

## Guide to Public ADR Offerings in the United States

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## I. Introduction

In the United States, the shares of many foreign corporations are traded in the form of American Depositary Receipts (“ADRs”). An ADR is a negotiable certificate in registered form evidencing American Depositary Shares (“ADSs”) that represent the underlying foreign shares on a share-for-share, partial-share or multiple-share basis. ADSs are usually issued by a U.S. commercial bank (the “Depositary”) with which, or with whose foreign correspondent (the “Custodian”), the underlying shares have been deposited.

The issuance of ADRs may be either “sponsored” or “unsponsored.” “Unsponsored” ADRs are issued by a Depositary for already outstanding foreign shares, without an agreement with the issuer of the shares. An ADR facility for an issuer’s shares, however, cannot be established unless the issuer either (i) is subject to the periodic reporting requirements under the Securities Exchange Act of 1934 (the “1934 Act”), or (ii) has obtained an exemption from these reporting requirements pursuant to Rule 12g3-2(b) under the 1934 Act. Consequently, in the case of an issuer that does not meet either of these two conditions, a Depositary cannot create an unsponsored ADR facility without the issuer’s cooperation in seeking a Rule 12g3-2(b) exemption.<sup>1</sup>

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<sup>1</sup> Under Rule 12g3-2(b) under the 1934 Act, an exemption from the registration and periodic reporting requirements of the 1934 Act is available to a foreign private issuer that has not offered securities under the Securities Act of 1933 (the “1933 Act”) and has no securities of any class listed on a national securities exchange (including, effective August 1, 2006, The NASDAQ Stock Market, Inc. (“NASDAQ”)) or on the OTC Bulletin Board service if the issuer publishes in English on its web site, or through an electronic information delivery system generally available to the public in its home country, the material information it has (i) made public pursuant to the law of its home country, (ii) filed with a securities exchange or (iii) distributed to its security holders, including, at a minimum, English translations of its annual report (including annual financial statements), interim reports that contain financial statements, press releases and all other communications and documents distributed directly to holders of each class of securities to which the exemption relates. Effective June 4, 2007, foreign companies that have offered securities under the 1933 Act will be permitted, if they satisfy certain requirements, to deregister and immediately apply for a Rule 12g3-2(b) exemption. See SEC Release No. 34-55540 (Mar. 27, 2007) and *infra* Note 50.

An issuer should consider carefully the advantages and disadvantages of seeking a Rule 12g3-2(b) exemption. On the one hand, apart from permitting the establishment of an ADR facility, a Rule 12g3-2(b) exemption can also be useful in facilitating access to the U.S. capital markets through offerings to large institutional investors pursuant to Rule 144A under the 1933 Act. On the other hand, once an issuer has a Rule 12g3-2(b) exemption, Depositaries will be able to establish their own unsponsored ADR facilities without the consent of the issuer, although as a courtesy Depositaries may request a letter of non-objection from the issuer prior to establishment of their ADR facilities. The existence of unsponsored ADR facilities may become an obstacle to an issuer’s establishing a sponsored ADR facility, since it is the current position of the staff of the Securities and Exchange Commission (“SEC”) that a sponsored ADR facility may not be established unless all unsponsored ADR facilities relating to the same underlying securities are terminated. In such a case, negotiated fees for cancellation of the unsponsored ADRs must be paid to the Depositaries of the unsponsored programs; these fees, which can be quite significant, are typically borne by the issuer or by the Depositary of the new sponsored facility. In 1991, the SEC sought comment generally on the functioning and characteristics of the ADR marketplace and its regulation under the federal securities laws, including on the issue of whether sponsored and unsponsored ADR facilities relating to the same underlying securities should be allowed to coexist. See SEC Release Nos. 33-6894 and 34-29226 (May 23,

“Sponsored” ADRs are issued by a Depositary pursuant to an agreement with the issuer and with its financial support for shares that are already outstanding or for shares issued specifically for an offering of ADSs in the United States. Different procedures, in terms of market practice and the requirements of U.S. securities laws, must be followed for each type of ADR program.

This memorandum describes the U.S. legal requirements and the principal procedures involved in the public offering in the United States of shares of a “foreign private issuer”<sup>2</sup> represented by ADSs issued under a sponsored ADR program.

## II. Nature and Purpose of ADRs

Shares of foreign corporations may be issued and traded in the United States in three different forms: (i) as a direct listing of ordinary shares,<sup>3</sup> (ii) as shares issued by the foreign corporation specifically for the U.S. market in a form adapted to the needs of U.S. investors (e.g., “Shares of New York Registry” issued by Philips N.V. and Gucci Group N.V.), or (iii) through ADSs evidenced by ADRs. ADSs currently are by far the most prevalent form through which foreign corporations list and offer equity securities in the United States.

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1991). The SEC did not propose or adopt any rules as a result of this concept release. See SEC Release Nos. 33-8287 and 34-48482 (Sept. 11, 2003).

<sup>2</sup> A corporation incorporated or organized under the laws of a foreign country is a “foreign private issuer” under Rule 405 under the 1933 Act and Rule 3b-4 under the 1934 Act, unless (A) more than 50 percent of the corporation’s outstanding voting securities are directly or indirectly held of record by residents of the United States, and (B)(i) the majority of its executive officers or directors are U.S. citizens or residents, (ii) more than 50 percent of its assets are located in the United States or (iii) its business is administered principally in the United States. If a foreign corporation ceases to qualify as a “foreign private issuer,” it will become subject to the provisions of the U.S. securities laws applicable to a domestic corporation.

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

<sup>3</sup> Historically, direct listings of ordinary shares of foreign private issuers have essentially been limited to Canadian issuers. A handful of foreign private issuers, however, have turned to direct listings as an alternative to ADRs. The New York Stock Exchange (the “NYSE”) has established a “Global Share” program to facilitate the listing of ordinary shares of foreign private issuers. The Global Shares that are listed directly on the NYSE are fungible with those listed in the issuers’ home countries. Difficulties in transfers of shares between U.S. and non-U.S. clearing systems, however, have prevented issuers in many jurisdictions from taking advantage of this program, and to date few issuers have listed Global Shares on the NYSE. DaimlerChrysler became the first to issue Global Shares on the NYSE in November 1998, followed by Celanese AG in October 1999, UBS in May 2000 and Deutsche Bank in October 2001.

The ADR, similar in form to a standard U.S. registered stock certificate, is a substitute trading certificate evidencing the ADSs that represent the underlying shares of the foreign corporation. The underlying shares remain at the office of the foreign bank acting as Custodian. ADRs can be submitted by the ADR holder to the Depository for cancellation and delivery by the Custodian of the underlying shares. Similarly, the underlying shares can be deposited with the Custodian against issuance by the Depository of ADRs. Each ADR evidences one or more ADSs, with each ADS representing a number or a fraction of underlying shares. If the U.S. dollar equivalent of the underlying shares would be unusually low or high by U.S. market standards, the ratio of ADSs to underlying shares can be adjusted to establish an ADS price in dollars that is consistent with U.S. market practice.

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

The ADR mechanism was developed to overcome certain practical problems confronting residents of the United States who invest in foreign securities. Some of these problems arise because foreign securities sometimes are available only in bearer form. Dividend payments and other distributions in respect of bearer shares are announced in foreign financial newspapers, and U.S. shareholders thus may not know when dividends are payable. In addition, shares in bearer form are generally ineligible for listing on the principal U.S. securities exchanges because of the difficulty of demonstrating that there is a sufficient number of U.S. shareholders to satisfy the listing requirements of the exchange. Since ADRs are registered in the name of the holders, dividends may be mailed to them and the number of ADR holders may be determined by reference to the ADR register.

ADRs facilitate the transfer of beneficial ownership by U.S. investors. Whereas a holder of foreign registered securities may be required to follow inconvenient transfer procedures and send the certificates abroad for transfer, ownership of ADRs may be transferred on the books of the Depository in the same manner as domestic stock certificates. ADRs also eliminate the need for the U.S. investor to convert into dollars dividends paid in a foreign currency. Dividends on the underlying shares are collected by the Custodian, converted into dollars and transmitted by the Depository to the ADR holders.<sup>4</sup> The Depository often also assists ADR holders with

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<sup>4</sup> Until recently, dividends typically were distributed at no charge to investors in sponsored ADR programs and this was a condition, for example, of listing the ADSs on the NYSE. Any charges levied by the Depository in connection with the distribution of dividends were paid by the issuer. Only some privately placed, sponsored ADR programs, required investors to bear dividend charges. On May 25, 2006, the NYSE amended its rules to eliminate restrictions on ADR depository dividend and servicing fees, noting that the restrictions adversely affected the NYSE's competitive position relative to other exchanges and quotation systems that did not limit these fees. See SEC Release No. 34-53978 (June 13, 2006). Nonetheless, the ability of the Depository to charge these fees to ADR holders is governed by the terms of the relevant Deposit Agreement, which, in the case of some older agreements, may not allow the Depository to charge these fees and, accordingly, will require an amendment to reflect the rule change.

filings necessary for any reduction in foreign withholding tax available under a U.S. tax treaty (as discussed in Part IV.B below).<sup>5</sup>

The Depositary keeps ADR holders informed of important developments concerning the issuer of the underlying securities, such as recapitalization plans, security exchange offers and subscription rights. In most cases, the Depositary informs ADR holders of matters submitted for the vote of shareholders. Depositaries will, of course, vote the shares they hold in accordance with instructions from ADR holders, and are often willing to vote shares for which no instruction is given in accordance with management's direction or in the same proportion that all other outstanding shares are voted.<sup>6</sup>

A foreign private issuer that chooses to issue its shares in the United States through ADSs enters into a deposit agreement (the "Deposit Agreement") with the Depositary, which governs the creation and maintenance of the deposit facility. The Deposit Agreement sets forth the rights and obligations of the ADR holders and covers matters such as the issuance of ADRs upon deposit of underlying shares (and the withdrawal of underlying shares upon presentation of ADRs), the treatment of dividends and other distributions, the procedure for voting the underlying shares, and the amendment and termination of the Deposit Agreement. The Deposit Agreement also specifies the fees of the Depositary for the issuance and cancellation of ADSs (generally \$5.00 per 100 ADSs, or portion thereof, to be issued or canceled), which generally are waived for an initial issuance in connection with a public offering, but are paid by investors for the subsequent deposit and withdrawal of the underlying shares.<sup>7</sup>

At or before the closing of a public offering made in connection with the establishment of an ADR facility, the Deposit Agreement is signed and at the closing the issuer transfers the underlying shares to the Custodian for deposit. The Depositary then issues the ADRs upon notification by the Custodian that the underlying shares have been received.

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<sup>5</sup> An additional direct benefit is that because each ADS often represents multiple underlying shares, stock exchange listing fees on ADSs are generally lower than on ordinary shares. See Appendix B.

<sup>6</sup> On October 24, 2006, the NYSE filed with the SEC a proposed amendment that would eliminate a similar practice, known as broker discretionary voting, in elections of members of the board of directors of U.S. companies listed on the NYSE. This amendment, if approved by the SEC, will apply to shareholder meetings held on or after January 1, 2008. If broker discretionary voting for directors is no longer allowed, depositaries and issuers may feel pressure to eliminate management proxies from their deposit agreements.

<sup>7</sup> In addition to the issuance and cancellation fees payable by the investor, the Depositary may charge the foreign issuer a fee for administering the program, which will vary depending on the number of accounts the Depositary maintains for holders of ADRs and the particular services to be provided (e.g., the number of cash or stock dividends to be distributed or reports to be mailed to ADR holders annually). The foreign issuer also may be required to reimburse the Depositary for its out-of-pocket expenses in establishing and administering the ADR facility, including legal fees and ADR printing costs. Charges for establishing and administering an ADR program are subject to negotiation between the foreign issuer and the Depositary.

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

Two principal U.S. federal laws govern the issuance and sale of securities in the United States. The 1933 Act regulates the public offering of securities. The 1934 Act regulates securities markets and generally requires periodic reporting by issuers of securities publicly traded in the United States.<sup>8</sup>

Under the 1933 Act, a public offering in the United States of securities, including equity securities in the form of ADRs, ordinarily must be registered with the SEC.<sup>9</sup> The issuer of the securities is required to file with the SEC a 1933 Act registration statement (a “Registration Statement”) containing a prospectus to be made available to prospective investors (a “Prospectus”). In the Registration Statement, the issuer must disclose information concerning itself and the securities to be offered, in compliance with detailed SEC regulations. The SEC does not itself judge the merits of any public offering, but it does seek to ensure that investors have the opportunity to base their decisions upon adequate and accurate factual information included in the Registration Statement and Prospectus.

The 1933 Act provides that an offering of securities may not commence until the related Registration Statement has been filed with the SEC, unless the offering is made pursuant to an exemption from the registration requirements of the 1933 Act.<sup>10</sup> Actions taken in advance of a public offering that have the effect of arousing public interest in the issuer or its securities,

<sup>8</sup> The Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”) was enacted in response to a series of corporate scandals in the United States. 5 U.S.C.A. § 552 (2002). The Sarbanes-Oxley Act affects all SEC-reporting companies, both domestic and foreign, as well as any company that has publicly filed a registration statement under the 1933 Act that has not yet become effective and that it has not withdrawn. The Sarbanes-Oxley Act is discussed in more detail in Part III.D below. For more information about the Sarbanes-Oxley Act generally, see THE SARBANES-OXLEY ACT OF 2002: ANALYSIS AND PRACTICE (2003), written by partners of this Firm.

<sup>9</sup> On June 29, 2005, the SEC adopted significant changes to the securities registration and offering rules under the 1933 Act and the 1934 Act that apply to both U.S. and foreign private issuers (the “Securities Offering Reform”). The Securities Offering Reform, which came into effect on December 1, 2005, liberalized communications in connection with registered offerings, clarified the liability framework applicable to registered offerings, and streamlined the securities registration process. For a more detailed discussion of the Securities Offering Reform, see SEC Release Nos. 33-8591 and 34-52056 (July 19, 2005) and this Firm’s memorandum entitled “SEC Adopts Securities Offering Reforms” dated October 19, 2005.

<sup>10</sup> Rule 163 under the 1933 Act allows “well-known seasoned issuers,” referred to as “WKSI,” to make offers by means of a “free writing prospectus” before filing a Registration Statement. A “free writing prospectus” is generally defined as any written communication representing an offer to sell or a solicitation of an offer to buy securities that is or will be the subject of a Registration Statement that does not otherwise satisfy the statutory prospectus requirements. WKSI are generally companies that (i) meet the registrant requirements of Form S-3 or F-3, including having timely filed their SEC reports during the past year; and (ii) have either (a) a worldwide market value of voting and non-voting common equity held by non-affiliates of at least \$700 million or (b) for purposes of registering debt securities only, have issued at least \$1 billion aggregate amount of registered debt securities in primary offerings for cash in the preceding three years. Under certain circumstances, a majority owned subsidiary of a WKSI may also qualify as a WKSI.

including information posted on the issuer’s web site, may constitute an “offer” of securities in violation of the 1933 Act.<sup>11</sup> The Securities Offering Reform, however, introduced a number of new safe harbors for communications that would otherwise constitute impermissible “offers” under the 1933 Act:

- Rule 163A under the 1933 Act provides a safe harbor for communications made by or on behalf of an issuer more than 30 days prior to the filing of the Registration Statement if the communication does not reference a securities offering and the issuer takes “reasonable steps” to ensure that the communication is not redistributed or republished during the 30-day period prior to the filing. Communications continue to be restricted during the 30-day period prior to a filing;
- Rules 168 and 169 under the 1933 Act provide a safe harbor for ongoing communications at any time during the offering process of (i) regularly released “factual business information”<sup>12</sup> by or on behalf of any issuer and (ii) regularly released “forward-looking information”<sup>13</sup> by or on behalf of any “reporting issuer”.<sup>14</sup>

<sup>11</sup> For example, the recent U.S. initial public offering prospectuses of Google and Salesforce.com each contained extensive risk factor disclosure concerning potential “gun jumping” violations in connection with those offerings (i.e., offers made prior to the filing of the Registration Statement), which resulted in delays to those offerings to allow for “cooling off” periods to reduce the risk of possible reliance by investors on information not included in those prospectuses.

<sup>12</sup> “Factual business information” is limited to: (i) factual information about the issuer or its business and financial developments or other aspects of its business (for all issuers), (ii) advertisements of, or other information about, the issuer’s products or services (for all issuers), and (iii) dividend notices (only for reporting issuers). To qualify for the safe harbor, the issuer must have previously released the same type of information in the ordinary course of business, and the timing, manner and form in which the information is disclosed must be consistent with past practice. In addition, information released by non-reporting issuers must be intended for persons, such as customers and suppliers, other than in their capacity as investors or potential investors.

<sup>13</sup> “Forward looking information” is limited to: (i) projections of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items, (ii) statements about management’s plans and objectives for future operations, products or services, (iii) statements about future economic performance and (iv) assumptions underlying or relating to any of the foregoing information. The safe harbor for forward looking information is subject to the same conditions regarding consistency with past practice as apply to the safe harbor for factual business information.

<sup>14</sup> For purposes of these rules, a “reporting issuer” includes a foreign private issuer that (i) meets the registrant requirements of Form F-3 other than the reporting history provisions, (ii) either meets the public float requirements of Form F-3 or is issuing non-convertible investment grade securities, and (iii) either has had its equity securities traded on a “designated offshore securities market” for at least 12 months or has a worldwide market value of common equity held by non-affiliates of at least \$700 million. A “designated offshore securities market” is defined as any foreign securities exchange or non-exchange market designated by the SEC under Regulation S under the 1933 Act and currently includes the Eurobond market (as regulated by the International Securities Market Association), the Alberta Stock Exchange, the Australian Stock Exchange Limited, the Barcelona Stock Exchange, the Berlin Stock Exchange, the Bermuda Stock Exchange, the Bilbao Stock Exchange, the Canadian Venture Exchange Inc., the Cairo and

In addition, pursuant to Rule 135 under the 1933 Act an issuer may, prior to filing a Registration Statement, publicly disclose that it intends to make a public offering of securities if certain conditions are met.<sup>15</sup> A foreign issuer also may rely on Rule 135e under the 1933 Act to hold offshore press conferences or issue press releases offshore without such publicity resulting in a violation of the 1933 Act.<sup>16</sup>

Publicity regarding the issuer or the offering is also restricted during the period between the filing of the Registration Statement and its effectiveness. Generally, the issuer may make written or oral offers during this period. Prior to the Securities Offering Reform, written offers had to be made exclusively through the preliminary Prospectus (the “Preliminary Prospectus,” also known as a “red herring”) as initially filed with the Registration Statement, subject to limited exceptions for Rule 134 notices<sup>17</sup> and Rule 135e communications. Since December 1, 2005, eligible issuers may also, under certain conditions, use “free writing prospectuses” during the period between filing and effectiveness of the Registration Statement in reliance on the non-exclusive safe harbor provided by Rule 164 under the 1933 Act.<sup>18</sup>

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Alexandria Stock Exchanges, the Channel Island Stock Exchange, the Copenhagen Stock Exchange, Euronext Amsterdam N.V., Euronext Brussels S.A./N.V., the Frankfurt Stock Exchange, the Helsinki Stock Exchange, the Stock Exchange of Hong Kong Limited (including the Growth Enterprises Market), the Irish Stock Exchange, the Istanbul Stock Exchange, the Johannesburg Stock Exchange, the Korea Stock Exchange, the Bolsa de Valores de Lima, the London Stock Exchange (including SEAQ International and the Alternative Investment Market), the Bourse de Luxembourg, the Madrid Stock Exchange, the Mexican Stock Exchange, the Borsa Valori di Milano, the Montreal Stock Exchange, the Oslo Stock Exchange, the Panama Stock Exchange, the Bourse de Paris, the Stock Exchange of Singapore Ltd., the Stockholm Stock Exchange, the SWX Swiss Exchange, the Taiwan Stock Exchange, the Tel-Aviv Stock Exchange Ltd., the Tokyo Stock Exchange (including the Tokyo Stock Exchange’s Market of High Growth and Emerging Stocks (“Mothers”)), the Toronto Stock Exchange, the Valencia Stock Exchange, the Vienna Stock Exchange and the Warsaw Stock Exchange.

<sup>15</sup> The Rule 135 notice may contain only the name of the issuer; the title, amount and basic terms of the securities proposed to be offered; the anticipated time of the offering; and a brief statement of the manner and purpose of the offering. It may not identify the prospective underwriters for the offering.

<sup>16</sup> Rule 135e establishes a safe harbor for foreign issuers under which members of the U.S. press may have access to offshore press conferences and press materials released offshore as long as: (i) the press activity is conducted offshore; (ii) at least part of the offering is conducted outside the United States; (iii) access to the offshore press activities is also provided to members of the foreign press; and (iv) any written materials related to offerings likely to have significant U.S. investor interest contain a cautionary legend and do not contain any form of purchase order or coupon that may be returned to express interest in the offering. Caution should be exercised, however, regarding the content of offshore press conferences and press materials as the SEC staff has been requiring that issuers include in their Registration Statements and Prospectuses substantive disclosures made in offshore conferences and press materials, including projections.

<sup>17</sup> Rule 134 under the 1933 Act permits limited information regarding the offering to be publicly disclosed during this period, including the identity of the underwriters.

<sup>18</sup> Pursuant to Rule 164, any free writing prospectus used by an eligible issuer that is not a WKSI or a “seasoned issuer” (i.e., an issuer that is eligible to use Form S-3 or F-3 for a primary offering of securities) must be accompanied or preceded by the Preliminary Prospectus (which, if the issuer is not an SEC-reporting company, must contain an estimated price range and an estimate of the maximum size of the offering). In addition, Rule 433 under the 1933 Act contains certain eligibility, legend, record retention and

Sales of publicly offered securities may not be made or confirmed until the SEC has declared the related Registration Statement “effective,” generally after review to ensure compliance with applicable disclosure requirements.

Issuers that have made a public offering under the 1933 Act become subject to the disclosure requirements of the 1934 Act and must periodically file reports with the SEC. Issuers whose securities are listed on a national securities exchange (e.g., the NYSE or NASDAQ<sup>19</sup>) also become subject to the disclosure requirements of the 1934 Act and must comply with the registration requirements of that Act. The purpose of these disclosure and registration requirements, which are similar to those of the 1933 Act, is to enable investors trading in the secondary markets to make well-informed investment decisions. Although an issuer must register under the 1934 Act in a procedure separate from 1933 Act registration, in practice preparation of the 1934 Act registration statement required in connection with a public offering registered under the 1933 Act is a simple matter since it does little more than incorporate by reference the information in the Registration Statement.<sup>20</sup>

All issuers, both domestic and foreign, must file their 1933 Act and 1934 Act registration statements, 1934 Act periodic reports and other documents electronically through the SEC’s Electronic Data Gathering Analysis and Retrieval (“EDGAR”) system. This requirement, which became applicable to foreign companies in November 2002, does not apply to a limited subset of documents, including “glossy” annual reports and “statutory reports.”<sup>21</sup>

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SEC filing requirements in connection with the use of free writing prospectuses. Rule 433 also provides guidelines for the treatment of certain communications under the free writing prospectus rules, such as media publications, electronic roadshows, information posted on web sites and term sheets.

<sup>19</sup> In June 2001, NASDAQ applied to the SEC for registration as a national securities exchange. On January 13, 2006, the SEC approved NASDAQ’s application, and, after fulfilling certain conditions, effective August 1, 2006 NASDAQ became a self-regulatory organization in its own right that is responsible for its own and its members’ compliance with the federal securities laws, and is no longer subject to supervision and control by the National Association of Securities Dealers Inc. (“NASD”).

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

<sup>21</sup> “Statutory reports” are defined as reports that an issuer must make public under the laws of its jurisdiction of organization or the rules of any exchange on which its securities are traded, so long as the report or other document is not a press release, is not required to be and has not been distributed to its security holders and, if discussing a material event, has already been the subject of an SEC filing. When foreign companies became subject to mandatory EDGAR filings, they also became subject to new requirements regarding the filing of foreign language documents. Issuers are required to submit an English translation or summary of any foreign language document filed as an exhibit to any SEC-filed document. Full translations are required for specified documents, including press releases, annual audited and interim consolidated financial information, and other information distributed directly to security holders (other than “glossy” annual reports that are required to be made public but not distributed directly to security holders), organizational documents, instruments affecting the rights of security holders, voting agreements, contracts on which the issuer’s business is substantially dependent and related party contracts. See SEC Release Nos. 33-8099 and 34-45922 (May 15, 2002).

A. 1933 Act Registration Procedures

The offer and sale of new equity securities in the United States in the form of ADSs evidenced by ADRs technically involve the registration of two securities, *i.e.*, the underlying shares and the ADSs. The ADSs are registered by filing a relatively simple Registration Statement on Form F-6, which requires certain information concerning the depositary arrangement and consists principally of the Deposit Agreement and a sample ADR certificate.<sup>22</sup> However, a more elaborate Registration Statement must be filed concerning the underlying shares, containing information regarding the business and operating and financial history of the issuer, and a description of the securities being offered.<sup>23</sup>

Most of the time and effort in registering an offering of ADSs is devoted to preparing the Registration Statement concerning the underlying shares of the foreign company. It is filed generally on one of two SEC forms, Forms F-1 and F-3, which contain detailed instructions as to the information to be included. The Prospectus included in the Registration Statement is the main selling document permitted to be used in soliciting the interest of investors for the new securities and, except in the case of a WKSI or a seasoned issuer, must accompany or precede any permitted free writing prospectus.<sup>24</sup> Depending in large part upon whether the issuer has previously offered securities in the United States and the nature of the particular offering, a considerable amount of time and planning may be required for preparation of the Prospectus. The issuer is primarily responsible for the preparation of its Registration Statement, with the assistance of its counsel and independent accountants. It is usually advisable for the issuer, the issuer's counsel and accountants and the underwriters and underwriters' counsel to meet as early as possible to discuss scheduling and assignments.

<sup>22</sup> Form F-6 is also used to register "unsponsored" ADSs. Since the establishment of an unsponsored ADR facility normally would not involve a public offering of the underlying shares by or on behalf of the issuer, there is no requirement that the underlying shares be registered under the 1933 Act. However, the SEC has published for comment a proposed amendment to Form F-6 to make the form unavailable to register "unsponsored" ADSs if the foreign private issuer has separately listed the deposited securities on a registered national securities exchange or automated inter-dealer quotation system of a national securities association. To date, the proposed rule has not been adopted. See SEC Releases Nos. 33-8287 and 34-48482 (Sept. 11, 2003).

<sup>23</sup> There are three "levels" of ADR programs, each with registration requirements of varying complexity. In brief, a Level 1 program is the most accessible for foreign private issuers whose securities are traded on a foreign stock exchange. ADRs issued under a Level 1 program are traded on the U.S. over-the-counter ("OTC") market. Only Form F-6, the simplified registration statement, is required to be filed with the SEC. Level 2 ADR programs involve exchange-listed ADRs without raising new capital. In addition to a registration statement on Form F-6, Level 2 ADR programs require filing of a more extensive registration statement on Form 20-F. Level 3 programs involve a public offering to raise capital in addition to an exchange listing. Level 3 programs require filing of a registration statement on Form F-1, which requires substantially the same issuer information as Form 20-F. Level 3 ADR programs similarly require filing of the simplified registration statement on Form F-6. In addition to the three levels of programs, issuers may also opt for a "restricted" ADR program, which provides access to the U.S. markets through Rule 144A under the 1933 Act without SEC registration. Such programs enable issuers to raise capital through the private placement of ADSs with large institutional investors in the United States and do not require filing any registration statement with the SEC.

<sup>24</sup> See supra Note 18.

For an issuer that has not previously made a public offering of securities in the United States or listed its securities on a national securities exchange,<sup>25</sup> the length of time required to compile the necessary information and draft the Registration Statement is often primarily a function of the amount of work needed to prepare audited consolidated financial statements reconciled to generally accepted accounting principles (“GAAP”) in the United States (“U.S. GAAP”). Such issuers generally will file on Form F-1, which requires extensive information concerning both the issuer and the securities to be offered. Preparation of a Registration Statement for issuers that have previously made a U.S. public offering or whose securities are already listed on a national securities exchange may be greatly expedited through either the incorporation by reference into the Registration Statement of certain information previously filed in SEC reports or the use of a “short-form” Registration Statement, Form F-3. Qualification for the use of this short form depends upon the nature of the issuer and the length of time that it has been filing periodic reports under the 1934 Act, as well as on the type of security being offered.<sup>26</sup>

A foreign private issuer that has been subject to the periodic reporting requirements of the 1934 Act for at least 12 months, has timely filed all required reports in the last 12 months and has filed at least one annual report on Form 20-F may register equity securities on Form F-3 if its voting and non-voting common stock held by non-affiliates has an aggregate worldwide market value (“float”) equivalent to at least \$75 million and if it has not defaulted on certain payments. An issuer using Form F-3 simply incorporates by reference in the Prospectus its most recent annual report on Form 20-F and any other periodic reports filed thereafter and prior to the termination of the offering (see Part III.C below), with the result that the Registration Statement often may be prepared relatively quickly and easily.<sup>27</sup>

<sup>25</sup> A foreign private issuer whose securities are listed on a national securities exchange is generally required to register with the SEC under the 1934 Act (see Part III.D below) and to file annual reports on Form 20-F.

<sup>26</sup> The Investor and Capital Markets Fee Relief Act, enacted on January 16, 2002 (Pub. L. No. 107-123, 115 Stat. 2390 (2002)), substantially reduced SEC filing fees. Effective February 20, 2007, the filing fee for a Registration Statement (whether on Form F-1 or Form F-3) is equal to 0.00307% (\$30.70 per \$1 million of securities) of the aggregate offering price of the securities being registered or, with respect to ADRs (registered on Form F-6) representing underlying shares, the maximum aggregate charges to be imposed in connection with the issuance of the related ADSs (generally \$5.00 per 100 ADSs, as indicated above, with a minimum registration fee of \$100). See SEC Fee Rate Advisory #6 for Fiscal Year 2007 (Feb. 15, 2007) and Rule 457 under the 1933 Act.

<sup>27</sup> Issuers eligible to use Form F-3 may also qualify to file a “shelf” Registration Statement, which is used to register securities to be offered and sold on an immediate, continuous or delayed basis (including “at the market offerings”) during the three-year period following effectiveness of the shelf Registration Statement. Once a shelf Registration Statement has been declared effective, individual offerings of the registered securities may generally be made immediately, *i.e.*, without further SEC review. Shelf Registration Statements may be used to register debt or equity securities or both (a Registration Statement covering both is often called a universal shelf Registration Statement). In addition, WKSIs may make use of an automatic shelf registration process under which shelf Registration Statements and post-effective amendments filed by WKSIs would generally become effective immediately upon filing without SEC staff review, would be deemed filed on the proper form and for which filing fees could be paid at the time of each offering (“pay-as-you-go”).

Once a Registration Statement has been filed, the staff of the SEC may elect to review it, and may give comments to the issuer and its counsel indicating changes the staff will require before declaring the Registration Statement effective.<sup>28</sup> As noted above, while an offering of securities may commence upon the filing of the Registration Statement, sales may be made only after this declaration of effectiveness by the SEC. During the period between the filing of the Registration Statement and its effective date, copies of the Preliminary Prospectus may be circulated to prospective purchasers and to sales personnel of securities dealers involved in the offering.<sup>29</sup> The Preliminary Prospectus typically omits information as to pricing and final underwriting arrangements, but is otherwise essentially complete.<sup>30</sup> The final Prospectus containing all information required by the 1933 Act must, however, be filed with the SEC prior to delivery of the securities purchased.<sup>31</sup>

While the period of SEC review of a Registration Statement may vary widely and the SEC may elect not to review the Registration Statement at all, it is ordinarily prudent to allow at least six to eight weeks for SEC review and the resolution of any SEC comments. In the case of issuers filing on Form F-3, the likelihood that the SEC will elect not to review the Registration Statement is significantly greater because the SEC will already have had an opportunity to review most of the information in the Registration Statement. In such cases the SEC may be willing to declare the Registration Statement effective as early as 48 hours after filing.

<sup>28</sup> Pursuant to a recent SEC staff policy change, the SEC has been making staff comment and issuer response letters publicly available on its web site, [www.sec.gov](http://www.sec.gov). This policy change, which applies to correspondence on Registration Statements filed on or after August 1, 2004 under the 1933 Act, 1934 Act and the Trust Indenture Act of 1939, represents a significant departure from the SEC's previous practice, whereby such correspondence was made publicly available only pursuant to requests under the U.S. Freedom of Information Act. The SEC will, however, continue its previous practice with respect to confidential submissions by foreign private issuers pursuing their initial SEC registration. In addition, both foreign and U.S. companies may continue to use the SEC's confidential review procedure for portions of their written responses to staff comments. The SEC has, however, indicated that it will challenge what it views to be overly broad requests. The SEC has indicated that there will be at least a 45-day delay between completion of SEC review of a Registration Statement filing and posting of comment letters and responses. See SEC Staff to Publicly Release Comment Letters and Responses, SEC Release No. 2004-89 (June 24, 2004).

<sup>29</sup> Pursuant to Rule 164, any free writing prospectus used by an issuer other than a WKSI or a seasoned issuer must be accompanied or preceded by the Preliminary Prospectus. See *supra* Note 18.

<sup>30</sup> If the registrant is not an SEC-reporting company prior to filing the Registration Statement, Item 501(b)(3) of Regulation S-K requires the Preliminary Prospectus first "circulated," or distributed to the market, to contain an estimated price range (which, according to SEC staff guidance, cannot be wider than \$2.00 or 10% of the top of the range) and an estimate of the maximum size of the offering. With respect to foreign registrants that are listed in their home country prior to filing, the SEC staff has often permitted such registrants to provide share price information for the home market as of a recent date in lieu of the price range information referred to above.

<sup>31</sup> The issuer will also satisfy the filing requirement if it has made a good faith and reasonable effort to file the final Prospectus in a timely manner under the 1933 Act and makes such filing as soon as practicable thereafter. Prior to the Securities Offering Reform, copies of the final Prospectus had to be physically delivered to investors at or prior to the earlier of delivery of a confirmation of sale and delivery of the securities.

Particular timing requirements, such as those that may arise in coordinating a global offering, should be raised in advance with the SEC staff, which has demonstrated a willingness to accommodate such requirements. The review process for Registration Statements of foreign private issuers has also been facilitated by the SEC's policy of allowing such Registration Statements to be submitted for review in draft form on a confidential basis.<sup>32</sup>

## B. Disclosure Requirements

The disclosure requirements for foreign private issuers under the 1933 Act and the 1934 Act are based upon SEC Form 20-F. Although the primary use of Form 20-F is for the 1934 Act annual reports, the information about the issuer that is required to be provided in a Registration Statement is substantially the same as that required by Form 20-F. The requirements of Form 20-F are outlined in Section 4 of Appendix A.

The disclosure requirements of Form 20-F are substantially the same as those applicable to the annual reports on Form 10-K filed by U.S. corporations, subject to certain exceptions. In particular, information concerning the compensation of directors and officers may be provided in an aggregate amount unless the issuer has otherwise made such data public with respect to individual directors and officers.<sup>33</sup>

Financial statement requirements for Form 20-F also differ from those applicable to U.S. corporations. The principal differences, as to content, are described in Items 17 and 18 of Form 20-F. Items 17 and 18 are alternatives. Item 17 is less stringent than Item 18 as it allows the omission of certain items of supplemental information ordinarily required to be disclosed in financial statements presented in accordance with U.S. GAAP and SEC regulations, the most important of which is "segment" financial information, *i.e.*, specified information with respect to the assets and results of operations of each of a company's "operating segments."<sup>34</sup> Financial

<sup>32</sup> Although the SEC continues to accept submissions of draft registration statements on a confidential basis in connection with a foreign private issuer's initial SEC registration, since 2001 it no longer accepts additional draft registration statements for foreign private issuers that have previously filed a registration statement under either the 1933 Act or 1934 Act, except in unusual circumstances. See SEC, Division of Corporation Finance, International Financial Reporting and Disclosure Issues at 18 (May 1, 2001).

<sup>33</sup> On July 26, 2006, the SEC adopted new rules requiring U.S. companies to disclose detailed information on the company's compensation for its named executive officers and directors in a new Compensation Discussion and Analysis ("CD&A") section of the company's annual report on Form 10-K (which generally is incorporated by reference to the company's proxy statement). These rules do not apply to foreign private issuers.

<sup>34</sup> The SEC's segment reporting requirements are consistent with those of the Financial Accounting Standards Board's Statement of Financial Accounting Standards ("SFAS") No. 131. See SEC Release Nos. 33-7620 and 34-40884 (Jan. 5, 1999). Among other things, SFAS No. 131 defines an "operating segment" as a component of a business enterprise that engages in business activities from which it may earn revenues and incur expenses (including revenues and expenses relating to transactions with other components of the same enterprise), whose operating results are regularly reviewed by the enterprise's chief operating decision maker to make decisions about resources to be allocated to the segment and assess its performance, and for which discrete financial information is available. To be reportable, an operating segment of an enterprise must meet any of the following thresholds: (i) its reported revenue, including both sales to external customers and inter-segment sales and transfers, must represent 10% or more of the combined revenue of all reported operating segments, whether generated inside or outside the company; (ii)

statements included in Form 20-F used as an annual report need comply only with Item 17. Although segment financial information is not required in annual reports on Form 20-F, disclosure is required of sales and revenues for the three most recent fiscal years broken down by categories of activity and geographic markets. Subject to certain limited exceptions, financial statements of foreign private issuers included or incorporated by reference in Registration Statements must comply with Item 18, which requires all information mandated by U.S. GAAP and SEC regulations, including full segment disclosure, except that for first time registrants only the financial statements for the two most recent fiscal years and any required interim period need comply with Item 18.

Both Items 17 and 18 require that the financial statements of a foreign private issuer otherwise be substantially similar in form and content to financial statements prepared in accordance with U.S. GAAP and SEC regulations applicable to U.S. companies.<sup>35</sup> Financial statements of a foreign private issuer may, however, be presented in accordance with accounting principles used in the issuer's home country<sup>36</sup> if the issuer provides an explanation of the

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its reported profit or loss must be 10% or more of the greater, in absolute amounts, of: (a) the combined reported profit of all operating segments that did not report a loss or (b) the combined reported loss of all operating segments that did report a loss; or (iii) its assets must be 10% or more of the combined assets of all operating segments. For each reportable segment, issuers must disclose the factors used to identify the enterprise's reportable segments, including the basis of organization and the types of products and services from which each reportable segment derives its revenues. In addition, issuers must disclose information about reported segment profit or loss, including certain revenues and expenses included in the reported segment profit or loss, segment assets, and the basis of measurement. The following items must be disclosed for each reportable segment if management considers them in measuring profit or loss: revenues from external customers and other operating segments, interest income and expense, depreciation, depletion, amortization and other significant non-cash items, unusual and extraordinary items, equity in net income of equity method investees and income taxes.

<sup>35</sup> A registrant may be required to include in its Registration Statement audited financial statements of certain significant acquired businesses and equity investees pursuant to Rules 3-05 and 3-09(a) of Regulation S-X under the 1933 Act, respectively. Depending on their significance, a registrant may also be required to present pro forma financial statements reflecting historical and probable future acquisitions and business combinations pursuant to Article 11 of Regulation S-X. First-time foreign registrants are not required to include a U.S. GAAP reconciliation of these supplemental financial statements if the acquired business or investee falls below a specified threshold. See SEC Release No. 33-7053 (Apr. 19, 1994).

<sup>36</sup> In April 2005, the SEC adopted amendments to its disclosure forms that apply when a foreign private issuer adopts International Financial Reporting Standards ("IFRS") as its basis of accounting for the first time. This is a temporary accommodation available only to issuers that adopt IFRS prior to or for the first fiscal year starting on or after January 1, 2007, and is not available to an issuer that has previously published audited IFRS financial statements. The accommodation would permit eligible foreign private issuers for their first year of reporting under IFRS to file two years rather than three years of audited financial statements, with appropriate related disclosure. The rule does not eliminate the requirement that IFRS financial statements be reconciled to U.S. GAAP, but modifies the form in which the reconciliation is presented in the first filing that includes IFRS financial statements by requiring certain additional condensed U.S. GAAP information. The rule also requires any company that adopts IFRS for the first time to provide disclosure related to exceptions from IFRS on which it relied, and to include a specified level of information in the reconciliation from its previous system of accounting to IFRS. Although this accommodation addresses an issue of great concern to European companies, which were required under European legislation to adopt IFRS for their financial years beginning on or after January 1, 2005, any foreign private issuer may rely on the new rules if it adopts IFRS voluntarily. See SEC Release Nos. 33-8567 and 34-51535 (Apr. 12, 2005). On August 2, 2006, the SEC and the Committee of European

principal differences between those accounting principles and U.S. GAAP and also a numerical reconciliation of the differences in financial results and principal balance sheet items as reported under its accounting practices and those that would have been obtained under U.S. GAAP and SEC regulations.<sup>37</sup> This numerical reconciliation is required both in Registration Statements and Form 20-F annual reports filed under the 1934 Act, except that for first time registrants the numerical reconciliation of financial results is required only for the two most recent fiscal years and any required interim period.<sup>38</sup>

Subject to the exceptions noted below, financial statements must include audited balance sheets as of the end of each of the three most recent fiscal years and audited statements of income and cash flow for each of the three most recent fiscal years.<sup>39</sup> However, a foreign private issuer may provide audited financial statements as of the end of the three fiscal years preceding the most recently completed fiscal year if (i) the audited balance sheet for the most recent fiscal year is not available, and (ii) the last audited financial statements included in the Registration Statement are no older than 15 months at the time the Registration Statement is declared effective.<sup>40</sup> Furthermore, if the foreign private issuer is making its initial public

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Securities Regulators (CESR) published a joint work plan to, among other things, enhance operational and supervisory coordination between regulators charged with overseeing financial information disclosure. This joint work plan is the latest step in the SEC's "roadmap" to eliminate, by 2009 at the latest, the requirement that IFRS financial statements be reconciled to U.S. GAAP in SEC filings. The elimination of the reconciliation requirement under the "roadmap" is not currently conditioned on a convergence of IFRS and U.S. GAAP standards. See SEC and CESR Launch Work Plan Focused on Financial Reporting, SEC Release No. 2006-130 (Aug. 2, 2006).

<sup>37</sup> A foreign private issuer that accounts in its primary financial statements for its operations in a hyper-inflationary economy in accordance with International Accounting Standards does not need to reconcile the differences in such financial statements and those that would result from application of U.S. GAAP and SEC regulations insofar as they arise from accounting for the effects of inflation.

<sup>38</sup> If a foreign private issuer prepares its primary financial statements in accordance with U.S. GAAP, the financial statements for a first-time registrant need only include audited balance sheets and statements of income and cash flows for the two most recent fiscal years. See SEC Release No. 33-7053 (Apr. 19, 1994). In addition, the SEC has adopted amendments to its disclosure forms that permit eligible foreign issuers in their first year of reporting under IFRS (for the first financial year beginning on or after January 1, 2007) to file two years rather than three years of income statements, cash flow statements and statements of changes in equity, with appropriate related disclosure, in each case reconciled to U.S. GAAP. See infra Note 114. Selected financial data presented pursuant to Item 3.A of Form 20-F for the full five fiscal years would still be required, subject to a hardship exemption that can decrease the period to three fiscal years.

<sup>39</sup> A balance sheet for the earliest of the three-year periods is not required, however, if that balance sheet is not required by the issuer's home jurisdiction (or other jurisdiction applicable to the issuer outside the United States). Two years of financial statements also will suffice under certain circumstances. See supra Note 38.

<sup>40</sup> Item 8.A.4 of Form 20-F clarifies that, for purposes of the 15-month rule, the last audited financial statements must be annual financial statements (rather than audited interim financial statements). See SEC, Division of Corporation Finance, International Disclosure Standards; Correction, SEC Release No. 34-44406 (June 11, 2001).

offering (i.e., before the offering, the foreign private issuer is public in neither the United States nor its home country), the last audited financial statements must be no older than 12 months.<sup>41</sup>

Unaudited, interim financial statements also must be included in the Registration Statement if the Registration Statement is declared effective more than nine months after the end of the last audited fiscal year. These financial statements must cover at least the first six months of the current fiscal year and, if they are presented in accordance with home country accounting principles, they must include a reconciliation to U.S. GAAP. Finally, if a foreign private issuer prepares and discloses to its shareholders or otherwise makes public interim financial information relating to revenues and income that is more current than the interim financial statement requirements described in this paragraph, the registrant is required to include the more current interim financial information in its Registration Statement (but not in an annual report on Form 20-F).<sup>42</sup>

If securities are registered on Form F-3, information must be provided regarding (i) material changes in the foreign private issuer's affairs that have occurred since the end of the fiscal year covered by the Form 20-F incorporated by reference, and (ii) significant business acquisitions, changes in accounting principles, corrections of previous accounting errors, and material dispositions of assets outside the normal course of business if not incorporated by reference to other filings under the 1934 Act or set forth in another 1933 Act Prospectus. If the financial statements in the Form 20-F are not sufficiently current to comply with the financial statement requirements for Registration Statements, complying financial statements must be included in the Prospectus. If the financial statements in the Form 20-F comply with Item 17 of Form 20-F, they generally must be revised to comply with Item 18 of Form 20-F, and the revised financial statements may be included in the Prospectus or an amended Form 20-F. If the registrant chooses to amend its Form 20-F, the Prospectus must disclose the existence of that amendment.

In connection with the disclosure of financial information, Form 20-F imposes conditions on the use of non-GAAP financial measures.<sup>43</sup> All filings under the 1933 Act, other

<sup>41</sup> The SEC has indicated it will consider waiving this requirement where the issuer represents to the SEC that this requirement is not applicable to the issuer in any jurisdiction outside the United States and that compliance with this requirement by the issuer is impracticable or involves undue hardship. In these cases, the issuer must file these representations as an exhibit to the Registration Statement and comply with the 15-month rule. See Instructions to Item 8.A.4 of Form 20-F.

<sup>42</sup> The financial statement requirements described in the text are in Item 8 of Form 20-F. When a foreign private issuer can demonstrate to the SEC staff that it is impractical for the issuer, in light of the reasonable timing demands of its specific offering, to include the interim financial statements required by Item 8 in the initial filing of its Registration Statement, the staff is prepared to review a filing that contains all the required information other than the interim financial statements and related information. In making its request for such treatment, the issuer must undertake in writing not to distribute its Preliminary Prospectus until the Registration Statement has been amended to include the interim financial statements and related information.

<sup>43</sup> A "non-GAAP financial measure" is defined as a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that (i) excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or

than documents filed by eligible Canadian issuers under the Multijurisdictional Disclosure System, that include a non-GAAP financial measure must also include:

- a presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- a reconciliation (by schedule or other clearly understandable method), which must be quantitative (subject to an exception for forward-looking information),<sup>44</sup> of the differences between the non-GAAP financial measure disclosed and the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- a statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations;<sup>45</sup> and
- to the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not disclosed under the preceding bullet point.<sup>46</sup>

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statement of cash flows (or equivalent statements) of the issuer; or (ii) includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented. In the case of a foreign private issuer whose primary financial statements are prepared in accordance with non-U.S. GAAP, GAAP refers to such non-U.S. GAAP (other than with respect to any U.S. GAAP-derived measures provided by that issuer). See SEC Releases Nos. 33-8176 and 34-47226 (Jan. 22, 2003). There are a number of exceptions to the rules prohibiting the dissemination of non-GAAP information applicable to foreign private issuers. See *infra* Note 76 and accompanying text. In addition, a non-GAAP financial measure that would otherwise be prohibited may be permitted in a filing of a foreign private issuer, provided that the non-GAAP financial measure: (i) relates to the GAAP used in the issuer's primary financial statements included in its filings with the SEC; (ii) is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and (iii) is included in the annual report prepared by the issuer for use in its home jurisdiction or for distribution to its security holders.

<sup>44</sup> Regulation S-K provides an exception from the quantitative reconciliation requirement with respect to forward-looking non-GAAP financial measures in situations where a quantitative reconciliation is not available without unreasonable effort. Where this exception applies, the SEC expects the issuer to (i) disclose the fact that the most directly comparable GAAP measure is unavailable; (ii) provide reconciling information that is available without unreasonable effort; and (iii) identify information that is unavailable and disclose its probable significance.

<sup>45</sup> The adopting release indicates that the fact that a non-GAAP financial measure is used by or is useful to analysts cannot be the sole support for presenting the non-GAAP measure. The justification must be substantive, although it can be the reason that causes a measure to be used by or useful to analysts. See SEC Release Nos. 33-8176 and 34-47226 (Jan. 22, 2003) at Note 45.

<sup>46</sup> In the case of filings other than annual reports on Form 20-F, an issuer need not include information regarding the purpose for which the non-GAAP financial measure is used and the reasons why that financial measure is believed to be useful to investors, so long as (i) that information was included in the registrant's most recent annual report on Form 20-F or a more recent filing; and (ii) that information is

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

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

The auditors’ report issued by the issuer’s foreign auditors should be acceptable to the SEC if the auditors are independent<sup>47</sup> of the issuer and have conducted an examination in

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updated to the extent necessary to meet the applicable requirements at the time of the current filing. The SEC has also confirmed that the reference to filings does not include reports on Form 6-K, which are “furnished” to the SEC, except insofar as they are incorporated by reference into a Registration Statement or Prospectus or a 1934 Act report filed with the SEC. See SEC Release Nos. 33-8176 and 34-47226 (Jan. 22, 2003). The SEC has also confirmed that the reference to filings does not include free writing prospectuses, unless the free writing prospectus is included in or incorporated by reference into a Registration Statement. See SEC, Division of Corporation Finance, Securities Offering Reform Questions and Answers (Nov. 30, 2005).

<sup>47</sup> In January 2003, the SEC adopted final rules to enhance the independence of accountants that audit financial statements included in SEC filings. See SEC Release Nos. 33-8183 and 34-47265 (Jan. 28, 2003). These rules, in certain cases subject to limited exemptions: (i) substantially broaden the list of the services (originally set forth in Rule 2-01 of Regulation S-X) that an independent auditor may not provide; (ii) require that the issuer’s audit committee supervise the engagement of the auditor of its financial statements to provide audit and non-audit services; (iii) require that (a) the lead and concurring audit partners of an issuer’s audit team rotate every five years and (b) other audit team engagement partners who provide more than 10 hours of audit, review or attest services for the issuer (excluding, among others, certain “specialty” or “national office” partners who do not have significant ongoing interaction with the issuer’s management) or serve as the lead audit partner for any subsidiary of the issuer whose assets or revenues constitute 20% or more of the issuer’s consolidated assets or revenues rotate every seven years; (iv) impose a “time out” period of five or two years, in each case depending on the partner’s respective role in the audit; (v) make an issuer’s employment of former auditor personnel in certain positions involving a financial reporting oversight role inconsistent with independence of that auditor; (vi) prohibit audit partners from receiving compensation from the accounting firm with respect to non-audit services provided to the issuer; (vii) require that the auditor report certain matters to the issuer’s audit committee, including the issuer’s “critical” accounting policies and practices; and (viii) require disclosure in the issuer’s Form 20-F of information related to the audit and non-audit services provided by, and fees paid by the issuer to, the auditor of the issuer’s financial statements for each of the two most recent fiscal years, including itemized disclosure of amounts paid to an issuer’s principal accountant for audit fees, audit-related fees, tax

accordance with auditing standards and practices generally accepted in the United States. Use of an accounting firm with an international reputation is generally prudent, however, in that it may provide the SEC with greater assurance of familiarity with these standards and practices. Some procedures required by U.S. auditing standards, such as observation of physical inventory and other field work, may not be customary in certain countries. Advance notice should be given to the issuer's auditors to enable them to comply with these requirements if they do not already do so.<sup>48</sup> SEC standards concerning the independence of auditors are also more stringent than those of many other countries. Issuers should confirm their auditor's independence under SEC standards as soon as an offering is being considered to allow for consultation with the staff of the SEC, if necessary.

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

To assist foreign issuers in resolving conflicting accounting requirements and other procedural matters involved in the registration process, the SEC has established a special staff section for foreign issuers. This section, the Office of International Corporate Finance, often provides guidance to a foreign issuer, its counsel and its investment banker during the course of a public offering. If necessary, an issuer contemplating a U.S. public offering may schedule a preliminary meeting with the SEC staff in advance of filing the Registration Statement. The issuer's U.S. counsel ordinarily assists the issuer in scheduling the meeting and

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preparation fees and all other fees. In August 2003, the SEC staff issued answers to a number of frequently asked questions regarding the new independence standards, and subsequently in December 2004 issued a number of additional responses. See SEC, Office of the Chief Accountant, Application of the Commission's Rules on Auditor Independence—Frequently Asked Questions (Dec. 13, 2004). In addition, in July 2005 the Public Company Accounting Oversight Board ("PCAOB") adopted new ethics rules on auditor independence that focus on tax services provided by audit firms. These rules impose requirements that are clearer and more restrictive than the applicable SEC rules, including a prohibition on contingent fees for tax services. See PCAOB Release No. 2005-002 (Aug. 2, 2005). In April 2006, these rules were approved by the SEC. See SEC Release No. 34-53677 (Apr. 19, 2006). The new rules provide, among other things, that an audit firm generally is not independent of an audit client if that firm, or an affiliate of the firm, provides tax services during the audit or professional engagement period to a person in, or an immediate family member of a person in, a financial reporting oversight role at that audit client. This rule is applicable only to tax services provided after April 30, 2007. In addition, on April 3, 2007 the PCAOB issued a release requesting comments on whether an audit firm's independence is affected if the firm is hired as the auditor with respect to a year in which the firm provided tax advice prior to its audit engagement. See PCAOB Release No. 2007-002 (Apr. 3, 2007).

<sup>48</sup> In adopting Item 8 of Form 20-F in 1999, the SEC made clear it would require that foreign audit procedures include all auditing procedures necessary under U.S. auditing standards. See SEC Release Nos. 33-7745 and 34-41936 (Sept. 28, 1999). On April 3, 2007, the PCAOB announced proposed changes to its auditing standards that would, if adopted and approved by the SEC, update and clarify auditor requirements for evaluating the consistency of the issuer's application of U.S. GAAP to better align these requirements with recently issued PCAOB standards. See PCAOB Release No. 2007-003 (Apr. 3, 2007).

often accompanies the issuer to the SEC. An agenda for the conference or a preliminary draft<sup>49</sup> of the Registration Statement should be circulated in advance to the SEC staff.

### C. 1934 Act Reporting Requirements

Section 15(d) of the 1934 Act imposes reporting obligations that commence during the fiscal year in which the Registration Statement becomes effective and continue during each fiscal year thereafter until such time as fewer than 300 persons resident in the United States hold of record securities of the same class as the securities to which the Registration Statement relates.<sup>50</sup> For purposes of Section 15(d), ADR holders are considered to hold the shares underlying the ADSs and the relevant class of securities is the class of the underlying shares. Within six months after the close of each fiscal year, annual reports on Form 20-F must be filed with the SEC and each U.S. stock exchange on which the issuer's securities are listed. Except with regard to segment information, the disclosure requirements for a Form 20-F used as an annual report under the 1934 Act are generally the same as for registration under the 1933 Act.<sup>51</sup> Although annual reports on Form 20-F need not provide segment information, except as discussed in Part III.B above, it often is advisable to provide segment information since as a general matter an annual report on Form 20-F may be incorporated by reference in Registration Statements only if it includes that information.

In addition to filing annual reports on Form 20-F, foreign private issuers are required from time to time to file a current report on Form 6-K, which requires that the issuer promptly provide to the SEC and to each U.S. stock exchange on which its securities are listed significant information that (i) must be made public in its country of domicile or incorporation pursuant to the law of that country, (ii) is filed with any foreign stock exchange on which its securities are listed and made public by such exchange, or (iii) is distributed to its security

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<sup>49</sup> See *supra* Note 32.

<sup>50</sup> On March 21, 2007, the SEC adopted rule amendments making it easier for foreign private issuers to terminate their 1934 Act registration and reporting obligations. Effective June 4, 2007, a foreign private issuer that is listed in its home country will be able to terminate its 1934 Act registration (and related reporting obligations) with respect to a class of equity securities if: (i) it has been registered for at least one year, (ii) it has filed all required SEC reports, including at least one annual report, (iii) subject to certain exceptions, it has not offered any securities in an SEC-registered offering in the United States for at least a year, and (iv) the average daily trading volume of its equity securities in the United States in the prior 12 months represented 5% or less of its worldwide average daily trading volume during the same period. An issuer must wait 12 months before terminating its 1934 Act registration if it has terminated any sponsored ADR facility or delisted a class of equity securities from a national securities exchange or inter-dealer quotation system in the United States and the average daily trading volume in the United States of the underlying securities or the delisted class of securities exceeded 5% of the worldwide average daily trading volume during the 12 months prior to such termination or delisting. The amendments also simplify the manner of counting U.S. holders to make it easier for foreign companies to determine their U.S. shareholder base. See SEC Release No. 34-55540 (Mar. 27, 2007).

<sup>51</sup> The financial statement requirements of Rule 3-05 and the *pro forma* requirements of Article 11 of Regulation S-X do not apply to annual reports on Form 20-F, but the financial statement requirements of Rule 3-09 do apply. See *supra* Note 35.

holders.<sup>52</sup> All information filed on Form 6-K must be in the English language. Where such information is made public by press releases or communications or materials distributed directly to security holders, an English translation or a summary in English must be furnished if the information is in a foreign language. In all other cases, a brief description in English of such documents is sufficient, unless the issuer has prepared English translations or summaries, in which case such translations or summaries are to be filed.<sup>53</sup> Copies of the original documents are not required and the documents included in Form 6-K are not deemed to be “filed” for the purpose of Section 18 of the 1934 Act or otherwise subject to the liabilities of that Section.<sup>54</sup>

#### D. 1934 Act Registration and the Sarbanes-Oxley Act

As previously noted, a foreign private issuer becomes subject to the periodic reporting requirements of the 1934 Act as a result of its registration of securities under the 1933 Act. A foreign private issuer generally will also be required to register securities under Section 12 of the 1934 Act, and file annual reports on Form 20-F and current reports on Form 6-K, if the issuer lists its securities on a national securities exchange.<sup>55</sup>

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

##### 1. CEO and CFO Certifications

Pursuant to Section 302 of the Sarbanes-Oxley Act, in connection with the filing of an annual report on Form 20-F,<sup>56</sup> the chief executive officer (“CEO”) and chief financial officer (“CFO”) of a foreign issuer must certify that:

- he or she has read the report;

<sup>52</sup> In 2004, the SEC significantly expanded the list of items that U.S. issuers must disclose on Form 8-K to include disclosure of a number of additional items. See SEC Release No. 33-8400 (Mar. 16, 2004). Although the SEC has not amended Form 6-K to require new disclosures by foreign private issuers or to change the illustrative list of disclosure items in the instructions to Form 6-K, foreign private issuers should view the changes to Form 8-K as an important signal and, at a minimum, should consider the expanded list of items in deciding whether particular press releases or home-country filings are significant and which Form 6-K reports should be incorporated into their Registration Statements.

<sup>53</sup> See supra Note 21 for a further discussion of the translation requirements applicable to foreign language documents filed with the SEC.

<sup>54</sup> Section 18 of the 1934 Act imposes liability on any person who makes a false or misleading statement in any application, report or document filed with the SEC pursuant to that Act. See Part III.F below.

<sup>55</sup> Review of periodic filings by the SEC will be more frequent in the future than it has been in the past, as Section 408 of the Sarbanes-Oxley Act requires SEC review of the filings of each reporting company, including foreign issuers, at least once every three years.

<sup>56</sup> Information included in a Form 6-K is not subject to the certification requirements of Section 302.

- based on his or her knowledge, the report contains no material misstatements or statements made misleading by the omission of material facts;
- based on his or her knowledge, the financial statements and other financial information fairly present in all material respects the financial condition, results of operations and cash flows of the issuer as of, and for, the periods presented in the report;
- the CEO and CFO are responsible for establishing and maintaining “disclosure controls and procedures,”<sup>57</sup> and that they have:
  - properly designed the disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under their supervision, to ensure that material information about the issuer and its consolidated subsidiaries is made known to them by others within those entities, particularly during the period during which the report is being prepared;
  - evaluated the effectiveness of the disclosure controls and procedures as of the end of the period covered by the report;
  - presented in the report their conclusions about the effectiveness of the controls and procedures based on that evaluation; and
  - disclosed in the report any change in the issuer’s internal control over financial reporting that occurred during its most recent fiscal quarter (the fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the issuer’s internal control over financial reporting.
- the CEO and CFO, based on their most recent evaluation of internal control over financial reporting, have disclosed to the audit committee and the issuer’s auditors:
  - all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably

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<sup>57</sup> “Disclosure controls and procedures” cover both financial and non-financial information, and are defined as controls and other procedures designed to ensure that information required to be disclosed under the 1934 Act is recorded, processed, summarized and reported in a timely and accurate manner. Rules 13a-15 and 15d-15 under the 1934 Act require that all issuers filing reports under the 1934 Act maintain disclosure controls and procedures. These cover all 1934 Act reporting obligations, including requirements to furnish reports on Form 6-K (in the case of foreign private issuers). The disclosure controls and procedures maintained by foreign private issuers should be designed to ensure timely submission of Form 6-K reports and to take into account that information submitted in Form 6-K reports is subject to 1934 Act Rule 12b-20 (which requires that, in addition to the information expressly required to be included in a Form 6-K report, a Form 6-K shall also include such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading).

likely to adversely affect the issuer's ability to record, process, summarize and report financial information; and

- any fraud (regardless of materiality) involving persons having a significant role in the internal control over financial reporting of the issuer.<sup>58</sup>

Pursuant to Section 906 of the Sarbanes-Oxley Act, in connection with the filing of an annual report on Form 20-F,<sup>59</sup> the CEO and CFO of a foreign private issuer must certify that the report fully complies with the requirements of Section 13(a) or 15(d) of the 1934 Act (as applicable) and that the information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the issuer.<sup>60</sup>

## 2. Internal Control over Financial Reporting

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

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

<sup>58</sup> This form of certification omits language concerning internal control over financial reporting that appears in the published form of certification, but that a certifying officer may omit until the rules on internal control over financial reporting become effective as to the issuer. Specifically, each of the CEO and CFO must also state that (i) they are responsible for establishing and maintaining internal control over financial reporting, and (ii) they have designed internal control over financial reporting, or caused it to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting and preparation of financial statements for external purposes in accordance with U.S. GAAP. See Part III.D.2 below.

<sup>59</sup> Form 6-K is event-driven and falls outside the scope of Section 906. See SEC Release Nos. 33-8400 and 34-49424 (Mar. 16, 2004). The SEC has adopted rules that require an issuer to furnish the Section 906 certifications as exhibits to its annual report for those required to be filed after June 30, 2003. See SEC Release Nos. 33-8238 and 34-47986 (June 5, 2003). The release makes clear the SEC's view that Section 906 certifications should be "furnished," rather than "filed," with the SEC. Accordingly, Section 906 certifications would not be subject to the civil anti-fraud provisions of Section 18 of the 1934 Act, nor would they be automatically incorporated by reference into an issuer's Registration Statement.

<sup>60</sup> The Sarbanes-Oxley Act contains criminal penalties for false certifications pursuant to Section 906.

- a statement that the auditor of the financial statements included in the annual report has issued an attestation report on management's assessment.<sup>61</sup>

Although the rules do not specify the method or procedures management should use to assess internal control over financial reporting or prescribe detailed criteria for the content of the report, the report must include disclosure of any material weakness in internal control over financial reporting identified by management and management may not conclude that internal control over financial reporting is effective where one or more material weaknesses exist. In addition, the SEC has indicated that management may not qualify its conclusions in its internal control report by saying that internal control over financial reporting is effective subject to certain qualifications or exceptions. Also, while the issuer is not required to disclose changes or

<sup>61</sup> See SEC Release Nos. 33-8238 and 34-47986 (June 5, 2003). In June 2004, the SEC approved a new auditing standard adopted by the PCAOB (Auditing Standard No. 2, An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements), which requires, among other things, that the auditor (i) express an opinion in its attestation report not only on management's assessment but also on whether the company maintained, in all material respects, effective internal control over financial reporting; (ii) test controls, including by means of "walkthroughs" of significant processes, (iii) if there is a material weakness, express in its attestation report an adverse opinion on a company's control over financial reporting, and (iv) assess the effectiveness of the audit committee. The engagement of the auditor to provide any internal control-related services must be specifically pre-approved by the audit committee. See PCAOB Release No. 2004-03 (June 17, 2004) and SEC Release No. 34-49884 (June 17, 2004). In addition, in February 2006 the SEC approved a new auditing standard adopted by the PCAOB (Auditing Standard No. 4, Reporting on Whether a Previously Reported Material Weakness Continues to Exist), which establishes the procedures necessary to allow an auditor, at the issuer's request, to express a formal opinion that a previously reported material weakness in the issuer's internal controls over financial reporting has been corrected without having to complete a new audit of such controls. See PCAOB Release No. 2005-001 (July 26, 2005) and SEC Release No. 34-53227 (Feb. 6, 2006). On December 13, 2006, the SEC proposed rule changes and interpretive guidance relating to reporting on internal control over financial reporting under Section 404 of the Sarbanes-Oxley Act, in a coordinated effort with the PCAOB to improve the implementation of Section 404. The proposed guidance focuses on how management should evaluate the effectiveness of internal controls, simplifies the auditor's report on internal controls by eliminating the requirement that the auditors express an opinion on whether management's assessment is fairly stated, and establishes a safe harbor for management evaluations performed in accordance with the guidance. See SEC Release Nos. 33-8762 and 34-54976 (Dec. 20, 2006). In line with the SEC's proposal, on December 19, 2006 the PCAOB proposed two new auditing standards (Auditing Standard No. 5, An Audit of Internal Control over Financial Reporting that is Integrated with an Audit of Financial Statements, and Auditing Standard No. 6, Considering and Using the Work of Others in an Audit), which would supersede Auditing Standard No. 2 and would provide new rules on internal control audits, incorporate procedures and guidance intended to promote efficiency and scale down the audit to fit the size and complexity of the company, and simplify the auditing standard. See PCAOB Release No. 2006-007 (Dec. 19, 2006).

In November 2006, the Committee on Capital Markets Regulation, a newly created independent group of leading representatives of the U.S. investor community and from U.S. business, financial, legal, accounting and academic circles, issued its interim report highlighting areas of concern about the competitiveness of U.S. capital markets and outlining 32 recommendations in four key areas to enhance that competitiveness. Among its policy recommendations, the Committee suggested several adjustments to the implementation of Section 404, including the adoption of a more reasonable materiality standard for internal controls and financial statements, enhanced SEC and PCAOB guidance on auditors' role and testing of internal controls, and the possibility of exemption for small companies if Section 404 compliance continues to be too burdensome despite these reforms.

improvements to internal controls made as a result of preparing for the first management report on internal control over financial reporting, the issuer will be required to identify and disclose any material changes in subsequent periodic reports.

In order to provide time for companies and their auditors to perform comprehensive evaluations of their internal control over financial reporting as a basis for the initial internal control report, the SEC has adopted an extended compliance period for these rules, except for the requirement to disclose material changes in internal control over financial reporting, which was effective August 14, 2003 for any quarterly or annual report due on or after that date. In addition, the first management report included in the Form 20-F for the first year of compliance will be deemed “furnished” rather than “filed” for liability purposes.

In the case of foreign private issuers, the SEC has adopted different compliance dates for various categories of issuers:

- for “large accelerated filers,” which are defined to include issuers that have been 1934 Act reporting companies for at least 12 months and have a public float of US\$700 million or more, the requirement to include a report from management on internal controls and an auditor’s attestation report on management’s assessment will be effective for fiscal years ending on or after July 15, 2006;
- for “accelerated filers,” which are defined to include issuers that have been 1934 Act reporting companies for at least 12 months and have a public float of US\$75 million or more, but below US\$700 million, the requirement to include a report from management on internal controls is also effective for fiscal years ending on or after July 15, 2006, but the requirement to include an auditor’s attestation is effective for fiscal years ending on or after July 15, 2007; and
- for foreign private issuers that are neither accelerated filers nor large accelerated filers, the requirement to include a report from management on internal controls is effective for fiscal years ending on or after December 15, 2007, but the requirement to include an auditor’s attestation is effective for fiscal years ending on or after December 15, 2008.

First-time registrants will be exempt from these rules until their second annual report filed with the SEC. A first-time registrant must also comply with the auditor’s attestation requirement at the same time that it furnishes its first management report on internal controls or, if later, the relevant compliance date applicable to it as described above.<sup>62</sup>

### 3. Audit Committee Requirements

The Sarbanes-Oxley Act requires that the SEC mandate that all companies

<sup>62</sup> See SEC Release Nos. 33-8392 and 34-49313 (Feb. 24, 2004), SEC Release Nos. 33-8545 and 34-51293 (Mar. 2, 2005), SEC Release Nos. 33-8618 and 34-52492 (Sept. 22, 2005) and SEC Release Nos. 33-8730A and 34-54294 (Aug. 9, 2006).

(including foreign private issuers) listed in the United States have a fully independent audit committee.<sup>63</sup> “Independent” in this context, as the SEC has defined the term in Rule 10A-3, means that no member of the audit committee may be an “affiliated person” of the issuer or any subsidiary of the issuer, apart from his or her capacity as a member of the board of directors or any board committee, and may not accept any consulting, advisory or other “compensatory fee”

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<sup>63</sup> On April 1, 2003, the SEC adopted Rule 10A-3, which implemented requirements for listing standards relating to audit committees established by Section 301 of the Sarbanes-Oxley Act and requires additional disclosure regarding audit committees. See SEC Release Nos. 33-8220 and 34-47654 (Apr. 9, 2003). Section 301 requires the SEC to direct U.S. securities exchanges and U.S. securities associations to prohibit the listing of any security of an issuer that is not in compliance with the audit committee requirements of the Sarbanes-Oxley Act. Rule 10A-3 applies only to issuers that have securities listed or quoted on a U.S. securities exchange or in an automated inter-dealer quotation system of a U.S. securities association, including equity securities, debt securities and derivative securities. The listing standards adopted under Rule 10A-3 apply to all listed issuers, subject to limited exceptions.

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

Rule 10A-3 also includes three exemptions for foreign private issuers from the independence requirements that permit the following persons to sit on the audit committee: (i) any employee who is not an executive officer, if that employee is elected or named to the board of directors or audit committee pursuant to the issuer’s governing law or constitutive documents, an employee collective bargaining or similar agreement or other home country legal or listing requirements; (ii) a person that is an affiliate or representative of an affiliate (including a controlling shareholder) as a non-voting observer, if that person is not the chair of the audit committee or an executive officer of the issuer and does not receive any compensation prohibited by the independence requirements; and (iii) a representative of a foreign government that is an affiliate of the issuer, if that representative is not an executive officer of the issuer and does not receive any compensation prohibited by the independence requirements. Rule 10A-3 also exempts a foreign private issuer from all of the audit committee requirements if it has an alternative mechanism for overseeing the independent auditor, such as a board of auditors or statutory auditors, that are separate from the issuer’s board of directors. Issuers are required to disclose their reliance on any of these exemptions in their Form 20-F annual reports. Foreign private issuers relying on the board of auditors or statutory auditors exemption will have to consider a number of interpretive issues relating to the responsibilities of the audit committee under other Sarbanes-Oxley rules, auditing rules and home country law.

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

The SEC, in the adopting release, noted expressly that it will not entertain no-action letter or exemption requests in this area. The SEC noted, however, that it has the exemptive authority to respond to, and will remain sensitive to, evolving standards of corporate governance, including changes in U.S. and foreign law, to address any unanticipated conflicts.

(including fees paid directly or indirectly)<sup>64</sup> from the issuer or any of its subsidiaries, other than in his or her capacity as a member of the board of directors or any board committee (including the audit committee).<sup>65</sup>

Although Rule 10A-3 does not contain “look-back” requirements with respect to the period before an audit committee member’s appointment when determining such member’s independence, the enhanced corporate governance standards adopted by the NYSE and NASDAQ apply three-year look back periods to U.S. issuers.<sup>66</sup>

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

#### 4. Additional Disclosure Requirements

The Sarbanes-Oxley Act also mandates certain disclosures in annual reports relating to corporate governance practices, namely whether the issuer’s audit committee includes an “audit committee financial expert,”<sup>67</sup> whether such person is “independent”<sup>68</sup> and whether or

<sup>64</sup> Indirect payments include, for example, payments to a law firm or financial services provider in which the audit committee member is a partner, member or officer.

<sup>65</sup> Section 10A(m)(3) of the 1934 Act. Under Rule 10A-3, the term “affiliate” of, or person “affiliated” with, a specified person means a person that directly or indirectly controls, or is controlled by or is under common control with, the person specified. The term “control” means “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” See Rule 10A-3(e)(4). The rule also provides that persons holding specified positions at an affiliate will themselves be deemed to be affiliates. The specified positions are executive officer, director (if the director is also an employee), general partner and managing member. The adopting release specifies that an outside director or another person with a passive, non-control position, such as limited partner, will not be deemed to be an affiliate. The adopting release also cautions that an affiliate cannot evade the prohibitions in the rule simply by designating a representative or agent that it directs to act in its place. The determination of affiliate status requires a factual analysis based on all the relevant facts and circumstances. Rule 10A-3 contains an explicit safe harbor for audit committee members who are not executive officers or beneficial owners, directly or indirectly, of more than 10% of any class of voting equity securities of the issuer. These persons are deemed not to control the issuer for purposes of the rule. In addition, the rule specifies that the safe harbor does not create a presumption that those outside the safe harbor are affiliates.

<sup>66</sup> See NYSE LISTED COMPANY MANUAL §303A(2); NASD Marketplace Rules, 4200(a), NASD MANUAL (CCH). The SEC approved these enhanced standards in November 2003. See SEC Release No. 34-48745 (Nov. 4, 2003).

<sup>67</sup> The SEC’s rules define an “audit committee financial expert” as a person who has all of the following attributes: (i) an understanding of generally accepted accounting principles and financial statements; (ii)

not an issuer has adopted a code of ethics for its CEO and senior financial officers regarding their conduct with respect to the business of the issuer.<sup>69</sup>

In addition, a foreign private issuer listed on the NYSE must disclose any significant ways in which its corporate governance practices differ from those followed by U.S. companies under the NYSE listing standards. This disclosure was required to be made either through the issuer's web site (provided it was in English and accessible from the United States) and/or in its annual report.<sup>70</sup> Recently, however, the SEC approved an NYSE rule change<sup>71</sup> that requires that a foreign private issuer maintain a publicly available web site and disclose significant differences between home country and NYSE governance practices exclusively

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

<sup>68</sup> In April 2003, the SEC adopted amendments to the audit committee financial expert disclosure provisions as they apply to foreign private issuers. Under these amendments, a U.S.-listed foreign private issuer must disclose whether its audit committee financial expert is independent, as that term is defined by the U.S. securities exchange or U.S. securities association rules applicable to that issuer. A foreign private issuer not listed or quoted in the United States must disclose the independence of its audit committee financial expert (if it has one) using any of the exchange or association definitions that have been approved by the SEC. Note that while a foreign private issuer not listed or quoted in the United States is not required to have an audit committee pursuant to the requirements of the Sarbanes-Oxley Act, this disclosure requirement will nonetheless apply. If a company does not have an audit committee, the full board of directors is the audit committee under the definition of that term in the Sarbanes-Oxley Act. Accordingly, such a company would be required to provide disclosure concerning the presence of an audit committee financial expert on its board of directors as a whole.

<sup>69</sup> In covering CEOs, the SEC's rules are broader than Section 406 of the Sarbanes-Oxley Act, which only addresses "senior financial officers."

<sup>70</sup> In August 2006, the SEC approved an NYSE rule change that eliminates the previous NYSE requirement that a listed company physically distribute an annual report to shareholders and now requires foreign private issuers to make annual reports available through the company's web site. The web site must include a clear statement in English indicating that any shareholder is entitled to a paper copy of the issuer's audited financial statements (and not the entire annual report) free of charge and the company must issue a press release at the same time as the web posting of the annual report stating that the annual report has been filed with the SEC and indicating the web site reference and the availability of paper copies free of charge. See SEC Release No. 34-54344 (Aug. 21, 2006).

<sup>71</sup> See SEC Release No. 34-54344 (Aug. 21, 2006).

through such web sites.<sup>72</sup> Like NYSE-listed foreign issuers, a foreign private issuer listed on NASDAQ must disclose in its annual reports on Form 20-F each corporate governance requirement applicable to NASDAQ-listed companies that it does not follow and describe the alternative home country practice followed in lieu of such requirement.<sup>73</sup> The issuer must also provide the National Association of Securities Dealers Inc. (“NASD”) a written statement from local counsel certifying that the laws of its home country do not prohibit the issuer’s practices.<sup>74</sup>

Regulation G imposes conditions on the use of non-GAAP financial measures in public disclosures in 1934 Act reports.<sup>75</sup> Rule 100(c) offers an exemption from Regulation G to foreign private issuers with securities listed outside the United States that disclose, outside the United States, non-GAAP financial measures not derived from U.S. GAAP.<sup>76</sup>

## 5. Other Sarbanes-Oxley Requirements

The Sarbanes-Oxley Act further imposes a number of other duties on and prohibitions with regard to the conduct of issuers. The Sarbanes-Oxley Act, among other things, (i) imposes duties on an issuer’s lawyers (including in-house lawyers) to report suspected violations of securities laws or fiduciary duties up-the-ladder, including, in certain circumstances, to the issuer’s board of directors, (ii) prohibits any issuer, directly or indirectly, from extending or maintaining credit or arranging for the extension of credit, in the form of a personal loan, to or for any director or executive officer of that issuer,<sup>77</sup> (iii) requires the

<sup>72</sup> NYSE LISTED COMPANY MANUAL §303A(11).

<sup>73</sup> NASD Marketplace Rules, Rule 4350, NASD MANUAL (CCH). NASDAQ’s disclosure requirement is substantially similar to the NYSE’s, except that NASDAQ requires disclosure of “each requirement” that the foreign issuer does not follow, while the NYSE only requires disclosure of “significant ways” in which the foreign issuer’s home country corporate governance practices differ from the NYSE’s requirements.

<sup>74</sup> NASD Marketplace Rules, Rule 4350, NASD MANUAL (CCH).

<sup>75</sup> A non-GAAP financial measure under Regulation G is defined in the same manner as such a measure under Item 10 of Regulation S-K. There are also a number of prohibitions regarding the manner in which non-GAAP information may be presented, which are subject to limited exemptions for foreign issuers. See supra Notes 43-46 and accompanying text.

<sup>76</sup> If the conditions for the exemption are satisfied, the exemption is available even if the information: (i) is included in a written communication released inside and outside the United States, so long as the communication is released in the United States contemporaneously with or after the release outside the United States and is not targeted at persons located in the United States; (ii) is accessible by U.S. journalists; (iii) appears on one or more web sites maintained by the issuer, so long as the web sites, taken together, are not available exclusively to, or targeted at, persons located in the United States; and/or (iv) is included in a Form 6-K submitted to the SEC after it is disclosed outside the United States. Many foreign private issuers have a practice of publishing advertisements highlighting their financial results in their home country press and in major U.S. financial newspapers. Because an advertisement in the U.S. press or in the U.S. edition of a foreign newspaper may be viewed as targeting persons located in the United States and thereby violating one of the requirements of Rule 100(c), foreign private issuers that wish to publish advertisements in the U.S. press or the U.S. edition of a foreign newspaper should ensure that any non-GAAP financial measures included in the advertisements comply with Regulation G.

<sup>77</sup> The SEC has exempted certain qualifying foreign banks from the insider lending prohibitions of Section 13(k) of the 1934 Act, which was added by Section 402 of the Sarbanes-Oxley Act. The SEC also

reimbursement to the issuer of incentive or equity-based compensation paid to CEOs and CFOs in the 12 months following the filing of a financial document subject to restatement as a result of “misconduct,” and (iv) prohibits officers and directors, or any other person acting under their direction, from taking any action to fraudulently influence, coerce, manipulate or mislead an issuer’s independent auditors for the purpose of rendering the issuer’s financial statements materially misleading.<sup>78</sup>

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

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

Persons who are directly or indirectly beneficial owners of more than five percent of any class of voting equity securities registered under Section 12 of the 1934 Act will be required to file reports under Sections 13(d) and 13(g) of that Act.<sup>79</sup> Regulation 13D-G under that Act generally requires each such person (or group of persons acting together for the purpose of acquiring, holding, voting or disposing of securities), within ten days after the five percent threshold is crossed, to file a report on Schedule 13D with the SEC and send copies to the issuer and relevant exchanges. Schedule 13D requires substantial disclosure regarding the identity of the acquirer, the source and amount of funds used to acquire the securities, the purpose of the acquisition, the amount and percentage of securities held by the acquirer, and related details about the acquirer’s involvement with the securities.

Certain investors, however, are permitted to report their beneficial ownership positions on the less burdensome Schedule 13G. For example, certain types of regulated institutional investors, such as U.S. banks and broker-dealers, who have acquired the securities in the ordinary course of their business without the purpose or effect of changing or influencing the control of the issuer may qualify, under certain circumstances, to file a report on Schedule 13G within 45 days after the end of the calendar year in which the acquisition occurred. In addition,

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amended Form 20-F to require foreign bank issuers to disclose “problematic” loans to insiders in a manner that more closely mirrors the disclosure required from domestic banks under Regulation S-K. See SEC Release No. 34-49616 (Apr. 26, 2004). For a detailed description of the requirements related to this exemption, see this Firm’s memorandum entitled “SEC Adopts Foreign Bank Exemption from Insider Lending Prohibitions of the Sarbanes-Oxley Act” dated May 7, 2004.

<sup>78</sup> SEC Release No. 34-47890 (May 20, 2003). Persons acting “at the direction of” an officer or director may include not only employees, but customers, vendors or creditors. The SEC noted in the adopting release that conduct may be unlawful under the rules even if the purpose of the conduct is not achieved.

<sup>79</sup> Although the rules under the 1934 Act do not specifically address whether ADSs registered under the 1934 Act constitute a class of voting equity securities distinct from the securities underlying the ADSs, the SEC has stated that ADSs should not be treated as a separate class of voting equity securities for purposes of Section 13(d) or (g) of the 1934 Act. See SEC Release Nos. 33-6894 and 34-29226 (May 23, 1991). Hence, as long as a person does not own ADSs representing (together with any underlying securities owned by that person) beneficial ownership of more than five percent of an issuer’s underlying voting equity securities, he will not be subject to the reporting requirements under Section 13(d) or (g) of the 1934 Act.

other, non-regulated investors that acquire beneficial ownership of less than 20% of a class of securities and that hold such securities without the purpose or effect of changing or influencing the control of the issuer may qualify to file under Schedule 13G within 10 days of such acquisition. Furthermore, investors who crossed the five percent threshold before the equity securities in question were registered under the 1934 Act are permitted to file on Schedule 13G rather than Schedule 13D, and such filing must be made within 45 days after the end of the calendar year in which the securities were registered under the 1934 Act. Investors that have acquired less than two percent of the relevant class of voting equity securities during the preceding 12 months also may report their beneficial ownership, when it exceeds five percent, on Schedule 13G within 45 days after the end of the calendar year in which their ownership position first exceeds five percent.

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

There are two significant exemptions to the tender offer rules applicable to securities of foreign private issuers. The “Tier I exemption” provides that tender offers for the securities of foreign private issuers, whether for consideration of cash or securities, are exempt from the tender offer rules if 10% or less of the class of securities subject to the tender offer is owned by U.S. persons. In making this computation, the securities held by the bidder and by any U.S. or non-U.S. holder owning 10% or more of the target class are excluded from the outstanding securities of the class (*i.e.*, such securities are excluded from both the numerator and the denominator). The “Tier II exemption” provides more limited relief from the tender offer rules to accommodate practices outside the United States. The Tier II exemption applies in circumstances where the target company is a foreign private issuer and 40% or less of the class of securities subject to the tender are owned by U.S. holders.<sup>80</sup>

Repurchases of securities that do not constitute a tender offer may nonetheless give rise to concerns that those repurchases resulted in the manipulation of the price of the issuer’s securities. To avoid these concerns, issuers repurchasing their securities should consider doing so pursuant to Rule 10b-18 under the 1934 Act.<sup>81</sup>

<sup>80</sup> When the SEC adopted these tender offer exemptions in January 2000, it also adopted two exemptions from 1933 Act registration of securities issued to holders of securities of foreign private issuers in exchange offers, business combinations and rights offerings, if, in each instance, U.S. ownership is 10% or less. For more information about the SEC rules affecting cross-border tender offers, exchange offers, business combinations and rights offerings, see Chapter 8 of U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS (8th ed. 2006), written by current and former partners of this Firm.

<sup>81</sup> Rule 10b-18 under the 1934 Act provides issuers and their affiliated purchasers with a safe harbor from liability under anti-manipulation provisions of the 1934 Act, including Rule 10b-5 thereunder, when they repurchase the issuer’s common stock on the open market in accordance with the Rule’s restrictions. In November 2003, the SEC adopted amendments to Rule 10b-18 that (i) shorten the time period in which issuers meeting minimum average daily trading volume and public float thresholds must be out of the

Pursuant to Section 13(b)(2) of the 1934 Act, any issuer that has registered a class of equity securities under Section 12 of that Act or otherwise has a periodic reporting obligation under the 1934 Act, and its subsidiaries (domestic or foreign), must maintain accurate books and records and an adequate system of internal controls.<sup>82</sup> Section 30A of the 1934 Act also prohibits any such issuer from using the mails or any means or instrumentality of interstate commerce (which includes communication between the United States and any foreign country) to make payments to foreign officials, foreign political parties or candidates for foreign political office for the purpose of corruptly influencing actions or decisions by them in order to assist the issuer in obtaining or retaining business for or with, or directing business to, any person.

#### F. Civil Liabilities under the 1933 Act and the 1934 Act

Various provisions of the 1933 Act and the 1934 Act prohibit manipulation or fraud in connection with securities transactions. Under Section 11 of the 1933 Act, any person who purchases a security covered by a Registration Statement has a private right of action, if at the time the Registration Statement became effective<sup>83</sup> it contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, against (i) the issuer, (ii) its principal executive officer, its principal financial officer and its principal accounting officer, (iii) its duly authorized

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market prior to the scheduled close of trading to qualify for the safe harbor, (ii) apply a uniform price condition, regardless of where an equity security is traded, and (iii) modify the treatment of block purchases in applying the Rule's volume limitation and calculating a security's average daily trading volume. Failure to meet any one of the manner, timing, price and volume conditions will disqualify the issuer's purchases from the safe harbor for that day. The SEC did not adopt a proposed change that would have extended the Rule to cover issuer repurchases effected in markets outside the United States. See SEC Release Nos. 33-8335 and 34-48766 (Nov. 10, 2003). The SEC has subsequently clarified that foreign trading volume should be disregarded when calculating the average daily trading volume of a security. See SEC, Division of Market Regulation, Answers to Frequently Asked Questions Concerning Rule 10b-18 ("Safe Harbor" for Issuer Repurchases) (May 18, 2004). The SEC also adopted amendments to Form 20-F requiring disclosure of all issuer repurchases of any class of equity securities registered under Section 12 of the 1934 Act, whether or not the repurchases are effected in accordance with Rule 10b-18. Disclosure is required regardless of whether the issuer has repurchased the shares themselves or ADSs that represent the underlying shares. For more information about these changes, see this Firm's memorandum entitled "SEC Adopts Amendments to Rule 10b-18 Under the Exchange Act" dated November 25, 2003.

<sup>82</sup> This requirement is separate from the requirements of the Sarbanes-Oxley Act and the rules thereunder to maintain and periodically evaluate disclosure controls and procedures and internal controls, as described in Section III.D above. The SEC has charged books and records violations to pursue a parent company for its subsidiary's actions without charging a violation of the anti-bribery provisions of Section 30A of the 1934 Act. See, e.g., SEC v. Schering-Plough Corp., SEC Litigation Release No. 18740 (June 9, 2004).

<sup>83</sup> Rule 430B under the 1933 Act provides that, with respect to the issuer and the underwriters, the effective date for a shelf Registration Statement for liability purposes in respect of a "shelf takedown" is the date a prospectus supplement filed in connection with the takedown is deemed part of the Registration Statement (i.e., the earlier of the date on which the supplement is first used and the date and time of the first contract of sale of securities pursuant to such supplement). This new effective date triggered by the takedown does not affect the information that was contained in the Registration Statement at the time of any prior sale, and the rights of an investor in a prior sale (with a previous effective date) remain unaffected by subsequently filed prospectus supplements or 1934 Act reports.

representative in the United States<sup>84</sup>, (iv) every person who is, or who consented to be named as a person who is about to become, a director at the time the Registration Statement became effective, (v) every accountant, engineer, appraiser or other professional person who has with his consent been named as having prepared or certified any part of the Registration Statement, and (vi) every underwriter of the security. Section 11(a) provides that a person who purchases securities after an earning statement covering a period of at least twelve months beginning after the effective date of the Registration Statement has been made available must prove that he acquired the securities in reliance on a materially false or misleading statement in the Registration Statement in order to have a right of recovery under Section 11. Accordingly, it is customary for a foreign issuer to agree in the underwriting agreement (see Part V.A below) to make generally available to its security holders such an earning statement (which must include a reconciliation to U.S. GAAP, if the issuer's financial statements are presented in accordance with accounting principles used in the issuer's home country). The filing of a Form 20-F is one method of satisfying the requirements of this provision.<sup>85</sup>

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

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

<sup>84</sup> Section 6(a) of the 1933 Act provides that the Registration Statement of a foreign private issuer must be signed by a duly authorized representative of such issuer in the United States.

<sup>85</sup> Rule 158 under the 1933 Act.

their controlling persons against liability under the securities laws must also be disclosed in the Prospectus.<sup>86</sup>

In addition, under Section 12(a)(2) of the 1933 Act, the purchaser of a security has a right of action for damages or rescission against the person who offered or sold the security to him by means of any prospectus or oral communication containing a material misstatement or omission (unless the purchaser was aware of the misstatement or omission). Section 12(a)(2) provides the seller with a “due diligence” defense, although one couched in somewhat different terms from that of Section 11: the seller is not liable if he can prove that “he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.”

Rule 159 under the 1933 Act, which was adopted as part of the Securities Offering Reform, provides that information conveyed to an investor *after* the time of sale should not be taken into account in determining whether the information conveyed to an investor *at* the time of sale (including any free writing prospectus) was materially deficient under Section 12(a)(2) of the 1933 Act.<sup>87</sup> The determination of whether information has been conveyed to an investor at or prior to the time of sale is a facts and circumstances test, though the SEC, in the adopting release for the Securities Offering Reform, has confirmed that the correct standard to apply is what information is “reasonably available” to the investor and not what the investor “truly knew.”<sup>88</sup>

One of the most significant anti-fraud and anti-manipulation provisions of the U.S. securities laws (although one that requires proof of scienter—*i.e.*, that the defendant engaged in willful misconduct or at least acted recklessly) appears in the 1934 Act. Section 10(b) of the 1934 Act forbids the use of any “manipulative” or “deceptive” device in connection with the purchase or sale of any securities. Rule 10b-5 prohibits the use of any device, scheme or artifice to defraud; the making of any untrue statement of a material fact or the omission of a material fact necessary to make the statements made not misleading; or the engaging in “any act, practice or course of business” that would operate to deceive any person in connection with the

<sup>86</sup> The SEC has taken the position that indemnification by the issuer of its officers, directors or controlling persons for liability arising under the 1933 Act is against public policy and, therefore, unenforceable, and there is support for this position in court decisions. The SEC has also indicated that in addressing requests for prompt declaration of effectiveness of a Registration Statement (see Part III.A above), it will refuse to accelerate its declaration of effectiveness if the registrant indemnifies any of its officers, directors or controlling persons, unless: (i) such person waives the benefits of indemnification with respect to the proposed offering, or (ii) the Registration Statement contains a certain undertaking to submit to a court of appropriate jurisdiction the question whether such indemnification is against public policy and to be governed by the final adjudication of such issue.

<sup>87</sup> For these purposes, the SEC states in the adopting release that a “sale” (including a contract of sale) occurs at the time an investment decision is made. See SEC Release Nos. 33-8591 and 34-52056 (July 19, 2005).

<sup>88</sup> To date, the SEC has not provided any safe harbors for determining when information is “reasonably available,” but we believe that the SEC’s own emphasis on the integrated disclosure system makes it clear that information contained in 1934 Act reports filed electronically with the SEC is “reasonably available.” However, pending further judicial or regulatory guidance, it would be prudent to make use of the free writing prospectus rules to communicate to investors information that is clearly material that is added to the public record shortly before the time of sale.

purchase or sale of any securities. Under Rule 10b-5, the issuer and its employees or agents may be liable for disseminating false or misleading information or suppressing material information about the issuer, whether or not the issuer or any of its employees or agents purchased or sold any securities. Such liability can be based on information filed in a registration statement or report filed with the SEC (including on Form 6-K), or upon public statements issued by the company.<sup>89</sup>

Press releases and other public information should, therefore, be carefully reviewed prior to release.<sup>90</sup> Furthermore, liability may arise under Rule 10b-5 from “insider” trading in securities while material information remains undisclosed.<sup>91</sup> Insiders should not trade

<sup>89</sup> In addition, without having alleged fraud or recklessness tantamount to fraud as would be required under Rule 10b-5, the SEC has cited Rule 12b-20 under the 1934 Act as the basis for a proceeding against a foreign private issuer and one of its executives for allegedly providing materially misleading information in a filing on Form 6-K. Rule 12b-20 requires that periodic reports include any additional information “as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.” This proceeding is discussed in greater detail in this Firm’s memorandum entitled “Memorandum Regarding SEC’s Sony Proceeding” dated August 13, 1998.

<sup>90</sup> An SEC administrative ruling, In re E.ON AG, demonstrates the extent to which 10b-5 liability can attach to foreign private issuers. See SEC Release No. 34-43372 (Sept. 28, 2000). In re E.ON AG involved management denials that merger discussions between two German companies were occurring when in fact they were. E.ON AG asserted that the denials were not a violation of German law. Moreover, while one of the parties was listed on the NYSE, only a small number of its shares was held by U.S. investors. Both companies were persuaded that a no-comment policy would be construed by the German press as a confirmation that talks were going on, and premature disclosure would have jeopardized the eventual merger. The SEC ruled that denying the merger discussions was false and therefore constituted a violation of Rule 10b-5. E.ON AG subsequently adopted a no-comment policy, as have most other German companies publicly traded in the United States.

<sup>91</sup> Rule 10b-5 creates a general prohibition on trading when the person or entity trading is “aware” of material nonpublic information. See SEC v. Adler, 137 F.3d 1325, 1337-39 (11th Cir. 1998). In 2000, the SEC adopted Rule 10b5-1, which sets forth two affirmative defenses to liability in circumstances where it is clear that a trade was not made “on the basis of” the material nonpublic information. The first affirmative defense provided by Rule 10b5-1(c)(1)(i) applies if: (i) a person had, before becoming aware of material non-public information (a) entered into a binding contract to purchase or sell the securities; (b) provided instructions to another person to purchase or sell the securities; or (c) adopted a written plan for trading the securities; (ii) the contract, instructions or plan: (a) specified the amount of, price of and date on which the securities were to be purchased or sold; (b) provided a written formula or computer program for determining the amount of, price of and date on which the securities were to be purchased or sold; or (c) did not permit the person to exercise any subsequent influence over how, when or whether to effect purchases or sales of the securities, and no person exercising such influence was aware of the material nonpublic information when doing so; and (iii) the purchase or sale occurred pursuant to the contract, instruction or plan. For example, an issuer operating a repurchase program need not specify with precision the amounts, prices and dates on which it will repurchase its securities. Rather, it could adopt a written plan, when it is not aware of material nonpublic information, that uses a written formula to derive amounts, prices and dates. Or the plan could simply delegate all the discretion to determine amounts, prices and dates to another person who is not aware of the information, provided that the plan did not permit the issuer to (and the issuer in fact did not) exercise any subsequent influence over the purchases or sales. See SEC Release Nos. 33-7881 and 34-43154 (Aug. 15, 2000). The second affirmative defense, provided by Rule 10b5-1(c)(2), is based on the existence of effective information barriers and generally relied on by securities professionals, such as broker-dealers. It negates entity liability for insider trading where the entity can demonstrate that (i) the individual making a decision to trade on behalf of the entity was not aware of material nonpublic information and (ii) the entity had implemented reasonable policies and

when a material event (including a proposed financing or acquisition) is developing but is not yet ripe for disclosure. A corporate insider also may be held liable for the actions of persons to whom he discloses material non-public information, even though the insider has not personally profited.<sup>92</sup>

Regulation M under the 1934 Act generally makes it unlawful for participants in a distribution of securities to purchase any such security, or any securities of the same class or series, from a specified date — ordinarily either one or five business days (depending on the trading characteristics of the securities being offered) — prior to the commencement of the offering (i.e., after pricing) until completion of the distribution. The prohibition extends to underwriters, the issuer, any selling stockholders and certain of their respective affiliates. There are certain exemptions, including for the underwriters generally in the case of distributions of actively traded securities and for specified stabilizing transactions by underwriters, and the SEC may grant additional exemptions upon application.<sup>93</sup>

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

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procedures, taking into consideration the nature of its business, to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information. These policies and procedures may include those that restrict any purchase, sale, and causing any purchase or sale of any security as to which the entity has material nonpublic information, or those that prevent such individuals from becoming aware of such information. See Division of Corporation Finance, Manual of Publicly Available Telephone Interpretations, Fourth Supplement (June 8, 2001).

<sup>92</sup> In 2000, the SEC adopted Regulation FD (Fair Disclosure), which prohibits issuers from selectively disclosing material nonpublic information to market professionals and holders of the issuer's securities under circumstances in which it is reasonably foreseeable that the security holders will trade on the basis of the information. See SEC Release Nos. 33-7881 and 34-43154 (Aug. 15, 2000). Although Regulation FD does not apply to foreign private issuers, such issuers should continue to avoid selective disclosure of material nonpublic information out of concern for potential liability under Rule 10b-5. In the release adopting Regulation FD, the SEC also announced that it has requested the Division of Corporation Finance to undertake a comprehensive review of reporting requirements of foreign private issuers. To date, no action has been taken. For guidelines regarding communications between management and securities analysts in light of applicable case law and Regulation FD, see this Firm's memorandum entitled "Communication with Financial Analysts and Related Disclosure Issues" dated January 26, 2006.

<sup>93</sup> In December 2004, the SEC proposed amendments to Regulation M that would, among other things, extend the restricted period for initial public offerings beyond the current five-day period, prohibit the conditioning or "tying" an allocation of shares to an agreement to buy shares in another offering or to payment of excessive commissions to the underwriters, enhance transparency of syndicate covering bids, prohibit the use of penalty bids, institute a record-keeping requirement with respect to the existing *de minimis* exception and adjust certain dollar value thresholds for inflation. See SEC Release Nos. 33-8511 and 34-50831 (Dec. 9, 2004). To date the proposed rule has not been adopted. In addition, in December 2006 the SEC proposed to modify Rule 105 of Regulation M. Rule 105 prohibits a person from effecting a short sale in a security during a specified period prior to the pricing of a registered offering of the same class of securities and then purchasing securities in the offering to cover that short sale. Rule 105, as proposed to be modified, would provide instead that any purchase in the offering by a person who had effected a short sale as described above would be prohibited (even if the purchase is not for the purpose of covering the prior short sale). See SEC Release No. 34-54888 (Dec. 6, 2006).

- Giving the SEC the authority to freeze possible “extraordinary payments” to directors, officers, agents and employees during the course of an investigation involving “possible” violations of the U.S. federal securities laws;
- Giving the SEC the authority to bar persons from serving as directors or officers of public companies in cease and desist proceedings;
- Creating a new securities fraud crime with respect to public companies that does not contain a purchase or sale requirement, and simply prohibits defrauding any person (or attempting to do so) in connection with any security of an issuer, with violators subject to fines and imprisonment of up to 25 years;
- Increasing maximum prison terms for mail and wire fraud and violations of the 1934 Act; and
- Enacting a broad new “anti-shredding” prohibition and sweeping new obstruction of justice offenses (not limited to document destruction).

#### IV. Other Legal Considerations

##### A. State “Blue Sky” and “Legal Investment” Requirements

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

Effective October 11, 1996, the National Securities Markets Improvement Act of 1996 (“NSMIA”) amended Section 18 of the 1933 Act to provide for federal preemption of any state laws and regulations requiring registration of securities or securities transactions that apply to a “covered security.” Among other categories, a covered security includes a security that is listed, or authorized for listing, on the NYSE, the American Stock Exchange (“AMEX”) or NASDAQ, or a security of the same issuer that is equal or senior in rank to a security so listed or authorized for listing. For the most part, this language tracks that of the current exemption under the Uniform Securities Act of 1956 (the “1956 USA”) adopted by most states, which provides an exemption from securities registration for stock exchange listed and blue chip securities.<sup>94</sup>

<sup>94</sup> This preemptive provision does not, however, include rights to purchase listed securities as does the 1956 USA listing exemption. The new version of the Uniform Securities Act (2002) (the “2002 USA”) specifically exempts covered securities that are listed and warrants or subscription rights with respect to such securities. As of the date of this memorandum, ten states and the U.S. Virgin Islands have adopted the 2002 USA.

Accordingly, no notice filings, sales reports or filing fee requirements may be imposed by the states in connection with an offering of listed securities.<sup>95</sup>

If the offered securities are not listed, other exemptions from individual state securities registration requirements may be available in certain instances, e.g., when sales within a state will be made exclusively to certain classes of institutional investors.<sup>96</sup>

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

The extent of the state regulators' review of the registration or filing materials submitted varies widely. Many states have adopted a standard of review that differs from the SEC's "full disclosure" requirements. In these states, the securities commissioner may deny registration if the offering is determined to be unfair, unjust or inequitable. Generally, these states have adopted regulations and policies which establish standards that an issuer must meet if its offering is to be considered "fair" and appropriate as an investment for the state's residents. These standards include (i) a prohibition against offering a class of equity securities with no voting rights or rights unequal to other classes of outstanding shares, (ii) limitations on the maximum underwriting commissions and other selling expenses that may be incurred by the issuer in connection with the offering, (iii) limitations on the amount of securities that may be covered by options issued or to be issued to management and underwriters, (iv) limitations on the price-earnings ratio of the securities offered, (v) a prohibition against loans to management, and (vi) limitations on securities issued to management for a consideration less than the public offering price.

There do not appear to be fairness standards of special relevance to foreign issuers, other than the requirement of a number of states, including Texas, that the foreign issuer be able to show that it has substantial assets in the United States. This reflects a concern about

<sup>95</sup> Federal preemption of state securities registration applies to any security that is a covered security or will be a covered security upon completion of the transaction. Accordingly, preemption will apply as long as the offered securities are approved for listing prior to the effective date of the Registration Statement.

<sup>96</sup> Another category of "covered securities" preempted under NSMIA from state securities registration requirements is an offer or sale of a security to "qualified purchasers, as defined by the Commission by rule." In December 2001 the SEC proposed a definition of "qualified purchaser" to be contained in Rule 146 of the 1933 Act. The proposed definition mirrors the definition of "accredited investor" in Rule 501(a) under Regulation D of the 1933 Act. For purposes of this memorandum, "accredited investors" include investors that are "financially sophisticated by their nature," such as "institutional investors and employee benefit plans where sophisticated fiduciaries make investment decisions." See SEC Release No. 33-8041 (Dec. 19, 2001). To date the proposed rule has not been adopted.

the risk of unenforceability in the United States of any judgment against the foreign issuer obtained by a U.S. investor.

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

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

## B. Tax Considerations

For U.S. tax purposes, a holder of an ADR generally will be treated as the owner of the underlying shares of the company’s stock represented by the ADR. The gross amount of all dividends paid with respect to an ADR or foreign equity security to a U.S. citizen or resident, a U.S. corporation or a holder that otherwise is subject to U.S. federal income tax on a net income basis in respect of an ADR or equity security (a “U.S. holder”) will be treated as dividend income for U.S. tax purposes. Dividends paid with respect to foreign equity securities generally do not qualify under the U.S. Internal Revenue Code for the dividends-received deduction allowed to corporate holders of equity securities but may qualify for the special 15% maximum tax rate applicable to individuals.

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

arrangements with the Depository for expedited procedures for claiming a reduced rate of withholding and any other benefits to which a U.S. holder is entitled under a tax treaty.<sup>97</sup>

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

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

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

## V. Underwriting Arrangements and Listing

### A. Underwriting Agreement

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

Typically, the underwriters agree to purchase the offered securities on a specified closing date, generally three business days after pricing.<sup>98</sup> Each underwriter is responsible to the

<sup>97</sup> Some countries have integrated or partially integrated systems for taxing the income of corporations and their shareholders. Under such an integrated system, shareholders typically are entitled to tax credits against their own tax liability for taxes paid by a corporation in respect of income distributed as dividends. Under certain tax treaties to which the United States is a party, U.S. investors are entitled to partial refunds of such taxes in lieu of the credits available to local investors. In the case of ADSs representing shares of a corporation that is a resident of such a jurisdiction, the Depository may be able to arrange for a U.S. holder of ADSs to obtain a refund of the corporate tax at the time the holder receives its dividend distribution if the holder complies with certain procedural requirements.

issuer only for its individual underwriting commitment. The underwriting agreement also includes various representations and warranties by the issuer regarding its legal status and financial condition, and a covenant by the issuer to indemnify the underwriters in respect of liabilities that may arise out of any inaccuracy or incompleteness of the information contained in the Registration Statement. The agreement also describes in detail the conditions to be fulfilled by the issuer prior to the closing, including delivery of legal opinions, officers' certificates and the accountants' "comfort" letters.<sup>99</sup>

ADSs are sometimes offered as a single "tranche" of a "global" offering of the issuer's shares in several countries. Generally in such cases, a separate underwriting agreement governs each of the tranches to be offered in the several countries, and an intersyndicate agreement coordinates the offering of the several tranches, including the public offering price and stabilization of the shares offered in each tranche and the reallocation of shares from one tranche to another. In recent years, it has been customary for underwriters to organize global offerings in two tranches: a "local" tranche, consisting of shares offered in an issuer's home country, and an "international" tranche, consisting of ADSs (and sometimes shares) offered in the United States and elsewhere outside the issuer's home country.<sup>100</sup>

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

It is advisable that the ADSs publicly offered in the United States be listed on a U.S. national securities exchange such as the NYSE or NASDAQ,<sup>101</sup> to provide a secondary

<sup>98</sup> The three-business day settlement period, effective as of June 7, 1995, is consistent with settlement requirements for securities traded generally in the United States. If pricing occurs after the U.S. markets close (which is typical in equity deals), settlement generally will occur on the fourth business day after pricing.

<sup>99</sup> It is also customary in U.S. public offerings for the issuer to grant the underwriters the authority to overallocate (i.e., to offer and sell more securities than the underwriters have contracted to purchase from the issuer on a "firm" basis), so the underwriters can ensure that there are purchasers ready to accept resales of shares that the underwriters purchase in the market as a result of stabilization. In order to protect the underwriters in circumstances in which the shares purchased as a result of stabilization are not sufficient to cover the short position created through overallocations, the issuer typically will grant them a so-called "overallocation option," also called a "green shoe option." The overallocation option generally allows the underwriters, for a period beginning with the execution of the underwriting agreement and ending 30 days after the closing date, to purchase from the issuer, at the public offering price less the commissions provided for in the underwriting agreement, up to 15% of the shares (or ADSs) being offered but solely for the purpose of covering any overallocations.

<sup>100</sup> Rule 2710(f)(2)(J) of the NASD Conduct Rules prohibits the receipt by NASD members in a firm commitment underwriting of an overallocation option relating to more than 15% of the securities being offered, without taking into account the securities offered pursuant to the overallocation option. The NASD staff has indicated that it interprets this rule as prohibiting NASD members participating in a firm commitment global offering from being allocated overallocation option securities in excess of 15% of the aggregate amount of securities registered with the SEC in the global offering, regardless of the number of securities actually sold by such members.

<sup>101</sup> In 2001, NASDAQ applied to the SEC for registration as a national securities exchange. On January 13, 2006, the SEC approved NASDAQ's application, and, after fulfilling certain conditions, effective August 1, 2006 NASDAQ became a self-regulatory organization in its own right that is responsible for its own and

trading market for the ADSs with readily available quotations, in U.S. dollars, based on actual trades. The listing requirements and procedures of the NYSE and NASDAQ are outlined in Appendix B. As discussed in Parts III.D and III.E above, before any securities can be admitted to trading on a national securities exchange, the issuer must file with the SEC a 1934 Act registration statement covering such securities and the SEC must declare this registration statement effective (independently of the effectiveness of the Registration Statement). Once a Registration Statement under the 1933 Act has become effective and the NYSE or NASDAQ has approved listing, registration of ADSs under the 1934 Act generally becomes effective concurrently with the Registration Statement.<sup>102</sup>

As a result of recent corporate governance failures, both the NYSE and NASDAQ have adopted more stringent corporate governance standards than those previously applicable. Not all of these standards, however, apply to foreign issuers. The NYSE and NASDAQ have generally exempted foreign issuers from their corporate governance standards to the extent those standards exceed the requirements of the Sarbanes-Oxley Act. Both the NYSE and the NASDAQ, however, require a foreign issuer to disclose any significant ways in which its corporate governance practices differ from the relevant listing standards.<sup>103</sup>

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its members' compliance with the federal securities laws, and is no longer subject to supervision and control by the NASD. On July 1, 2006, the NASDAQ National Market, which was formerly the higher tier of NASDAQ on which the most active and liquid stocks were traded, was renamed the NASDAQ Global Market. In conjunction with this, NASDAQ created the new NASDAQ Global Select Market, a segment of the NASDAQ Global Market with higher initial listing standards that are currently more stringent than those of the NYSE.

<sup>102</sup> In 2004, NASDAQ began to permit issuers with securities listed on the NYSE to also apply to list those securities on NASDAQ. See 69 Fed. Reg. 8253 (Feb. 23, 2004) (citing the repeal of NYSE Rule 500 as the catalyst for NASDAQ's dual listing initiative and noting that NASDAQ intends for the initiative to foster competition among markets and benefit investors and shareholders by increasing liquidity, reducing execution time and narrowing spreads).

<sup>103</sup> See *supra* Notes 70-74 and accompanying text.

APPENDIX A

Outlines of Forms Used in Registration

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

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

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

1. Registration Statement on Form F-1

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

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

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

Item 3. Summary Information, Risk Factors, and Ratio of Earnings to Fixed Charges. Pursuant to Item 503 of Regulation S-K, the Prospectus, if lengthy or complex, must include a summary of the information it provides. The summary, which must be written in plain English, should provide a brief overview of the key aspects of the offering. The Prospectus must also include the address and telephone number of the principal executive offices of the issuer, a statement of any special risk factors concerning the issuer and the offering, and if debt or preferred equity securities are being registered, a statement of the ratio of earnings to fixed charges for the issuer.

Item 4. Information With Respect to the Registrant and the Offering. All of the information required by Part I of Form 20-F (as described below) is to be provided in the Prospectus itself, as well as the information required by Item 18 of Form 20-F. If the only securities being offered are non-convertible, investment grade securities or the only securities to be registered are to be offered: (1) upon the exercise of outstanding rights granted by the issuer; or (2) pursuant to an interest reinvestment or dividend plan; or (3) upon either the conversion of outstanding convertible securities or the exercise of outstanding transferable warrants issued by the issuer, the information required by Item 17 of Form 20-F may be provided in lieu of that required by Item 18.

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

Item 5. Incorporation of Certain Information by Reference.<sup>104</sup> Certain eligible reporting issuers that have filed at least one annual report and that are current in their 1934 Act reporting obligations may incorporate by reference into their Form F-1 information required by Items 3 and 4 from previously filed 1934 Act reports and documents. The ability to incorporate by reference is conditioned on an issuer making its 1934 Act reports and other documents available through its web site. The issuer must also list in the Form F-1 all reports and information incorporated by reference, state that copies of such reports and information will be provided at no cost upon request and that reports and information filed with the SEC may be read and copied at the SEC's public reference room. No information may be incorporated by reference if filed after the Form F-1 was effective (i.e., no "forward incorporation").

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

\* \* \*

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

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

<sup>104</sup> Item 5 was added effective December 1, 2005 by the Securities Offering Reform.

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

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

- (a) copies of all underwriting agreements with respect to the securities being registered;
- (b) copies of plans of acquisition, reorganization, arrangement, liquidation, or succession;
- (c) copies of the issuer's charter and by-laws or corresponding instruments;
- (d) instruments defining the rights of security holders, including indentures;
- (e) opinion of counsel as to the legality of the securities being registered;
- (f) opinion of counsel, or revenue ruling from the Internal Revenue Service, supporting statements made in the filing concerning tax consequences to shareholders, if material;
- (g) any voting trust agreements and amendments thereto;
- (h) copies of every contract of the issuer, material to the issuer or referred to in the Prospectus, made other than in the ordinary course of business within two years prior to the Registration Statement or to be performed in whole or in part at or after the filing of the Registration Statement;<sup>105</sup>
- (i) statements of computation of per share earnings and any required ratios;

<sup>105</sup> Special consideration must be given to contracts containing representations and warranties made by the issuer in respect of its affairs, business, assets or liabilities. On March 1, 2005, the SEC issued a Report of Investigation on potential liability under Sections 10(b) and 14(a) of the 1934 Act in connection with settling an enforcement action against The Titan Corporation. See SEC Release No. 34-51283 (Mar. 1, 2005). In its Report, the SEC noted that, depending on the context in which the disclosure is made (including the significance of the representations and the total mix of available information), a reasonable investor could conclude that a contractual representation describes the actual state of affairs of the issuer and could be material information. As a result, issuers should carefully review the provisions of material contracts that will be included as exhibits to public filings and consider adding adequate disclaimers and disclosure in the body of the filing regarding these provisions.

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

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

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

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

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

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

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

## 2. Registration Statement on Form F-3

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

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

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

interim financial statements or other information that otherwise would have to be included in the Prospectus.

\* \* \*

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

- (a) copies of all underwriting agreements with respect to the securities being registered;
- (b) copies of plans of acquisition, reorganization, arrangement, liquidation, or succession;
- (c) instruments defining the rights of security holders, including indentures;
- (d) opinion of counsel as to the legality of the securities being registered;
- (e) opinion of counsel, or revenue ruling from the Internal Revenue Service, supporting statements made in the filing concerning tax consequences to shareholders, if material;
- (f) where applicable, a letter from the independent accountant acknowledging awareness of the use in a Registration Statement of unaudited interim financial statements;
- (g) copies of consents required to be filed and of any powers of attorney (for any name signed pursuant to a power of attorney);
- (h) a statement of eligibility and qualification of each person designated to act as a trustee under an indenture to be qualified under the Trust Indenture Act of 1939; and
- (i) any additional exhibits which the issuer may wish to file or any document incorporated by reference in the filing which is not otherwise required.

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

### 3. Annual Report on Form 20-F

Part I of Form 20-F includes the following:

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

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

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

Item 3. Key Information. This four-part item requires the issuer to summarize key information about the issuer's financial condition, capitalization, reasons for the offering and risk factors. Part (a) requires disclosure of selected income statement and balance sheet data of the issuer and, in certain cases, its predecessor, for the five most recent years (or three most recent years if five years of information is impossible or unduly burdensome to provide) and for any interim period for which financial statements are required. This part also requires exchange rate disclosure for the five years and any interim period where the financial statements are not prepared in U. S. dollars.<sup>106</sup> Part (b) requires a statement of capitalization and indebtedness as of a date within 60 days prior to filing (and does not apply to annual reports). Part (c) requires an estimate of the net amount of proceeds to be realized from the offering and the intended use thereof (and does not apply to annual reports). Part (d) requires disclosure of risk factors.

Item 4. Information on the Company. The issuer must provide information about its business operations and the products or services it provides. This item requires information concerning the issuer's history; a description of the issuer's operations and its principal activities, markets, suppliers, sources, competitive position and seasonality; organizational structure; and information regarding any material tangible fixed assets, including leased property, plant and equipment as well as information about size, use, capacity, improvements, financing, and environmental issues with respect to such property. This item requires disclosure responsive to any of the SEC's industry guides applicable to the issuer.

Item 4A. Unresolved Staff Comments. This item, which was added by the Securities Offering Reform as of December 1, 2005, requires the issuer to disclose the substance

<sup>106</sup> If the issuer chooses to provide any non-GAAP financial information, it must also provide (i) a presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP, (ii) a quantitative reconciliation between the GAAP measure and the non-GAAP measure in question; (iii) a statement explaining why management believes the non-GAAP measure provides useful information regarding the issuer; and (iv) to the extent material, any additional purposes for which management uses the measure. There are also a number of prohibitions regarding the manner in which non-GAAP information may be presented, which are subject to limited exemptions for foreign issuers. See supra Notes 43-46 and accompanying text.

of any written comments made by the SEC staff regarding its periodic filings under the 1934 Act not less than 180 days before the end of the fiscal year to which the Form 20-F relates that the issuer believes are material and that remain unresolved at the time the Form 20-F is filed. The disclosure may include the position of the issuer with respect to any such comment.

Item 5. Operating and Financial Review and Prospects. This item requires a discussion of the financial condition, changes in financial condition and results of operations for each year and interim period for which financial statements are required. It calls for disclosure corresponding to what historically has been provided as management’s discussion and analysis (“MD&A”) of financial condition and results of operations, including with respect to the issuer’s U. S. GAAP reconciliation.<sup>107</sup> This item also requires disclosure of off-balance sheet arrangements that may have a current or future material effect on the issuer’s financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources, and certain tabular information about specified contractual obligations.

Item 6. Directors, Senior Management and Employees. This item requires disclosure of the name, business experience, function, outside business activities, date of birth, share ownership and compensation (including pursuant to stock bonus or option plans) of directors and senior management of the issuer. Compensation information must be provided on an individual basis, unless individual disclosure is not required in the issuer’s home country.<sup>108</sup> The issuer also must disclose any arrangement or understanding between a director or executive officer and any other person pursuant to which he was selected as a director or executive officer, and any family relationship between any director or executive officer and any other director or executive officer. In addition, information regarding board terms and committees (including the

<sup>107</sup> Each Registration Statement and Form 20-F is required to contain an MD&A section for the periods covered by the financial statements included in the filing, including interim periods. The MD&A section is intended to permit investors to look at the issuer “through the eyes of management.” Concept Release on Management’s Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-6711 (Apr. 17, 1987). The section places particular emphasis on the future prospects of the issuer by providing narrative disclosure of information necessary to assess the issuer’s financial condition and operating results.

In interpretive guidance issued in December 2003, the SEC presented its views on ways that companies can and should improve MD&A. The release focused on what the SEC viewed as shortcomings in the presentation, content and focus, and disclosure regarding liquidity and capital resources and critical accounting estimates in MD&A. See SEC Release Nos. 33-8350 and 34-48960 (Dec. 19, 2003). The release also reaffirmed the SEC’s prior statements on critical accounting policy disclosure, stating that companies should consider enhanced discussion and analysis of critical accounting estimates and assumptions that (i) supplements, but does not duplicate, the description of accounting policies in the notes to the financial statements and (ii) provides greater insight into the quality and variability of information regarding financial condition and operating performance. For a description of the guidance included in the SEC release, see this Firm’s memorandum entitled “SEC Issues Interpretive Guidance on MD&A” dated January 21, 2004.

<sup>108</sup> On July 26, 2006, the SEC adopted new rules requiring U.S. companies to disclose detailed information on the company’s compensation for its named executive officers and directors in a new Compensation Discussion and Analysis (“CD&A”) section of the company’s annual report on Form 10-K (which generally is incorporated by reference to the company’s proxy statement). These rules do not apply to foreign private issuers.

audit committee, or board of auditors where relevant) and the total number of persons employed by the issuer, broken down by category and geographic location, must be disclosed. In particular, an issuer listed or quoted in the United States must disclose whether its entire board of directors is acting as the company's audit committee.

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

Disclosure of transactions, including loans, between the issuer and directors, major shareholders, key management personnel, unconsolidated affiliates or by enterprises owned or controlled (with 10% ownership giving rise to presumptive control) by directors, major shareholders or key management also is required.<sup>109</sup>

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

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

Item 9. The Offer and Listing. The issuer must provide information regarding the offer or listing of the securities and the plan for their distribution. The information that must be provided includes the expected price of the offering; the manner of determining the offering price if there is no established market for the securities; the price history of the securities; the markets on which they trade; the type and class of the securities being offered; and dilution. For annual reports disclosure is required only for price history and trading markets.

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

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

<sup>109</sup> The SEC amended Item 7.B in 2004 to reflect the foreign bank exemption from the insider lending prohibition of Section 13(k) of the 1934 Act. See SEC Release No. 34-49616 (Apr. 26, 2004).

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

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

\* \* \*

Part II of Form 20-F includes the following:

Item 13. Defaults, Dividend Arrearages and Delinquencies. The issuer must identify any of its or its subsidiaries' indebtedness exceeding 5% of the issuer's or its subsidiaries' assets on which there has been any material default in the payment of principal, interest, any sinking or purchase fund installment, or any other material default not cured within 30 days, and must state the nature of the default. Any material arrearage in the payment of dividends that has occurred, or any other material delinquency not cured within 30 days, with respect to any class of preferred stock of the issuer which is registered or which ranks prior to any class of registered securities, or with respect to any class of preferred stock of any significant subsidiary of the issuer must also be disclosed. Information called for by this item previously reported on a Form 6-K may be incorporated by reference.

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

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

Items 15(b), (c) and (d) require a management report on internal control over financial reporting, a related attestation report of the auditor, and any changes in internal control over financial reporting identified in connection with the evaluation that occurred during the period covered by the Form 20-F that has materially affected, or is reasonably likely to materially affect, the issuer’s internal control over financial reporting. The requirement to disclose changes in the issuer’s internal control over financial reporting occurring during the period that materially affected, or are reasonably likely to materially affect, such internal control, currently applies to all issuers. In order to provide time for companies and their auditors to perform comprehensive evaluations of their internal control over financial reporting as a basis for the initial internal control report, the SEC has adopted an extended compliance period for the requirements to include a management report on internal control over financial reporting and the related attestation report of the auditor.<sup>110</sup>

Item 16A. Audit Committee Financial Expert. If the Form 20-F is being used as an annual report, the issuer must disclose whether it has at least one “audit committee financial expert” serving on its audit committee and, if so, the name of the expert. If an issuer does not have an audit committee financial expert, it must disclose this fact and explain why it has no such expert.<sup>111</sup>

Item 16B. Code of Ethics. If the Form 20-F is being used as an annual report, the issuer must disclose whether it has adopted a code of ethics that applies to its CEO, CFO, principal accounting officer or controller and persons performing similar functions. If the issuer has not adopted a code of ethics governing its CEO and senior financial officers, it must disclose that fact. A “code of ethics” means written standards that are reasonably designed to deter wrongdoing and to promote (i) honest and ethical conduct; (ii) full, fair, accurate, timely and understandable disclosure in documents filed with the SEC and in other public communications;

<sup>110</sup> See supra Note 62 and accompanying text.

<sup>111</sup> In April 2003, the SEC adopted amendments to the audit committee financial expert disclosure provisions as they apply to foreign private issuers. Under these amendments, a foreign private issuer listed or quoted in the United States must disclose whether its audit committee financial expert is independent, as that term is defined by the U.S. securities exchange or U.S. securities association rules applicable to that issuer. See SEC Release Nos. 33-8220 and 34-47654 (Apr. 9, 2003). Note that while a foreign private issuer not listed or quoted in the United States is not required to have an audit committee pursuant to the requirements of the Sarbanes-Oxley Act, this disclosure requirement will nonetheless apply. If a company does not have an audit committee, the full board of directors is the audit committee under the definition of that term in the Sarbanes-Oxley Act. Accordingly, such a company would be required to provide disclosure concerning the presence of an audit committee financial expert on its board of directors as a whole.

(iii) compliance with applicable laws, rules and regulations; (iv) the prompt internal reporting of violations of the code to an appropriate person or persons; and (v) accountability for adherence to the code. The code of ethics must be filed with the SEC, posted on the issuer's web site or otherwise made available to any person requesting a copy without charge. This item also requires the disclosure, on an annual basis, of any waiver (including any implicit waiver) granted to the CEO or any of the senior financial officers subject to the code, and any amendments that may be made to the code.

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

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

Item 16E. Purchases of Equity Securities by the Issuer and Affiliated Purchasers. Item 16E requires disclosure of all repurchases of shares (or other units) of any class of the issuer's equity securities<sup>112</sup> that is registered under Section 12 of the 1934 Act by or on behalf of the issuer or any affiliated purchaser.

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

- The total number of shares (or units) purchased;
- The average price paid per share (or unit);

<sup>112</sup> The term "equity securities" has a different meaning for U.S. issuers and non-U.S. issuers. For the corresponding disclosure required of U.S. issuers in Form 10-K and Form 10-Q, "equity securities" has the definition set forth in Section 3(a)(11) of the 1934 Act, while for purposes of Form 20-F, "equity securities" is defined in General Instruction F to Form 20-F. As a result, U.S. issuers will be required to disclose repurchases of convertible debt securities, while non-U.S. issuers will not. Section 3(a)(11) defines "equity security" as "any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the [SEC] shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security." Under General Instruction F to Form 20-F, equity security "includes common or ordinary shares, preferred or preference shares, options or warrants to subscribe for equity securities, and any securities, other than debt securities, which are convertible into or exercisable or redeemable for equity securities of the same company or another company." (Emphasis added.)

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

\* \* \*

Part III of Form 20-F includes the following:

Items 17 and 18. Financial Statements. Items 17 and 18 are alternatives. Item 17 is less stringent than Item 18, as it allows the omission of many items (including segment data) ordinarily required to be disclosed in financial statements presented in accordance with U.S. GAAP and the SEC's Regulation S-X. Item 17 financial statements may be used in a Form 20-F that serves only as a registration statement or annual report under the 1934 Act. If, however, the Form 20-F is to be incorporated by reference into a Form F-1 or Form F-3 Registration Statement, Item 18 financial statements must be provided either in the Form 20-F as originally filed or in an amendment thereto. Financial statements included in a Form F-1 Registration Statement also must comply with Item 18 unless the only securities being registered are non-convertible investment grade or the offering is to the issuer's existing security holders. Notwithstanding the preceding two sentences, for issuers that are first time registrants only the financial statements for the two most recent fiscal years and any required interim period included or incorporated by reference in the Registration Statement need comply with Item 18.

Items 17 and 18 are identical in all other respects. Under both items the financial statements must be in essentially the same format as financial statements included in a filing on Form 10-K, the counterpart of Form 20-F for U.S. domestic corporations. They may be presented in accordance with accounting principles other than those generally accepted in the United States, but in such cases the issuer must provide a numerical reconciliation of the differences between financial statement amounts presented in accordance with the foreign generally accepted accounting principles and those presented in accordance with U.S. GAAP (except that for first time registrants the numerical reconciliation of net income is required only for the two most recent fiscal years and any required interim period). This numerical reconciliation must be set forth on the face of, or in the notes to, the financial statements.<sup>113</sup>

Item 19. Exhibits. The issuer must provide a list of the exhibits filed as part of the Form 20-F, including exhibits incorporated by reference. Where the Form 20-F is being used as

<sup>113</sup> To the extent convergence between U.S. and European Union ("EU") accounting standards is achieved, the SEC may eventually be prompted to accept financial statements prepared by EU companies in accordance with International Financial Reporting Standards ("IFRS") without a reconciliation to U.S. GAAP. In the meantime, however, the SEC recently adopted amendments to Form 20-F to permit eligible foreign private issuers, for their first year of reporting under IFRS, to file two years rather than three years of income statements, cash flow statements and statements of changes in equity. See SEC Release Nos. 33-8567 and 34-51535 (Apr. 12, 2005) and supra Note 36.

an annual report, the certifications to be provided by the CEO and CFO pursuant to Sections 302 and 906 of the Sarbanes-Oxley Act must be filed and furnished, respectively, as exhibits.<sup>114</sup>

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

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<sup>114</sup> See supra Notes 56-60 and accompanying text.

APPENDIX B

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

I. New York Stock Exchange

Under U.S. securities law and the rules of the NYSE, all corporate securities must be registered under the 1934 Act before being admitted to trading on the NYSE. A foreign private issuer qualifies to list its securities on the NYSE if it satisfies certain eligibility requirements. In addition, for ADSs to qualify for listing, the ADSs must be sponsored by the foreign private issuer.<sup>115</sup> The NYSE encourages companies seeking to list their securities on the NYSE to obtain informal approval on the basis of a confidential preliminary review of eligibility. The formal listing application can be filed at any time within six months after such approval.

In order to make U.S. equity markets more accessible to foreign private issuers, the NYSE has adopted special standards and procedures for the listing of shares (or ADSs) of foreign private issuers where there is a broad, liquid market for their shares in their home country. The principal criteria include distribution and size requirements that require the foreign private issuer to have, worldwide, a minimum of 5,000 holders<sup>116</sup> of 100 or more shares, and a minimum of 2.5 million shares held publicly having a market value of at least \$100 million.<sup>117,118</sup> The alternate listing standards for foreign private issuers also require the issuer to meet one of the following three financial standards (determined under U.S. GAAP) based on earnings, operating cash flow or global market capitalization:

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

<sup>115</sup> Historically, the NYSE required that holders of sponsored ADRs receive without charge such services as cash and stock dividend payments, transfer of ownership and distribution of company financial statements and notices. However, on May 25, 2006, the NYSE amended its rules to eliminate restrictions on ADR depositary dividend and servicing fees, noting that the restrictions adversely affected the NYSE's competitive position relative to other exchanges and quotation systems that did not limit these fees. See SEC Release No. 34-53978 (June 13, 2006). Nonetheless, the ability of the depositary to charge these fees to ADR holders is governed by the terms of the relevant deposit agreement, which, in the case of some older agreements, may not allow the depositary to charge these fees and, accordingly, will require an amendment to reflect the rule change.

<sup>116</sup> Determined on the basis of beneficial ownership (if known) in addition to holders of record.

<sup>117</sup> In connection with initial public offerings, the NYSE will accept an undertaking from the underwriters that the offering will meet the NYSE's standards.

<sup>118</sup> Shares held by directors, officers or their immediate families and other concentrated holdings of 10% or more are excluded from the calculation of the number of publicly held shares. If an issuer has a significant concentration of shares or an issuer's public market value has been adversely affected by market forces and would otherwise qualify for a listing, the NYSE will consider stockholders' equity of at least \$100,000,000, as an alternate measure of size, if the issuer's public market value is no more than 10% below the minimum of \$100,000,000.

specified items,<sup>119</sup> which totals \$100,000,000 in the aggregate for the last three years (with a minimum of \$25,000,000 in each of the most recent two years);<sup>120</sup> or

(ii) for companies with a total worldwide market capitalization of not less than \$500,000,000 and revenues (in the most recent 12-month period) of \$100,000,000, to have aggregate operating cash flow (calculated in accordance with NYSE specifications) for the last three years of at least \$100,000,000 (with a minimum of \$25,000,000, as adjusted for certain specified items, in each of the two most recent years); or

(iii) to have not less than \$750,000,000 in total worldwide market capitalization (with not less than \$75,000,000 in revenues in the most recent fiscal year).

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

A foreign private issuer can also elect to qualify under the NYSE’s domestic listing standards, which impose substantially less stringent financial tests but require a minimum of (i) 2,000 U.S. holders of a unit of trading, generally 100 shares, or (ii) 2,200 total U.S. stockholders and average monthly U.S. trading volume of 100,000 shares during the most recent six months, or (iii) 500 total U.S. stockholders and average monthly U.S. trading volume of 1,000,000 shares during the most recent 12 months and a minimum of 1,100,000 shares publicly held in the United States with a market value of at least \$60,000,000 in the case of companies that list at the time of their initial public offerings, or \$100,000,000 for other companies, excluding shares held by directors, officers, their immediate families or 10% or greater shareholders.<sup>121</sup> Under the domestic listing standards, the NYSE also requires companies to

<sup>119</sup> These adjustments include non-operating adjustments for currency devaluations when associated with translation adjustments representing a significant devaluation of a country’s currency (but not those associated with normal currency gains or losses).

<sup>120</sup> Reconciliation to U.S. GAAP for the third year would only be required if the NYSE determines it is necessary to demonstrate the \$100,000,000 threshold is satisfied.

<sup>121</sup> If an issuer has a significant concentration of shares or an issuer’s public market value has been adversely affected by market forces and would otherwise qualify for a listing, the NYSE will consider stockholders’ equity of at least \$60,000,000 or \$100,000,000, as applicable, as an alternate measure of size, if the issuer’s

meet one of three alternative financial standards (determined under U.S. GAAP) based on earnings, operating cash flow or global market capitalization, as follows:

(i) to have aggregate pre-tax earnings from continuing operations, after minority interest, amortization and equity in the earnings or losses of investees and as adjusted for certain specified items, over the last three years of \$10,000,000 in the aggregate together with \$2,000,000 in the two most recent fiscal years and positive amounts in all three years; or

(ii) for companies with a global market capitalization of not less than \$500,000,000 and revenues (in the most recent 12-month period) of \$100,000,000, to have aggregate operating cash flow (calculated in accordance with NYSE specifications) for the last three years of at least \$25,000,000 (with each year reported as profitable); or

(iii) to have not less than \$750,000,000 in total worldwide market capitalization (with not less than \$75,000,000 in revenues in the most recent fiscal year).

The NYSE requires issuers whose securities are listed on the exchange to comply with certain financial reporting and corporate governance policies. In November 2003, the NYSE introduced Section 303A to its Listed Company Manual, implementing several of the corporate governance standards that had been proposed to the SEC the previous year. Foreign private issuers are generally exempt from compliance with those new requirements (except with respect to the independent audit committee and audit committee financial expert requirements mandated by the Sarbanes-Oxley Act) provided they disclose any significant way in which their corporate governance practices differ from those followed by domestic companies under NYSE standards. Until 2006, this disclosure was required to be made in a brief, general summary on the issuer's web site (provided it is in the English language and accessible from the United States) or in its annual report. Recently, however, the NYSE amended its rules to require that a foreign private issuer maintain a publicly available web site and disclose significant differences between home country and NYSE governance practices exclusively through such web site.<sup>122</sup> Foreign private issuers' CEOs must promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any material non-compliance with any applicable corporate governance standard.<sup>123</sup> In addition, foreign private issuers are required to submit to the NYSE (i) annual written affirmations (with respect to, among other things, compliance with Section 303A and the composition and governance structure of the company's audit and, for U.S. issuers, nominating and compensation committees) and (ii) interim written

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public market value is no more than 10% below the minimum of \$60,000,000 or \$100,000,000, as applicable.

<sup>122</sup> See *supra* Note 70. Regarding the content of the disclosure, the NYSE is concerned with actual corporate governance practices of foreign private issuers, and not general home country corporate governance standards. See NYSE LISTED COMPANY MANUAL §303A(11). For ease of reference, many foreign private issuers use chart style disclosure to compare and contrast the NYSE's standards with their practices.

<sup>123</sup> The NYSE recently proposed an amendment to require written notification of *any* (rather than material) non-compliance with NYSE governance standards of which an executive officer becomes aware. See *supra* Note 70.

affirmations (with respect to, among other things, changes in director independence determinations and audit and, for U.S. issuers, nominating and compensation committees, and compliance with Section 303A).<sup>124</sup>

The NYSE may issue a public reprimand letter to any listed company that violates a NYSE listing standard.

Until recently, the NYSE required a foreign private issuer to furnish its stockholders an annual report containing annual audited financial statements within 225 days of the close of its fiscal year. In 2006, the NYSE eliminated this requirement and now requires a foreign private issuer to post its annual report on Form 20-F on its web site, include a prominent undertaking in English on its web site to provide holders the ability, upon request, to receive a hard copy of the audited financial statements (and not the complete annual report) free of charge, and issue a press release stating the Form 20-F has been filed with the SEC specifying the company's web site address and the ability to request a hard copy of the financial statements.<sup>125</sup> A foreign private issuer must also quickly release to the public certain information that could reasonably be expected to have a material effect on the market for its securities, and act promptly to dispel unfounded rumors that result in unusual market activity or price variations, and publish interim statements of earnings as soon as they become available. Foreign companies that, pursuant to foreign law or practice, do not issue quarterly reports may issue interim earnings reports only semiannually and still be eligible for NYSE listing.

The other corporate governance requirements of the NYSE are not, however, subject to waiver by the NYSE, and are applicable to foreign private issuers. These requirements are found in the NYSE's rules and relate to such matters as mandatory annual shareholders' meetings, concentration of voting power, oversight by each listed company of transactions with its officers and directors, defensive takeover measures that discriminate against certain shareholders, purchases and sales of a listed company's stock by its directors and officers, awards of stock options to directors and officers, redemption of listed securities, tender offers by a listed company for its securities and special rights of certain shareholders.<sup>126</sup>

The NYSE also has established rules with respect to the solicitation of proxies and other matters relating to annual meetings of shareholders and to certain transactions involving the issuer or its securities. These rules include a requirement that issuers solicit from each shareholder a proxy (a written authorization given by the shareholder to someone else to vote his shares at a shareholders' meeting) for all shareholder meetings.<sup>127</sup> The NYSE may grant

<sup>124</sup> See NYSE LISTED COMPANY MANUAL §303A(12)(c). The NYSE has published the annual written affirmation form on its web site at <http://www.nyse.com/pdfs/FPIAnnualWrittenAffirmation.pdf>.

<sup>125</sup> See SEC Release No. 34-54344 (Aug. 21, 2006).

<sup>126</sup> See NYSE LISTED COMPANY MANUAL, Section 3.

<sup>127</sup> See NYSE LISTED COMPANY MANUAL, Section 402.04. In contrast, the SEC's rules governing proxy solicitations, including the internet delivery amendments adopted in 2006, are not applicable to foreign private issuers. See Rule 3a12-3 under the 1934 Act.

an exemption from this rule when applicable law precludes or makes virtually impossible the solicitation of proxies in the United States.

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

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

- (a) A certified copy of the issuer's charter and by-laws (translated into English);
- (b) Specimens of certificates traded or to be traded in the U.S. market;
- (c) A copy of the Deposit Agreement;
- (d) Copies of the issuer's annual reports to stockholders for the last five years, with two copies of the report for the latest year. If English versions are not available, translations of the last three years' reports must be provided;
- (e) The latest available Prospectus covering an offering under the 1933 Act (where available) and the latest annual SEC filing, if any. Where no SEC documents are available, a copy of the most recent document utilized in connection with an offering of securities to the public or existing shareholders as well as any filings made with any regulatory authority;
- (f) The proxy statement or equivalent material made available to stockholders for the most recent annual (general) meeting (translated into English);
- (g) Worldwide and U.S. stock distribution schedules;
- (h) Supplementary data to assist the exchange in determining the character of the share distribution and the number of publicly held shares. This information on both U.S. and worldwide holdings includes: (i) the names of the 10 largest holders, (ii) NYSE member organizations holding 1,000 or more shares, (iii) a list of the various stock exchanges or other markets upon which the issuer's securities are currently traded as well as the price range and volume of those securities over the past five years, (iv) stock owned or known to be controlled by officers, directors and their immediate families, or other holdings of 10% or more, (v) any type of restriction (and the details thereof) relating to shares of the company, (vi) an estimate of non-officer employee ownership, and (vii) shares of the issuer held in profit-sharing, savings, pension or similar plans for benefit of its employees;

- (i) If the issuer has any partially-owned subsidiaries, a description of the ownership (public or private) of the remainder, including ownership by any of the issuer's officers or directors;
- (j) A list of the issuer's principal bankers and a statement of the holdings of its stock by any one of these bankers in excess of 5%;
- (k) The identity of any regulatory agency which regulates the issuer or any portion of its operations, and a description of the extent and impact of such regulation on taxation, accounting, foreign exchange control, etc.;
- (l) Identification of the issuer's principal officers and directors, including name, title and principal occupation;
- (m) Total number of employees and general status of labor relations; and
- (n) A description of pending material litigation and opinion as to potential impact upon the issuer's operations.

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

## II. NASDAQ

The substantive and procedural requirements for inclusion of common shares (or ADSs) of foreign private issuers in the NASDAQ Capital Market<sup>128</sup> are considerably less burdensome than the corresponding NYSE standards. More stringent requirements must be met for such securities to be included in the NASDAQ Global Select Market or the NASDAQ Global Market.<sup>129</sup> The principal difference between these markets and the NASDAQ Capital Market is that the former presents the last sale prices of a security on an immediate basis, while the latter reports only current bid and asked quotations.

The listing requirements for any of the NASDAQ markets consist of criteria relating to distribution of the issuer's stock and the size of the issuer. Effective September 28, 2004, NASDAQ applies the same quantitative initial inclusion standards to non-Canadian foreign private issuers seeking to list on the NASDAQ Capital Market as those applicable to U.S. and Canadian issuers. The initial listing standards include the following requirements: (i) a minimum bid price of \$4; (ii) at least 1,000,000 publicly held shares of the issuer's common stock worldwide with a market value of at least U.S.\$ 5 million (in the case of ADSs, there must

<sup>128</sup> In September 2005, NASDAQ changed the name of the NASDAQ SmallCap Market to "NASDAQ Capital Market."

<sup>129</sup> On July 1, 2006, the NASDAQ National Market, which was formerly the higher tier of NASDAQ on which the most active and liquid stocks were traded, was renamed the NASDAQ Global Market. In conjunction with this, NASDAQ created the new NASDAQ Global Select Market, a segment of the NASDAQ Global Market with higher initial listing standards that are currently more stringent than those of the NYSE.

be at least 100,000 ADSs outstanding at the time of such inclusion); (iii) at least 300 round lot holders of the security; (iv) at least three registered and active market makers for the security (two for continued inclusion); and (v) the issuer must comply with the NASD's corporate governance requirements. In order to meet the NASDAQ Capital Market issuer size criteria, the issuer must have (x) stockholders' equity of at least \$5 million; (y) market capitalization of at least \$50 million; or (z) net income of at least \$750,000 in its last fiscal year or two of its last three fiscal years.

The requirements for inclusion of securities in the NASDAQ Global Market apply to all issuers, both U.S. domestic and foreign. There are three alternative sets of criteria for initial listing on the NASDAQ Global Market. In each case, certain basic requirements must also be met, including (i) a public float of 1,100,000 shares or ADSs worldwide, (ii) 400 round lot holders of the shares or ADSs and (iii) a minimum bid price for such securities within a period of approximately five business days preceding inclusion in the NASDAQ Global Market, or a projected offering price of such securities in the case of an initial public offering, of at least \$5.

Under the first alternative, the public float must have an aggregate market value of at least \$8 million. There is no market capitalization requirement. In addition, the issuer must have had pre-tax income of at least \$1 million in its most recent fiscal year or in two of its three most recent fiscal years and stockholders' equity of \$15 million. Finally, the issuer must have at least three registered and active market makers.

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

Under the third alternative there are no pre-tax income or operating history requirements, and the public float must have an aggregate market value of at least \$20 million. In addition, the issuer must have either (i) a market capitalization of \$75 million or (ii) total assets of \$75 million and total revenue of \$75 million. Finally, the issuer must have four registered and active market makers.

The requirements for inclusion of securities in the NASDAQ Global Select Market also apply to all issuers and there are also three alternative sets of criteria for initial listing. In each case, certain basic requirements must also be met, including (i) a public float of 1,250,000 shares or ADSs worldwide, (ii) 2,200 beneficial holders of the shares or ADSs, (iii) a minimum bid price for such securities within a period of approximately five business days preceding inclusion in the NASDAQ Global Select Market, or a projected offering price of such securities in the case of an initial public offering, of at least \$5, (iv) a "public float" (i.e., shares that are not held directly or indirectly by any officer or director of the issuer or by any other person who is the beneficial owner of more than 10% of the total shares outstanding) with an aggregate market value of at least \$70 million, and (v) at least three registered and active market makers.

Under the first alternative, the issuer must have had (i) aggregate pre-tax income of at least \$11 million in its three most recent fiscal years, (ii) pre-tax income of at least \$2.2 million in each of its two most recent fiscal years and (iii) pre-tax income (as opposed to a loss) in each of the prior three fiscal years. There is no market capitalization or cash flow requirement.

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

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

For purposes of initial listings, the market capitalization standard is based on the market value of securities listed on any national securities exchange.

NASD Marketplace Rule 4350<sup>130</sup> establishes a set of “corporate governance requirements,” generally similar in scope to the corresponding NYSE rules, which are applicable to issuers whose securities are listed on NASDAQ.<sup>131</sup> These rules, like the NYSE rules, generally exempt foreign private issuers from compliance with the corporate governance requirements (except with respect to the independent audit committee and audit committee financial expert requirements mandated by the Sarbanes-Oxley Act) provided that they disclose in their annual reports on Form 20-F each requirement that is not followed and describe the alternative home country practice followed in lieu of such requirement.<sup>132</sup> The issuer must also provide the NASD a written statement from local counsel certifying that the laws of its home country do not prohibit the issuer’s practices.

<sup>130</sup> NASD Rules 4200 and 4350 were approved by the SEC in November 2003, simultaneous with the SEC’s approval of NYSE corporate governance rules. See SEC Release No. 34-48745 (Nov. 4, 2003). NASD subsequently issued rule changes to conform certain provisions of NASD Rules 4200 and 4350 to the corresponding NYSE rules. The rule changes provide that a company that has ceased to be a “Controlled Company” is permitted to phase in both independent nominating and compensation committees and majority independent boards on the same schedule as companies that are listing in conjunction with their initial public offering, as follows: (i) one independent member at the time of listing; (ii) a majority of independent members within 90 days of listing; and (iii) all independent members within one year of listing. A company that has ceased to be a “Controlled Company” must, however, comply with the audit committee requirements as of the date it ceased to be a “Controlled Company.” NASD also slightly amended the language related to the \$60,000 test for independence, providing that the look-back is for any 12-month period within the preceding three years (previously it had applied to any fiscal year within the preceding three years). The rule changes were effective immediately at the time they were issued. See SEC Release No. 34-49901 (June 29, 2004).

<sup>131</sup> NASDAQ offers guidance on how to comply with its corporate governance-related requirements in the form of a list of “frequently asked questions” with responses, available under the “Legal and Compliance” section of the “Listed Companies” page on its web site ([www.nasdaq.com](http://www.nasdaq.com)).

<sup>132</sup> In addition, any waivers of an issuer’s code of conduct or code of ethics for directors or executive officers must be disclosed in the annual report on Form 20-F following such waiver. See NASD Rule 4350(n).

Pursuant to Rule 4350, an issuer whose securities are listed on NASDAQ is required to:

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

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

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

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

(v) adopt a formal written audit committee charter;

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

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

(viii) obtain shareholder approval prior to the issuance of securities (a) under certain stock option or purchase plans pursuant to which stock may be acquired by officers, directors, employees or consultants of the issuer, (b) when the issuance or potential issuance will result in a change of control of the issuer, (c) in certain cases, in connection with the acquisition of stock or assets of another company, and (d) in certain cases of private offerings of securities;

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

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

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

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

### III. Schedule of Listing Fees For Equity Securities

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

1. Original Listing Fee<sup>133</sup>

Base Amount \$37,500<sup>134</sup> *plus*

Up to 75 million shares (or ADSs)<sup>135</sup> \$ 4,800 per million

Over 75 and up to 300 million shares (or ADSs) \$ 3,750 per million

In excess of 300 million shares (or ADSs) \$ 1,900 per million

2. Initial Listing Fee with Respect to Additional Issues

To be calculated according to the above schedule<sup>136</sup>

Minimum Initial Listing Fee \$5,000

<sup>133</sup> The minimum Original Listing Fee for the NYSE is \$150,000. The maximum Original Listing Fee is \$250,000. In addition, there is a \$500,000 cap on aggregate fees (listing and annual fees) per issuer in any given calendar year (which includes and encompasses all classes of securities except derivatives issued by listed companies as part of their capital structure). The cap does not apply to closed-end funds.

<sup>134</sup> Payable once by an issuer upon the original listing of any type of securities.

<sup>135</sup> A foreign company that issues ADSs in the United States would list the ADSs rather than the underlying shares on the NYSE. The NYSE fees set forth on this schedule would then be determined on the basis of the number of ADSs, rather than the number of shares, outstanding and issued in the United States.

<sup>136</sup> An additional listing is aggregated with earlier listings for purposes of determining the fee per million shares. A reduced initial listing fee for additional issuances may be payable if a new listing results only from a technical change in an issuer's corporate structure.

3. Continuing Annual Fee<sup>137</sup>

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

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

1. NASDAQ Capital Market

Entry Fee.<sup>138</sup> The fee is calculated based on the aggregate number of shares to be listed at the time of initial listing, regardless of class<sup>139</sup>, according to the schedule below. This fee does not include a one-time company listing fee of \$5,000 representing a non-refundable processing fee.

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

Annual Fee. The issuer pays an annual fee of \$27,500 regardless of the number of total shares outstanding. However, in the case of ADRs, the issuer pays an annual fee of \$17,500 for up to 10 million ADRs or \$21,000 if it has total ADRs outstanding of 10 million or more.<sup>140</sup>

2. NASDAQ Global Market and NASDAQ Global Select Market

Entry Fee.<sup>141</sup> The fee is calculated based on the aggregate number of shares to be listed at the time of initial listing, regardless of class, according to the schedule below. This fee does not include a one-time company listing fee of \$5,000 representing a non-refundable processing fee.

<sup>137</sup> The applicable NYSE fee is the greater of the minimum annual fee and the fee calculated on a per share basis, subject to the fee cap described above. See supra Note 134. The annual fee structure differs for closed-end funds.

<sup>138</sup> Total entry fees paid by a company for all classes of securities listed on the NASDAQ Capital Market, regardless of date listed, may not exceed \$50,000 (excluding the \$5,000 non-refundable processing fee required for each application).

<sup>139</sup> For foreign private issuers, entry fees are levied only on those shares or ADRs issued and outstanding in the United States.

<sup>140</sup> Annual fees are based on the issuer’s total shares outstanding, which, in the case of foreign private issuers, includes only those shares issued and outstanding in the United States.

<sup>141</sup> Total entry fees paid by a company for all classes of securities listed on the NASDAQ Global Market, regardless of date listed, may not exceed \$150,000 (excluding the \$5,000 non-refundable processing fee required for each application).

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

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

Up to 10 million shares	\$30,000
10+ to 25 million shares	\$35,000
25+ to 50 million shares	\$37,500
50+ to 75 million shares	\$45,000
75+ to 100 million shares	\$65,500
100+ to 150 million shares	\$85,000
Over 150 million shares	\$95,000

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

Up to 10 million ADRs	\$21,225
10+ to 25 million ADRs	\$26,500
25+ to 50 million ADRs	\$29,820
Over 50 million ADRs	\$30,000.