchaser that the seller and any person acting on the seller's behalf reasonably

believes is a QIB); (iii) the offered securities meet the eligibility requirements under Rule 144A; (iv) the issuer is not an open-end investment company, unit investment trust or face-amount certificate company; and (v) if the securities are debt securities or ADRs, the issuer will not resell any securities in which it or any of its affiliates has acquired a beneficial ownership interest. For further discussion on the purchase agreement, please see "Additional Purchase Agreement Information" below.

- An agreement among underwriters or syndication agreement;[1]
- In some cases, a registration rights agreement between the issuer and the initial purchasers;
- In a debt offering, an indenture;
- Comfort letters from the issuer's auditors; and
- Closing documentation including "bring down" comfort letters, legal opinions, a "10b-5" or "negative assurance" letter from legal counsel, and closing certificates.

Similar to a registered offering, the issuer will work with its counsel, an investment bank, investment bank's counsel and independent accountants to prepare the required documents.

For a Rule 144A offering combined with a Regulation S offering, the Regulation S offering may be conducted using documents that are based on the country-specific practices of the relevant non-U.S. jurisdiction or jurisdictions. However, the disclosure documents in such a circumstance generally will contain the same substantive information so that investors have the same "disclosure package."

Additional Purchase Agreement Information

If the offering includes common equity, either directly or upon conversion of preferred stock or debt securities or upon exercise of warrants, the initial purchaser may require the issuer and even its senior management or other shareholders to "lock up" their common stock.

The initial purchasers in a combined Rule 144A/Regulation S transaction will also make limited representations, warranties and covenants which is distinct from an underwriting agreement in a public offering. The initial purchasers, as "distributors" (within the meaning of Regulation S) will also represent, warrant and covenant that they will offer and sell securities throughout the applicable distribution compliance period exclusively in compliance with either Regulation S or any other available exemption from the Securities Act registration requirements, or pursuant to a registration statement filed with the SEC. If the transaction is an equity offering by a U.S. issuer, the distributor also must agree not to engage in any hedging transactions involving Category 2 or Category 3 securities during the distribution compliance period, unless in compliance with the Securities Act.

If there is a standalone Regulation S offering (or the combined offering is structured to permit separate Rule 144A and Regulation S syndicates), the agreement between the financial intermediaries and the issuer may not resemble a U.S.-style purchase (or underwriting) agreement.

[1] Many broker-dealers are already party to a "master agreement among underwriters" that governs the relationship among syndicate members. Therefore, a deal-specific agreement among underwriters typically is not required. Combined offerings that are syndicated to a substantial number of non-U.S. broker-dealers may use a number of syndication agreements, including agreements among underwriters (on a per syndicate level), intersyndicate agreements and transaction-specific dealer agreements. The International Primary Market Association's Standard Form Agreement Among Managers is sometimes used in Regulation S debt offerings syndicated primarily to London-based broker-dealers.

The Trust Indenture Act

An indenture for a Regulation S (and a side-by-side Rule 144A) offering is not required to be qualified under the Trust Indenture Act of 1939, as amended (the "Trust Indenture Act") because Rule 144A and Regulation S debt offerings are exempt from the registration requirements of the Securities Act. However, these debt offerings, particularly of U.S. issuers contemplating a subsequent registered exchange offering for the Rule 144A tranche, should be issued under an indenture that meets the requirements of the Trust Indenture Act. When the exchange offer registration statement is subsequently filed, the indenture must then be qualified under the Trust Indenture Act. In the ordinary course, issuers and initial purchasers choose trustees that can comply with the requirements of the Trust Indenture Act, but such trustee qualification (on Form T-1) also is required when the registration statement is subsequently filed. Although it is standard to use an indenture, if the debt will not be registered subsequently with the SEC (which is typical in a standalone Regulation S offering), a fiscal and paying agency agreement would be sufficient since it covers substantially the same matters.

Regulation S and FINRA filing requirements

Regulation S securities are exempt from the FINRA filing requirements. Securities offered in side-by-side offerings will also generally be exempt from the FINRA filing requirements, based on another applicable exemption.

Regulation S securities and TRACE reporting

The Trade Reporting and Compliance Engine ("TRACE") is the FINRA-developed vehicle that facilitates the mandatory reporting of transactions in eligible (generally fixed income) securities by FINRA members. While all FINRA members are required to report transactions in TRACE-eligible securities, dealers that are not registered with FINRA do not have TRACE reporting obligations.

Securities sold in a Regulation S transaction are not subject to TRACE reporting. However, if securities originally sold in a Regulation S transaction are later resold pursuant to another exemption, the subsequent sale may be subject to TRACE reporting. Additionally, Rule 144A securities in a Rule 144A/Regulation S side-by-side offering will be subject to TRACE reporting.

Checklist of Key Questions

- Is the offering made outside of the United States?
- Is the offer and sale made in an offshore transaction and no directed selling efforts are made?
- Does the offering involve a substantial U.S. market interest?
- What category of issuer is involved with the offering?
- What category of transaction is the offering?
- What type of security is being issued?
- Will the Regulation S offering be made concurrent with a Rule 144A offering?