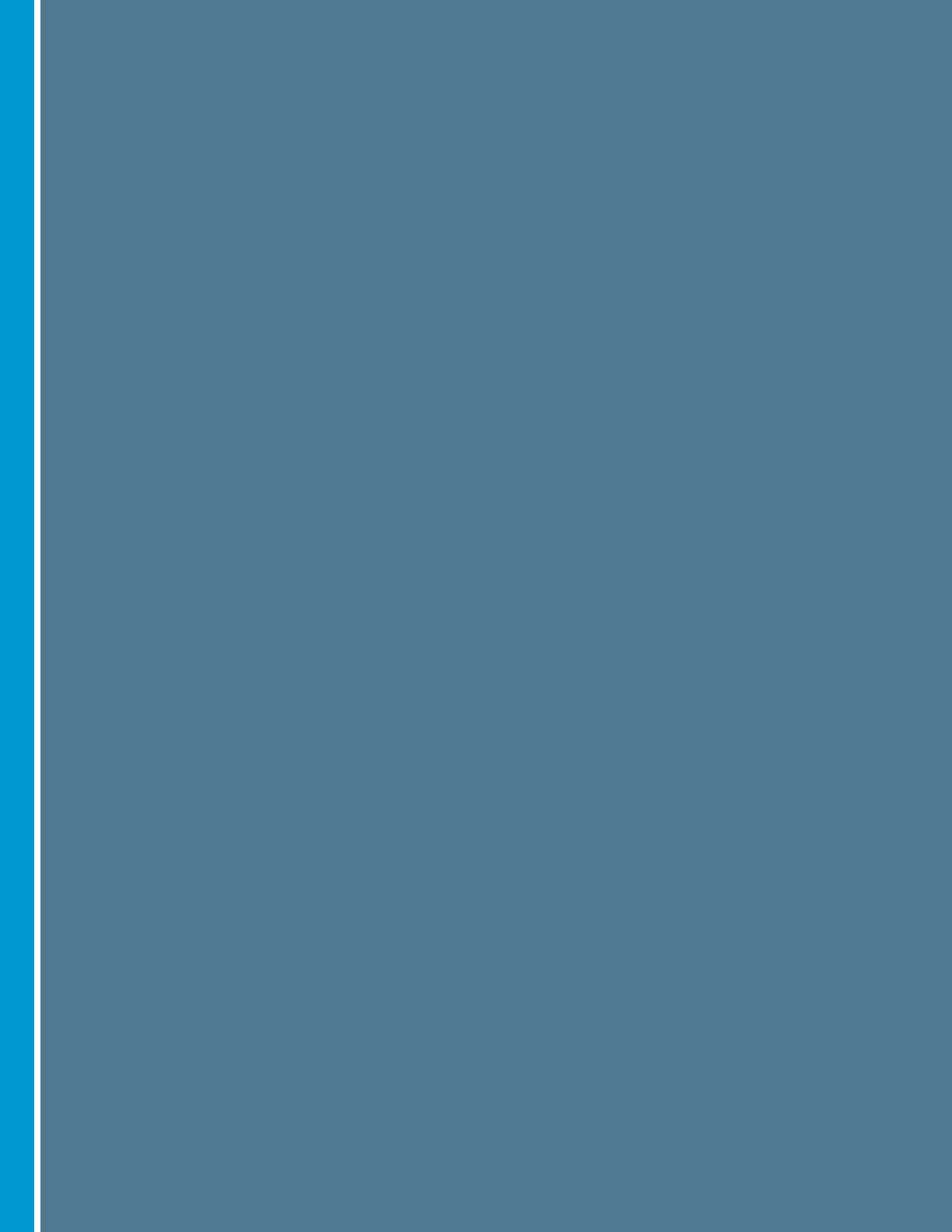


**LATHAM & WATKINS** LLP

**The Latham FPI Guide:  
Accessing the US Capital  
Markets From Outside the  
United States**

**2019 Edition**



# The Latham FPI Guide: Accessing the US Capital Markets From Outside the United States

Fabry-Pérot Interferometer, SA is a highly successful non-US company known to the world as FPI. FPI is considering doing a debt or equity offering in the United States. What are the key legal issues it, and its underwriters or financial advisors, are likely to face? This book was written to help answer that question. Our aim is to help the FPIs of the world and their investment bankers understand better the regulatory regime applicable to capital-raising activities in the United States.

US regulation of securities offerings is quite complex and may appear overwhelming to an issuer accessing the US capital markets for the first time. In order to make the maze of US regulations a bit more manageable, we have chosen in this book to focus only on those aspects of US law that, in our experience, are most relevant to US capital markets transactions involving non-US companies. Taking this approach means we have had to be selective – for example, we do not address the separate regimes that apply to offerings by certain Canadian-domiciled issuers, non-US governments, and registered investment companies. And we do not attempt to provide a detailed analysis of every legal issue or every regulatory regime (such as, for example, those that may apply to companies engaged in business in highly regulated areas like banking, communications, or utilities) that a non-US company may face. But we think our approach strikes the appropriate balance between a simple issues outline and a typical multi-volume treatise and, as such, hope you will find this book to be a useful – and more user-friendly – resource for those wishing to enter and navigate these waters.

Before we delve further into our topic, just an additional word about format. We have included various “Practice Points” throughout the book to highlight certain key items we think are helpful to keep in mind as the proposed transaction takes shape and you begin to formulate your strategy. As a necessary evil, we have also included extensive endnotes, which include references to the primary source materials and are quite handy when trying to recall the basis for, or evolution of, a particular position. (Of course, the underlying statutes, rules, regulatory interpretations, and the like are subject to change and should always be consulted anew for each proposed transaction, and this book should not be relied on as providing definitive advice with respect to any particular transaction or situation.)

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# CHAPTER 1

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## Background

There are a few primary federal statutes that we will be talking a lot about in this guide. Here is a brief summary to get things started.

### US Securities Act of 1933; US Securities Exchange Act of 1934

The two Depression-era US federal statutes at the center of our discussion are the US Securities Act of 1933 and the US Securities Exchange Act of 1934. The Securities Act generally governs the initial offer and sale of securities in the United States, while the Exchange Act generally regulates the post-issuance trading of securities, the activities of public companies, including reporting obligations and M&A transactions, and the activities of certain market participants (such as underwriters).

The US Securities and Exchange Commission, the regulatory body in charge of the Securities Act and the Exchange Act, has issued a comprehensive body of rules and regulations under those Acts that have the force of law. The SEC and its Staff have also provided interpretive guidance on a wide range of questions under the securities laws.

### JOBS Act

In April 2012, the Jumpstart Our Business Startups Act became law. The JOBS Act made significant changes to the IPO process and other aspects of the US securities laws. Above all, it created a new category of issuer, called an emerging growth company, or EGC. EGCs benefit from a transition period, or on-ramp, from private to public company. Non-US companies can be EGCs, and we discuss the JOBS Act in more detail below.

### Foreign Private Issuers

The reference to “issuer” means an entity (a corporation, a plc, an SA, an SE, an SpA, a GmbH, or any of a myriad other types of business organizations) that issues securities (presumably in the US capital markets) while the reference to “private” is only designed to draw a distinction with foreign governmental (*i.e.*, “public interest”) entities – it has nothing to do with the difference between publicly traded and privately held companies. Importantly, a non-US company that is publicly traded can still be a foreign private issuer.

We’ll start with some basic concepts – what is a foreign private issuer and how does it differ from its US domestic relative?

#### What Is a “Foreign Private Issuer”?

A foreign private issuer is an entity (other than a foreign government) incorporated or organized under the laws of a jurisdiction outside of the US unless:<sup>1</sup>

- more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents; and

- any of the following applies:
  - the majority of its executive officers or directors are US citizens or residents;
  - more than 50% of its assets are located in the United States; or
  - its business is administered principally in the United States.

#### PRACTICE POINT

An issuer that has more than 50% US ownership can still be a foreign private issuer. To fail to qualify as a foreign private issuer, a company needs to be both majority owned by US residents and meet any one of the three additional tests noted above.

### How Is US Ownership of Record Determined?

In order to determine the percentage of outstanding voting securities held “of record” by US residents, a company should begin with a review of the addresses of its security holders in its records.<sup>2</sup> But the inquiry does not end there. In particular, the company first needs to look through institutional custodians (such as the Depository Trust Company, or DTC, and its nominee, Cede & Co.) and other commercial depositories (such as Euroclear and Clearstream) to identify participants in those systems (such as broker-dealers, banks, and nominees). Then, it must drill down beyond certain “street name” accounts – that is, accounts held of record by a broker-dealer, bank, or nominee located in:<sup>3</sup>

- the United States;
- the company's jurisdiction of incorporation; and
- the jurisdiction that is the company's primary trading market for its voting securities (if different than the jurisdiction of incorporation).

In the case of these securities, the number of separate accounts for which the securities are held should be counted.<sup>4</sup>

A company may rely in good faith on the information supplied by the broker-dealer, bank, or nominee.<sup>5</sup> If, after reasonable inquiry, the company is unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, it may assume that these customers are residents of the jurisdiction in which the nominee has its principal place of business.<sup>6</sup>

### When Is Foreign Private Issuer Status Determined and What Are the Consequences of Gaining or Losing That Status?

Under the foreign private issuer definition, for a company that is registering with the SEC for the first time, the determination of whether an issuer qualifies as a foreign private issuer is made as of a date within 30 days prior to the filing of the initial registration statement.<sup>7</sup> Thereafter, it must test its status annually, at the end of its most recently completed second fiscal quarter.<sup>8</sup>

Once a company qualifies as a foreign private issuer after the relevant test date, it is immediately able to use the forms and rules designated for foreign private issuers. For example, a company that reports as a domestic US issuer but subsequently determines that it qualifies as a foreign private issuer as of the end of its second fiscal quarter would no longer need to continue making Form 8-K and Form 10-Q filings for the remainder of that fiscal year. Instead, it could immediately begin furnishing reports on Form 6-K and would file an annual report on Form 20-F (rather than Form 10-K).



By contrast, if an issuer does not qualify as a foreign private issuer at the end of its second fiscal quarter, it nonetheless remains eligible to use the forms and rules for foreign private issuers until the end of that fiscal year – in other words, it does not lose its status as a foreign private issuer until the first day of the next fiscal year. Once an issuer fails to qualify as a foreign private issuer, it will be treated as a domestic US issuer unless and until it requalifies as a foreign private issuer as of the last business day of its second fiscal quarter.

Take the example of a calendar year company that does not qualify as a foreign private issuer as of the end of its second fiscal quarter in 2019. It would not become subject to quarterly reporting on Form 10-Q during 2019. However, it would be required to file its annual report on Form 10-K in 2020 in respect of its 2019 fiscal year on the same timetable as a domestic US company. It would also become subject to the proxy rules, reporting of beneficial ownership of securities by officers, directors, and beneficial owners of more than 10% of a class of equity securities of the issuer, and reporting on Form 8-K and Form 10-Q as of the first day of 2020.<sup>9</sup>

## **What Are Some of the Benefits of Being a Foreign Private Issuer?**

Foreign private issuers are allowed a number of key benefits not available to domestic US issuers, including the following:

### **Ability to Use US GAAP, IFRS, or Local GAAP**

Domestic US issuers must file financial statements with the SEC in accordance with US generally accepted accounting principles.<sup>10</sup> The financial statements of foreign private issuers, however, may be prepared using US GAAP; International Financial Reporting Standards, or IFRS; or home-country generally accepted accounting principles, or local GAAP.<sup>11</sup> In the case of foreign private issuers that use the English-language version of IFRS as issued by the International Accounting Standards Board, or IASB IFRS, no reconciliation to US GAAP is needed.<sup>12</sup> By contrast, if local GAAP or non-IASB IFRS is used, the consolidated financial statements (both annual and required interim statements in a prospectus) must include information in a footnote that provides a reconciliation to US GAAP.<sup>13</sup>

### **Quarterly Reporting Not Required; Current Reporting on Form 8-K Not Required**

Unlike domestic US issuers, foreign private issuers are not required to file quarterly reports (including quarterly financial information) on Form 10-Q.<sup>14</sup> They also are not required to use Form 8-K for current reports, and instead furnish (not file) current reports on Form 6-K with the SEC.<sup>15</sup> Some foreign private issuers, however, choose (or are required by contract) to file the same forms with the SEC that domestic US issuers use. In that case, they must comply with the requirements of the forms for domestic issuers (and would file quarterly reports on Form 10-Q and current reports on Form 8-K, in addition to annual reports on Form 10-K).<sup>16</sup> However, they may file financial statements prepared under IASB IFRS or in local GAAP with a reconciliation to US GAAP.<sup>17</sup>

### **Financial Information Goes “Stale” More Slowly**

The SEC's rules also allow a foreign private issuer's registration statement to contain financial information that is of an earlier date than that allowed for domestic US issuers. In particular, foreign private issuers can omit interim unaudited financial statements if a registration statement becomes effective less than nine months after the end of the last audited fiscal year (unless the issuer has already published more current interim financial information).<sup>18</sup> After that time, a foreign private issuer must provide interim unaudited financial statements (which may be unaudited) covering at least the first six months of the fiscal year, together with comparative financial statements for the same period in the prior year.<sup>19</sup>

### Exempt From Proxy Rules

Foreign private issuers are exempt from the US proxy rules (which specify the procedures and required documentation for soliciting shareholder votes).<sup>20</sup>

### Exempt From Regulation FD

Regulation FD provides that when a domestic US issuer, or someone acting on its behalf, discloses material nonpublic information to certain persons (including securities analysts, other securities market professionals, and holders of the issuer's securities who could reasonably be expected to trade on the basis of the information), it must make simultaneous public disclosure of that information (in the case of intentional disclosure) or prompt public disclosure (in the case of non-intentional disclosure). Foreign private issuers are exempt from Regulation FD.<sup>21</sup>

#### PRACTICE POINT

Foreign private issuers that file reports with the SEC typically choose to comply with Regulation FD (at least in part), particularly since the restrictions in their home jurisdictions in many cases overlap with Regulation FD's requirements.

#### PRACTICE POINT

Regardless of the exemption from Regulation FD, foreign private issuers remain exposed to potential liability from selective disclosure, for example from "tipping" securities analysts or selected shareholders.

### Affiliates, Directors, and Officers Are Exempt From Beneficial Ownership Reporting and Short-Swing Profit Recapture Rules

Under Section 16(a) of the Exchange Act, anyone who owns more than 10% of any class of equity security registered under the Exchange Act, or who is an officer or director of an issuer of such a security, must publicly file a statement of beneficial ownership with, and publicly report changes in beneficial ownership to, the SEC. In addition, Section 16(b) requires any such shareholder, officer, or director to disgorge to the issuer profits realized on purchases and sales within any period of less than six months. Securities of foreign private issuers are exempt from Section 16.<sup>22</sup>

### Have More Time to File Annual Reports

Annual reports on Form 10-K by domestic US issuers are due within 60, 75, or 90 days after the end of the issuer's fiscal year, depending on whether the company is a "large accelerated filer," "accelerated filer," or a non-accelerated filer.<sup>23</sup> By contrast, the deadline for foreign private issuers to file annual reports on Form 20-F is four months after the end of their fiscal year.<sup>24</sup>

### Exempt From Certain Aspects of Sarbanes Oxley

The US Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) made broad revisions to the US federal regulation of public companies and their auditors. Although the Act itself generally did not distinguish between domestic US issuers and foreign private issuers, the SEC has, in its rules implementing Sarbanes-Oxley, made a number of significant exemptions for the benefit of foreign private issuers.

### Ability to Follow Home-Country Governance Practices

Foreign private issuers can follow home-country governance practices as long as the differences between those practices and US practices are disclosed to investors.<sup>25</sup>

## Registered and Unregistered Offerings

The Securities Act requires registration with the SEC of any transaction involving the offer or sale of a security, unless the security is of a type that is exempt from registration or the transaction is structured to take advantage of an available exemption from registration. The terms “offer,” “sale,” and “security” are very broadly defined.

As we discuss in more detail below, registered transactions involve filing a registration statement with the SEC and meeting detailed disclosure and financial statement requirements. In addition, registered transactions trigger the wide-ranging provisions of Sarbanes Oxley and a comprehensive liability scheme.

By contrast, the requirements of unregistered transactions are generally – but not invariably – less demanding. A foreign private issuer will not typically become subject to Sarbanes-Oxley merely by issuing securities in an unregistered transaction, and the liability regime governing unregistered transactions is more circumscribed.

The decision whether to issue securities in a registered or unregistered transaction involves balancing business, timing, and legal objectives. Broadly speaking, registered transactions are more complex, time-consuming, and carry greater liability risks. However, not all securities issuances can take the form of an unregistered transaction. For example, if a foreign private issuer wishes to list its securities on a US securities exchange, or to make a public offering of securities to retail investors in the US, the transaction will have to be registered.

## ENDNOTES

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- 1 Securities Act Rule 405; Exchange Act Rule 3b-4.
- 2 Instruction to paragraph (c)(1) of Exchange Act Rule 3b-4; Instructions to paragraph (1) of the definition of “Foreign private issuer” in Securities Act Rule 405. Note that these instructions send the reader to Exchange Act Rule 12g3-2(a), which in turn refers to Exchange Act Rule 12g5-1.
- 3 Instruction to paragraph (c)(1) of Exchange Act Rule 3b-4; Instructions to paragraph (1) of the definition of “Foreign private issuer” in Securities Act Rule 405.
- 4 Exchange Act Rule 12g3-2(a)(1).
- 5 *Id.*
- 6 Instruction (i) to paragraph (c)(1) of Exchange Act Rule 3b-4; Instruction (b) to paragraph (1) of the definition of “Foreign private issuer” in Securities Act Rule 405. *Cf. Final Rule: International Disclosure Standards*, Release No. 33-7745 (September 30, 2000) at II.E (issuer may rely on a presumption that customer accounts are held in the nominee’s principal place of business if the nominee’s charge for supplying the information would be unreasonable).
- 7 Securities Act Rule 405, clause (2); Exchange Act Rule 3b-4(d).
- 8 Securities Act Rule 405, clause (3); Exchange Act Rule 3b-4(e).
- 9 See SEC Division of Corporation Finance, *Financial Reporting Manual*, Section 6120.2 [*Financial Reporting Manual*]
- 10 See Regulation S-X (S-X) Rule 4-01(a)(1) (financial statements of domestic US issuers not prepared in accordance with “generally accepted accounting principles” are presumed to be misleading or inaccurate); see also *Financial Reporting Manual*, Section 1410.1 (US domestic issuers must follow Regulation S-X and US GAAP).
- 11 S-X Rule 4-01(a)(2).
- 12 *Final Rule: Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Accounting Standards Without Reconciliation to US GAAP*, Release No. 33-8879 (December 21, 2007) [*IFRS Reconciliation Release*]; see also *Financial Reporting Manual*, Section 6310.1. In this case, the accounting policy footnote must state compliance with IASB IFRS, and the auditor’s report must opine on compliance with IASB IFRS. *Financial Reporting Manual*, Section 6310.2.
- 13 See Form 20-F, Items 17(c), and 18.
- 14 Exchange Act Rule 13a-13(b)(2).
- 15 See Exchange Act Rule 13a-11(b); see also Exchange Act Rule 13a-16(c) (reports on Form 6-K are furnished, not filed).
- 16 See *Financial Reporting Manual*, Section 6120.1 (if a foreign private issuer elects to do so, “it must comply with all the requirements of the ‘domestic company’ forms”).
- 17 See *id.* Section 5120.6.
- 18 See Form 20-F, Item 8.A.5; *Financial Reporting Manual*, Sections 6220.1, 6220.6.
- 19 See Form 20-F, Item 8.A.5.
- 20 Exchange Act Rule 3a12-3(b).
- 21 Regulation FD, Rule 101(b)(ii).
- 22 Exchange Act Rule 3a12-3(b). These securities remain subject to the beneficial ownership reporting requirements of Exchange Act Sections 13(d) and 13(g).
- 23 See Form 10-K, General Instruction A(2); see also Exchange Act Rule 12b-2 (defining the terms “large accelerated filer” and “accelerated filer”).
- 24 Form 20-F, General Instruction A(b).
- 25 See NYSE Listed Company Manual 303A.00, Nasdaq Rule 5615(a)(3), Form 20-F, Item 16G.

## CHAPTER 2

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### Unregistered Global Offerings – Regulation S, Rule 144A, and Traditional Private Placement Transactions

Global offerings that are not registered in the United States with the SEC are typically structured to take advantage of a combination of exemptions. The portion of the transaction sold to investors outside the United States will be designed to comply with the safe harbor for offshore transactions provided by Securities Act Regulation S. At the same time, the portion sold to US investors will be structured to comply with the safe harbor of Securities Act Rule 144A for resales to certain large US institutional investors known as qualified institutional buyers, or QIBs, or (generally for smaller transactions), the private placement exemptions of Section 4(a)(2) of the Securities Act, or Securities Act Regulation D.

We discuss these exemptions below.

#### Regulation S – Background

Regulation S provides a safe harbor from Securities Act registration requirements for certain offerings outside the United States and offshore resales of securities. If the conditions of Regulation S are met, the transaction is deemed to take place outside the United States and hence does not trigger the registration requirements of Section 5 of the Securities Act.<sup>1</sup>

All Regulation S transactions start with the same basic requirements, set out in Rule 903. Then Regulation S layers on additional restrictions depending on the nature of the issuer.

The basic requirements (we refer to them below as the Regulation S Basic Conditions) are that:

- the offer or sale must be made in an “offshore transaction,” and
- there must be no “directed selling efforts” in the United States.

An “offshore transaction” is defined as an offer that is not made to a person in the United States, and either:<sup>2</sup>

- at the time the buy order is originated, the buyer is outside the United States, or the seller (and any person acting on the seller's behalf ) reasonably believes that the buyer is outside of the United States;
- for purposes of the issuer safe harbor, the transaction is executed in, on, or through the physical trading floor of an established foreign securities exchange located outside of the United States (this would be a rare occurrence today); or
- for purposes of the resale safe harbor, the transaction is executed in, on, or through the facilities of a designated offshore securities market, and neither the seller (nor any person acting on the seller's behalf ) knows that the transaction has been prearranged with a buyer in the United States.

The term “directed selling efforts” is broadly defined to include any activities that have, or can reasonably be expected to have, the effect of conditioning the market in the United States for the securities being offered in reliance on Regulation S.<sup>3</sup> Prohibited efforts include mailing offering materials into the United States, conducting promotional seminars in the United States, granting interviews about the offering in the United States (including by telephone), or placing advertisements with radio or television stations broadcasting in the United States.<sup>4</sup> Importantly, selling activities in the United States in connection with concurrent US offerings – whether registered or exempt – do not constitute directed selling efforts.<sup>5</sup> More generally, offshore transactions in compliance with Regulation S are not integrated with registered or exempt US domestic offerings.<sup>6</sup>

## Regulation S Safe Harbor for Sales by an Issuer, Underwriter, or Affiliate

Rule 903 of Regulation S provides a safe harbor for sales by issuers, “distributors” (essentially, entities that act as underwriters for the issuer) and most affiliates of the issuer (other than certain officers and directors). Bear in mind that the term “affiliate” is defined very broadly, and it is not always simple to determine precisely who is and who is not an affiliate.

Under Rule 903, there are three levels or “categories” of requirements, with Category 1 being the least burdensome and Category 3 being the most restrictive.

### Category 1

Category 1 has no requirements other than the Regulation S Basic Conditions. It is available for:

- securities offered by foreign issuers<sup>7</sup> who reasonably believe at the commencement of the offering that there is no “substantial US market interest”<sup>8</sup> in the securities offered;
- securities offered and sold in an “overseas directed offering;”<sup>9</sup>
- securities backed by the full faith and credit of a foreign government; or
- securities offered and sold pursuant to certain employee benefit plans established and administered under the laws of a foreign country.

#### PRACTICE POINT

Even if Category 1 is available, market practice for debt offerings is often to follow Category 2 restrictions where there is a concurrent Rule 144A offering.

### Category 2

- Category 2 covers securities that are not eligible for Category 1 and that are either (1) equity securities<sup>10</sup> of a foreign issuer that is a reporting company under the Exchange Act or (2) debt securities<sup>11</sup> of Exchange Act reporting issuers (domestic or foreign) and non-reporting foreign issuers. Category 2 (and Category 3) contain additional restrictions not found in Category 1, including restrictions against offers and sales to “US persons,” which are defined as individuals who are resident in the United States, and corporations and other entities formed under US law, subject to a long list of exclusions and inclusions covering specific circumstances.

Issuers in Category 2 may take advantage of the safe harbor if the following conditions are met along with the Regulation S Basic Conditions:

- Certain “offering restrictions”<sup>12</sup> must be adopted, including:
  - Each distributor must agree in writing that all offers and sales during a 40-day distribution compliance period may be made only in accordance with safe harbors under Regulation S, pursuant to registration under the Securities Act, or an exemption from registration.

- Prospectuses, advertisements, and all other offering materials and documents (other than press releases) used in connection with offers and sales during the distribution compliance period must disclose that the securities are not registered under the Securities Act and cannot be sold in the United States or to US persons (other than distributors) unless so registered or an exemption from registration is available.<sup>13</sup>
- During the 40-day distribution compliance period, offers and sales of the security cannot be made to a US person other than a distributor.
- Any distributor selling securities to another distributor, dealer, or person receiving a selling commission must deliver, during the 40-day distribution compliance period, a confirmation or notice to the purchaser stating that the purchaser is subject to the same resale restrictions as the distributor.

The 40-day distribution compliance period begins on the later of the date of the closing or the date on which securities were first offered to persons other than distributors (generally, the pricing date).<sup>14</sup>

### Category 3

Category 3 is a catch-all and has the most restrictive conditions. It includes all securities that are not eligible for Category 1 or 2, such as any securities of a non-reporting domestic US issuer, equity securities of a reporting domestic US issuer, and equity securities of a non-reporting foreign issuer (with substantial US market interest in the equity securities of that issuer). In addition to the Regulation S Basic Conditions, an issuer must also meet the following requirements:

- Each of the offering restrictions described above for Category 2 must be met,<sup>15</sup> except that a one-year distribution compliance period (or six-month distribution compliance period for reporting issuers) applies to offerings of equity securities and a 40-day distribution compliance period applies to offerings of debt securities.
- During the applicable distribution compliance period, offers or sales cannot be made to a US person other than a distributor (although exempt sales, such as those pursuant to Rule 144A, may be made) and, in the case of equity securities:
  - the purchaser (other than a distributor) must certify that it is not a US person;
  - the purchaser must agree to resell the securities only in accordance with Regulation S, pursuant to registration under the Securities Act, or an exemption from registration; and
  - certain other restrictions must be satisfied, including a prohibition against corporate registration of transfers not made in accordance with Regulation S.
- Debt securities generally must be represented upon issuance by a temporary global security not exchangeable for definitive securities until the expiration of the 40-day distribution compliance period and, for persons other than distributors, until certification of beneficial ownership by a non-US person.
- Any distributor selling the securities to another distributor, dealer, or person receiving a selling commission must deliver, during the applicable distribution compliance period, a notice or confirmation to the purchaser stating that the purchaser is subject to the same resale restrictions as the distributor.

#### PRACTICE POINT

Equity securities issued by a domestic US issuer (whether reporting or non-reporting) pursuant to Regulation S are considered “restricted securities”<sup>16</sup> subject to limitations on resale, and they remain restricted securities even after an exempt resale pursuant to Regulation S.<sup>17</sup> As a practical matter, these restrictions have limited the use of Regulation S for exempt sales of equity securities by domestic US issuers.

#### PRACTICE POINT

A foreign private issuer that is a reporting issuer with the SEC may be required to furnish a copy of an offering memorandum relating to a Regulation S offering on Form 6-K (if, for example, it files that offering memorandum with a stock exchange on which its securities are listed, and the exchange makes the offering memorandum public). This will generally not constitute directed selling efforts.<sup>18</sup>

#### PRACTICE POINT

The safe harbors of Regulation S are not exclusive and parties may use any other applicable exemptions provided by the Securities Act.<sup>19</sup> Regulation S only applies to the registration requirements of the Securities Act and does not limit the applicability of the US federal antifraud laws or any state laws relating to securities offerings.<sup>20</sup>

## Consequences of Not Following the Regulation S Safe Harbor Conditions

The consequences of a breach of the conditions for use of Regulation S could be significant, since this would potentially allow buyers of the securities to rescind their purchases.<sup>21</sup> If an issuer, distributor, any of their respective affiliates, or any person acting on their behalf fails to comply with the Regulation S Basic Conditions, then the issuer safe harbor will not be available to any person in connection with the offer or sale of the securities. However, if any of these persons fails to comply with any of the other issuer safe harbor requirements (in other words, other than the Regulation S Basic Conditions), then only the party who fails to comply (as well as its agents and affiliates) will be unable to rely on the issuer safe harbor exemption. In that case, the fact that there may have been a breach on the part of the issuer or distributor, or their affiliates or agents (other than certain officers or directors relying on the resale exemption) does not generally negate a resale safe harbor exemption for an unaffiliated person.<sup>22</sup>

## Rule 144A Transactions

Although market participants often refer to Rule 144A offerings, as a technical matter most Rule 144A transactions involve two steps. These are sales to initial purchasers under an exemption such as Regulation S or Regulation D (discussed below), followed by resales to QIBs under Rule 144A. As a result, Rule 144A transactions follow various limitations not found directly in Rule 144A itself as well as the explicit requirements of Rule 144A.

#### PRACTICE POINT

Securities purchased under Rule 144A are deemed restricted securities and can only be resold pursuant to Rule 144A or another exemption (including the Regulation S resale safe harbor described below).<sup>23</sup>

## Rule 144A Requirements

The requirements for a valid Rule 144A transaction include:

- *Sales to QIBs:* the securities must be offered and sold only to QIBs or to a person who the seller (and any person acting on its behalf ) “reasonably believes” is a QIB;
- *Notice to buyers:* the seller (and any person acting on its behalf ) must take “reasonable steps” to ensure that the buyer is aware that the seller may be relying on Rule 144A (generally by so noting either in the offering memorandum or, in the case of an undocumented offering, in the trade confirmation);
- *Fungibility:* the securities must not be, when issued, of the same class as securities listed on a US national securities exchange (or, in the case of convertible or exchangeable securities, have an effective conversion premium of 10% or more); and



- *Information delivery*: if the issuer is a reporting company under the Exchange Act or is exempt from reporting under Exchange Act Rule 12g3-2(b), a seller wishing to resell the securities is not obligated to furnish the purchaser with information concerning the issuer. However, if the issuer is not a reporting company and is not exempt under Exchange Act Rule 12g3-2(b), a holder or the purchaser must have the right to obtain from the seller or the issuer, upon request, certain minimal “reasonably current” information concerning the business of the issuer and its financial statements.

## General Solicitation

As revised pursuant to Title II of the JOBS Act, Rule 144A(d)(1) requires simply that securities must be sold – not *offered* and sold, as under Rule 144A as in effect prior to the JOBS Act – only to QIBs or to purchasers that the seller and any person acting on behalf of the seller reasonably believe are QIBs. As a result, the Rule 144A exemption is now available even where general solicitation is actively used in the marketing process or has occurred inadvertently.

## Definition of QIB

A QIB is defined in Rule 144A to include any of the following entities acting for its own account or the account of other QIBs that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the QIB:

- corporations, partnerships, and business trusts;
- US-regulated insurance companies;
- investment companies registered under the US Investment Company Act of 1940;
- small business investment companies licensed by the US Small Business Administration;
- certain employee benefit plans;
- certain trusts;
- certain tax-exempt organizations;
- certain registered investment advisers;
- certain registered broker-dealers; and
- US banks and savings and loan associations, and non-US banks, savings and loan associations, and equivalent institutions.

## A/B Exchange Offers

Rule 144A is particularly popular for global offerings of non-convertible debt securities. On occasion, a Rule 144A debt offering will include registration rights under which QIBs can effectively swap their Rule 144A securities, which are not freely tradeable, with identical but SEC-registered debt securities. This swap is allowed under a line of SEC Staff no-action letters that permits issuers who have sold debt securities to QIBs pursuant to Rule 144A subsequently to register an exchange offer of identical securities for the Rule 144A securities.<sup>24</sup> This procedure allows QIBs, subject to limited exceptions, to obtain freely tradable registered securities in exchange for the restricted, legended securities they obtained in the Rule 144A offering. Because the exchange offer will go through the SEC registration process, most issuers and underwriters seek to conform the original Rule 144A offering memorandum as closely as possible to the requirements of a full registration statement.

The availability of this exchange procedure allows issuers and underwriters to complete transactions quickly under Rule 144A to take advantage of market conditions, but with the expectation that the issuer will promptly register an exchange of identical securities. As a result, purchasers generally do not require the liquidity discount they would otherwise demand if the securities were to remain private

(though there is typically an interest rate bump in the event the issuer does not effect the registered exchange within the specified time frame). In addition to promising public registration under the Securities Act, the issuer also typically agrees to file periodic reports with the SEC under the Exchange Act, thereby enhancing public information and liquidity.

Foreign private issuers that are not registered with the SEC may also use the A/B exchange offer technique for Rule 144A offerings of equity securities and convertible debt securities in the United States.<sup>25</sup>

## Traditional Private Placements – Section 4(a)(2)

Section 4(a)(2) of the Securities Act exempts “transactions by an issuer not involving any public offering.” The term “public offering” is not defined in the Securities Act, and the scope of the Section 4(a)(2) exemption has largely evolved through case law, SEC pronouncements, and market practice.

The core issue is whether the persons to whom securities are offered need the protection of the Securities Act – that is, whether they are sufficiently sophisticated so as to be able to fend for themselves.<sup>26</sup> In determining whether a transaction is a public offering, relevant factors include the number of offerees and their relationship to each other and the issuer, the number of securities being offered, the size of the offering, and the manner in which the offering is conducted.<sup>27</sup> All of the surrounding circumstances must be considered in this analysis.<sup>28</sup>

### PRACTICE POINT

Section 4(a)(2) is only available for offers and sales by an issuer; resales of securities acquired from an issuer require a separate exemption (such as Rule 144A).

Private placements under Section 4(a)(2) typically consist of, among other things:

- a nonpublic offering (that is, an offering without any form of general solicitation or advertising);
- to a limited number of offerees;
- who are buying for investment and not with a view to distribution; and
- who are sophisticated investors and have been provided with or have access to information about the issuer.<sup>29</sup>

In addition, the securities issued in a private placement generally include restrictions on resales by the purchasers (such as through the use of stop-transfer orders, restrictive legends, and the like).<sup>30</sup>

## Regulation D Private Placements

### Rule 506 Safe Harbor

As you can see, it is not possible to map the borders of Section 4(a)(2) with precision. Securities Act Regulation D helps give some certainty in this area, and it also establishes various safe harbors from Securities Act registration.

Foreign private issuers are most likely to look to Rule 506 of Regulation D, which is not limited to offering amount (other parts of Regulation D are limited to offerings of up to \$5 million, for example). If the conditions of Rule 506 are met, the transaction is deemed not to be a public offering within the meaning of Section 4(a)(2).

Under Rule 506:

- *Accredited Investors and others:* There is no limit to the number of accredited investors, or AIs, who may participate in the transaction, and up to 35 non-AIs may purchase securities. In addition, each non-AI must demonstrate to the issuer's reasonable belief that it, "either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment."<sup>31</sup> Issuers and their placement agents typically satisfy this requirement by having potential investors complete "investor questionnaires" demonstrating their accredited status or their sophistication.
- *Information requirements:*<sup>32</sup> There is no specific information requirement for AIs such as a prospectus, although antifraud considerations of course come into play. By contrast, non-AIs must receive extensive information about the issuer. If the issuer is not an Exchange Act reporting company, that information includes non-financial and financial information substantially equivalent to that which it would have been required to provide in a registration statement under the Securities Act (for example, Form F-1 in the case of a first-time foreign registrant). For a foreign private issuer that is a reporting company, it may provide its most recent annual report on Form 20-F. The issuer must also make available to each purchaser the opportunity to ask questions about the offering or the issuer.

#### PRACTICE POINT

Regulation D's information requirements effectively mean that financial information provided by a foreign private issuer to a non-AI must be prepared in accordance with US GAAP or IASB IFRS, or if prepared in local GAAP/non-IASB IFRS, be reconciled to US GAAP.

- *General solicitation/general advertising only permitted under certain circumstances:* "General solicitation" or "general advertising" may only be used to offer or sell the securities under certain circumstances spelled out in Rule 506(c).
- *Limitation on resale:*<sup>33</sup> Securities acquired in a Regulation D transaction are "restricted securities" that cannot freely be resold absent registration or an exemption from registration. The issuer must take reasonable care to make sure that purchasers would not be deemed to be statutory underwriters (that is, engaged in a distribution of the securities), which is typically satisfied by requiring purchaser representations about investment intent, restrictive legends on certificates, and restrictions on transfer.
- *Form D:*<sup>34</sup> The issuer must file a notice with the SEC on Form D no later than 15 days after the first sale of securities. Form D must be filed electronically on the SEC's EDGAR system.<sup>35</sup>

Accredited investors include:<sup>36</sup>

- certain US financial institutions such as banks, savings and loan associations, broker-dealers, and the like;
- corporations or partnerships not formed for the specific purpose of acquiring the securities being offered with assets over \$5 million;
- directors, executive officers, and persons holding similar positions with or in the issuer;
- natural persons with a net worth (alone or with that person's spouse) exceeding \$1 million, excluding the value of the primary residence of the investor;
- natural persons with individual income in excess of \$200,000 per year or, with that person's spouse, in excess of \$300,000 per year; and
- any entity in which all the equity owners are themselves AIs.

## Deviations From Regulation D

Under Rule 508, a person may establish the existence of an exemption under Regulation D with respect to any purchaser even if the person failed to meet one or more of the requirements of Regulation D. In this case, the person must show that:

- the failure to comply did not pertain to a term, condition, or requirement directly intended to protect the purchaser;
- the failure to comply was “insignificant to the offering as a whole;” and
- the person made a good faith and reasonable attempt to comply with the relevant requirements of Regulation D.

## Rule 506(c) Offerings

Rule 506(c), adopted under Title II of the JOBS Act, permits general solicitation in connection with certain Regulation D offerings. In particular, Rule 506(c) permits the use of general solicitation if:

- the issuer takes “reasonable steps to verify” that purchasers are accredited investors;
- all purchasers are accredited investors, or the issuer reasonably believes that they are, at the time of the sale; and
- all requirements of Rules 501 (definitions), 502(a) (integration), and 502(d) (resale restrictions) are met.

Whether verification steps are reasonable depends on facts and circumstances. Rule 506(c) includes four specific non-exclusive methods of verifying accredited investor status:

- when verifying whether an individual meets the accredited investor *income* test, reviewing for the two most recent fiscal years any IRS forms that report the individual’s income, and obtaining a written representation from the individual with respect to the expectation of income for the current year;
- when verifying whether an individual meets the accredited investor *net worth* test, reviewing certain bank, brokerage, and similar documents and obtaining a written representation from the individual with respect to the disclosure of all liabilities;
- obtaining written confirmation from an SEC-registered broker-dealer or investment adviser, a licensed attorney, or a CPA that has itself taken reasonable steps to verify, and has determined within the prior three months, that the purchaser is an accredited investor; and
- obtaining a certification of accredited investor status at the time of sale from an individual who invested in an issuer’s Rule 506(b) offering as an accredited investor prior to the effective date of Rule 506(c), for any Rule 506(c) offering conducted by the same issuer.

The SEC has confirmed that privately offered pooled investment vehicles relying on the qualified purchaser (Section 3(c)(7)) or 100-holder (Section 3(c)(1)) exclusions under the Investment Company Act may engage in general solicitation under Rule 506(c).

## “Bad Actor” Disqualification From Rule 506 Offerings

In 2013, the SEC adopted final rules as directed by Section 926 of the Dodd-Frank Act to disqualify an issuer from relying on the Rule 506(b) or (c) exemptions if that issuer had committed securities fraud or various other violations of financial regulatory and antifraud laws.

Under Rule 506(d), an issuer will not be able to rely on the Rule 506 exemptions if certain “covered persons” have been subject to one or more disqualifying events, such as a conviction for securities fraud. Individuals and entities that are “covered persons” include:

- the issuer;
- a predecessor of the issuer;

- affiliated issuers, unless the event occurred prior to the commencement of the affiliation, and the affiliated issuer is not under the issuer's control and is not "under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events;"
- beneficial owners of 20% or more of the issuer's voting equity securities (calculated on the basis of voting power);
- an issuer's directors, executive officers, and other officers, as well as general partners and managing members, who participate in the offering; and
- any person who has received or will receive direct or indirect compensation for solicitation of purchasers in connection with a securities offering.

The disqualifying events include:

- criminal convictions in connection with the purchase or sale of a security or involving the making of a false filing with the SEC, or arising out of the conduct of certain types of financial intermediaries. The criminal conviction must have occurred within five years of the proposed sale of securities in the case of the issuer and its predecessors and affiliated issuer, or within 10 years for other covered persons;
- court injunctions and restraining orders in connection with the purchase or sale of a security, or involving the making of a false filing with the SEC, or arising out of the conduct of the business of an underwriter, an SEC-regulated entity such as a broker-dealer. The injunction or restraining order must have occurred within five years of the proposed sale of securities;
- final orders from certain federal or state regulators that bar the issuer from associating with a regulated entity, or engaging in the business of securities, insurance, or banking or in savings association or credit union activities or that are based on fraudulent, manipulative, or deceptive conduct, and issued within 10 years of the proposed sale of securities;
- certain unexpired SEC disciplinary orders relating to regulated entities in the securities industry and their associated persons;
- unexpired SEC cease-and-desist orders related to violations of scienter-based antifraud provisions of the federal securities laws or the Securities Act Section 5 registration requirements that were entered within five years before the proposed sale of securities;
- previously filing or being named as an underwriter in a registration statement that, within five years before such sale, was the subject of a refusal order, stop order, or suspension order, or is, at the time of such sale, the subject of an investigation or proceeding to determine whether issuance of such an order is appropriate;
- suspension or expulsion from membership in a self-regulatory organization (SRO) or association with an SRO member for violating just and equitable principles of trade; and
- US Postal Service false representation orders issued within five years of the proposed sale of securities.

Any disqualifying events that occurred prior to the effectiveness of the rules (September 23, 2013) will not prevent an issuer from relying on Rule 506, though they will be subject to mandatory disclosure requirements. For disqualifying events occurring after the effectiveness of the rules, an issuer may nevertheless rely on Rule 506 if the SEC determines upon a showing of good cause that denial of an exemption is not necessary under the circumstances, the court or regulator that issued the disqualifying order advises the SEC in writing that the exemption should not be denied, or the issuer can demonstrate that it did not know and, in the exercise of reasonable care, could not have known that a disqualifying event existed.

The SEC has published guidance as to the factors it will consider when evaluating a waiver request. These factors include: (1) who was responsible for the misconduct; (2) what was the duration of the misconduct; (3) what remedial steps have been taken; and (4) the impact if the waiver is denied.

The SEC has noted that no single factor is dispositive.<sup>37</sup> When they are granted, waiver requests can be expected to take several weeks to process through the SEC and are made publicly available. Waiver requests have recently been subject to much discussion and expectations on receiving a waiver should not be high.<sup>38</sup>

## Restrictions on Communications in Connection With Unregistered Global Offerings

As discussed above, directed selling efforts or general solicitation in the United States can destroy the availability of certain exemptions from registration. In addition, publicity about an unregistered transaction can amount to an illegal offer of securities. Accordingly, communications about a planned or pending unregistered transaction are subject to certain limitations.

In particular, a foreign private issuer may:

- continue to advertise products and services and to issue press releases regarding factual business and financial developments in accordance with past practice;<sup>39</sup>
- distribute a preliminary and final offering memorandum to certain investors;
- conduct certain press activities outside the United States under Securities Act Rule 135e; and
- if available, make a limited notice within the United States under Securities Act Rule 135c.

### Offshore Press Activity – Securities Act Rule 135e

Rule 135e provides a safe harbor from the definition of offer for FPIs, and offshore press activity meeting Rule 135e does not constitute general solicitation or directed selling efforts.<sup>40</sup>

Rule 135e allows an FPI to provide journalists with access to: (1) its press conferences held outside the United States; (2) meetings with issuer (or selling security holder) representatives conducted outside the United States; and (3) written press-related materials released outside the United States at or in which the issuer discusses its intention to undertake an offering. To take advantage of Rule 135e, the offering must not be conducted solely in the United States – that is, the issuer must have a bona fide intent to make an offering offshore concurrently with the US offering. The issuer must also provide access to both US and non-US journalists, and ensure that any written press releases are distributed to journalists (including US journalists) outside the United States and contain a specified legend.

#### PRACTICE POINT

Note that even if Rule 135e is otherwise available, an issuer may not rely on it to provide internet access to its offshore press conferences or written press-related materials issued offshore, unless it implements procedures to ensure that only persons physically located outside the US will have access to the press conferences or materials.<sup>41</sup>

### Limited Notices of Unregistered Offerings – Securities Act Rule 135c

Rule 135c provides that a company subject to the reporting requirements of the Exchange Act (and certain non-reporting FPIs) will not be deemed to make an offer of securities under Section 5(c) if it issues a press release about a proposed or completed unregistered offering. Rule 135c is the safe harbor relied on for the press release announcing the commencement of a private offering by a public company.

A Rule 135c notice – which can take the form of a press release or a written communication directed to shareholders or employees – does not constitute “general solicitation” or “directed selling efforts.”<sup>42</sup>

In order to take advantage of Rule 135c, the notice must:

- state that the securities offered have not been or will not be registered under the Securities Act and may not be offered absent registration or an exemption from registration;
- contain only limited information, including:
  - the name of the issuer;
  - the title, amount, and basic terms of the securities being offered;
  - the amount of the offering, if any, being made by selling shareholders;
  - the time of the offering;
  - a brief statement of the manner and purpose of the offering, *without naming the underwriters*; and
- be filed on Form 8-K (or furnished on Form 6-K, in the case of a foreign private issuer).

#### PRACTICE POINT

Even though Rule 135c is not technically available to voluntary filers, most practitioners behave as if it were. The policy concerns underlying Rule 135c – namely, that a reporting company has a legitimate interest in communicating with its security holders about its financings activities – apply with equal force to voluntary filers. Conversely, Rule 135c is not available to private companies that are not registered with the SEC even if there is a limited trading market for their securities.

## Research Reports

The issuance of a research report regarding an issuer or its securities around the time of an unregistered offering raises the question of whether such a report could be viewed as directed selling efforts and/or general solicitation in respect of the offering – the presence of which may result in the loss of an available registration exemption. For this reason (and because of general liability concerns), many broker-dealers will not allow research to be distributed in the United States in connection with unregistered offerings in which they are participating unless a separate exemption is available for the dissemination of that research under the safe harbor provisions of Securities Act Rule 138 or 139.<sup>43</sup> This is the case even for Rule 144A offerings (conducted either separately or concurrently with a Regulation S offering) where, pursuant to Title II of the JOBS Act, there is no longer a prohibition against general solicitation in such offerings.<sup>44</sup>

Securities Act Rule 138 provides that if the conditions of the rule are otherwise met, publication of ordinary-course research by a broker-dealer (including one that is participating as an underwriter or placement agent in the offering) will not be considered to be an offer or to constitute general solicitation in the context of a Rule 144A offering. Likewise, the publication would not be seen as prohibited directed selling efforts in connection with a Regulation S transaction.

Similarly, if the other conditions of Securities Act Rule 139 are met, ordinary-course research may be published during Rule 144A or Regulation S offerings without fear of being treated as general solicitation or directed selling efforts.

Other issues regarding the distribution of research around the time of an offering must still be considered, however, including restrictions applicable to US broker-dealers (and, in certain cases, their affiliates) under the rules imposed on member firms by the Financial Industry Regulatory Authority, or FINRA.<sup>45</sup>

## Use of the Internet for Unregistered Global Offerings

If a foreign private issuer wants to conduct an unregistered global offering of securities over the internet, or to make available via the internet offering documentation that goes beyond the limited category of information that is permissible under US publicity restrictions, it should implement the following procedures:

### Offshore Offering With No Concurrent US Offering

A foreign private issuer that is planning an offshore offering under Regulation S with no concurrent US offering (registered or unregistered) must:<sup>46</sup>

- include a prominent disclaimer on its website making clear that the offer is directed only to countries other than the United States. For example, the website can state that the securities are not being offered in the United States or to US persons; and
- implement procedures on its website that are reasonably designed to guard against sales to US persons. Before allowing a prospective investor to view materials online, for example, the investor should be required to certify non-US status and to provide an address or telephone number outside the United States. The website should automatically reject any person who refuses to provide the certification (and preferably should be set up to reject any person who provides a US address).

### Offshore Offering With Concurrent US Unregistered Offering

A foreign private issuer that is planning a Regulation S offering in combination with an unregistered offering in the US (such as a Rule 144A offering) must:<sup>47</sup>

- implement the restrictions for an offshore offering discussed above;
- either exclude US persons from the website or take steps to ensure that only QIBs (in the case of a Rule 144A offering) or AIs (in the case of a Regulation D private placement) have access to the website, for example, by limiting access in the US to those investors who have been provided with a password; and
- to the extent practicable, limit information posted on the website to information about the offshore offering, and only include information on the private US offering that is required by foreign law. (This may, however, be difficult to accomplish if a single offering memorandum is used for the global offering, as is commonly the case.)

## State Blue Sky Issues in Unregistered Global Offerings

The United States has a federal system of government, and securities transactions are regulated at the state level as well as at the federal level. The body of state securities law is often referred to as "blue sky" laws.

Section 18 of the Securities Act preempts various elements of state blue sky laws in connection with certain securities and transactions.<sup>48</sup> These include:

- securities sold in Rule 144A offerings where the issuer is an SEC reporting company; and
- securities sold in Regulation D offerings complying with Rule 506.

There are, however, some significant exceptions to preemption relevant to unregistered global offerings. In particular:

- Private offerings that are not conducted in compliance with Rule 506 of Regulation D do not qualify for federal preemption. For example, in a global offering where the US portion is being made under Section 4(a)(2) to institutional AIs, each relevant state's law should be reviewed to confirm that all investors are exempt institutional investors under the applicable state securities statute.



- Rule 144A offerings for issuers that are not reporting companies do not qualify for federal preemption. This can present blue sky issues in particular for secondary offerings conducted in reliance on these exemptions by foreign private issuers that include retail (or non-institutional) investors.

#### **PRACTICE POINT**

Blue sky requirements are not necessarily preempted for guarantees of securities even if the offering of the underlying security is preempted.

## **FINRA Filing Requirements for Private Placements**

FINRA Rule 5123 generally requires FINRA members that sell securities in private placements to file certain information with FINRA within 15 calendar days following the date of first sale.<sup>49</sup> This 15-day period tracks the Form D filing requirements applicable to issuers under Regulation D and the rule is intended to provide FINRA with more timely information about the private placement activities conducted by member firms on behalf of non-affiliated issuers.<sup>50</sup> In particular, Rule 5123 requires member firms to file with FINRA within the specified time period any offering documents distributed to potential investors, as well as any material amendments to those originally filed documents. If no offering documents are used in connection with a particular offering, then the member firm need only indicate the absence of such offering document in its FINRA filing. Importantly, in a departure from the original proposal issued by FINRA, the member firm is not required to provide its own disclosure document to prospective investors if one has not been prepared by the issuer.

The rule's filing requirements are subject to an extensive set of exemptions, including exemptions for Rule 144A and Regulation S offerings and for private placements to certain categories of investors. Given the large number of exemptions, the impact of the rule should be limited primarily to private placements involving individual accredited and non-accredited investors.

## ENDNOTES

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- 1 Securities Act Rule 901.
- 2 Securities Act Rule 902(h).
- 3 Securities Act Rule 902(c)(1).
- 4 Securities Act Rule 902(c).
- 5 *Final Rule: Offshore Offers and Sales*, Release No. 6863, text at n.64 (April 24, 1990).
- 6 *Id.*, text at n.145.
- 7 Securities Act Rule 902(e). A “foreign issuer” is any foreign government or foreign private issuer.
- 8 Securities Act Rule 902(j) defines “Substantial US Market Interest.”
- 9 Securities Act Rule 903(b)(ii) defines what is considered an “overseas directed offering.”
- 10 Securities Act Rule 405 defines the term “equity securities.” Note that this includes debt securities convertible into equity securities.
- 11 Securities Act Rule 902(a) defines the term “debt securities” as all securities that are not equity securities, and includes non-participating preferred stock and asset-backed securities.
- 12 Securities Act Rule 902(g) defines the term “offering restrictions.”
- 13 Securities Act Rule 902(g).
- 14 Securities Act Rule 902(f).
- 15 Securities Act Rule 903(b)(3)(i).
- 16 Securities Act Rule 144(a)(3) defines the term “restricted securities.”
- 17 Securities Act Rule 905.
- 18 *See Coral Gold Corp.*, SEC Staff No-Action Letter, 1991 SEC No-Act LEXIS 320 (February 19, 1991).
- 19 Regulation S, Preliminary Note 5.
- 20 *Id.* Preliminary Note 1.
- 21 Securities Act Section 12(a).
- 22 *Final Rule: Offshore Offers and Sales*, Release No. 6863, text at n.144 (April 24, 1990).
- 23 Securities Act Rule 144A, Preliminary Note 6.
- 24 *See Exxon Capital Holdings Corp.*, SEC Staff No-Action Letter, 1988 SEC No-Act LEXIS 682 (May 13, 1988); *Shearman & Sterling*, SEC Staff No-Action Letter, 1993 SEC No-Act LEXIS 853 (July 2, 1993); *Morgan Stanley & Co. Inc.*, SEC Staff No-Action Letter, 1991 SEC No-Act. LEXIS 762 (June 5, 1991).
- 25 *See Grupo TMM, S.A. de C.V.* SEC Staff No-Action Letter, 2002 SEC No-Act. LEXIS 640 (June 27, 2002); *Grupo Financiero InverMexico, S.A. de C.V.* SEC Staff No-Action Letter, 1995 SEC No-Act. LEXIS 428 (April 4, 1995); *Corimon C.A., S.A.C.A.*, SEC Staff No-Action Letter, 1993 SEC No-Act. LEXIS 555 (March 22, 1993); *Vitro, Sociedad Anónima*, SEC Staff No-Action Letter, 1991 SEC No-Act. Lexis 1311 (November 19, 1991).
- 26 *See SEC v. Ralston Purina Co.*, 346 US 119, 125 (1953) (“the applicability of the [private placement exemption] should turn on whether the particular class of persons affected needs the protection” of the Securities Act; an offering to those “who are shown to be able to fend for themselves” is a private placement).
- 27 *See* Release No. 33-285, 1935 SEC LEXIS 485 (January 24, 1935).
- 28 *See* Release No. 33-4552 (November 6, 1962), 1962 SEC LEXIS 166 (all the surrounding circumstances must be considered “including such factors as the relationship between the offerees and the issuer, the nature, scope, size, type, and manner of the offering”).
- 29 Certain courts have held that this information must be comparable to the information investors would have received in a public offering. *See, e.g., Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 903 (5<sup>th</sup> Cir. 1977).
- 30 Securities sold under Section 4(a)(2) are restricted securities that may not be freely resold to the public. Securities Act Rule 144(a)(3).
- 31 Securities Act Rule 506(b)(2)(ii); Securities Act Rule 501(h) defines “purchaser representative.”
- 32 Securities Act Rule 502(b).
- 33 Securities Act Rule 502(c).

34 Securities Act Rule 503.

35 Regulation S-T, Rule 101(a)(1)(xiii).

36 Securities Act Rule 501(a).

37 *SEC Guidance: Process for Requesting Waivers of “Bad Actor” Disqualification Under Rule 262 of Regulation A and Rules 505 and 506 of Regulation D* (March 13, 2015), <https://www.sec.gov/divisions/corpfin/guidance/262-505-waiver.htm>.

38 See, e.g., *Dissenting Statement Regarding Certain Waivers Granted by the Commission for Certain Entities Pleading Guilty to Criminal Charges Involving Manipulation of Foreign Exchange Rates* (May 21, 2015) available at <https://www.sec.gov/news/statement/stein-waivers-granted-dissenting-statement.html>; *SEC’s Stein Blasts Waiver Grants To Felon Banks*, Law360 (May 22, 2015).

39 See *Guidelines for the Release of Information by Issuers Whose Securities Are in Registration*, Release No. 33-5180 (August 16, 1971).

40 Securities Act Rules 502(c), 902(c)(3)(vii).

41 *SEC Guidance: Use of Electronic Media*, Release No. 33-7856, n.68 (April 28, 2000).

42 Securities Act Rules 502(c), 902(c)(3)(vi).

43 See “Research Reports” in Chapter 6 for a fuller discussion of Securities Act Rules 138 and 139.

44 See “Rule 144A Transactions – General Solicitation” earlier in this Chapter. Although JOBS Act Title II addresses only Rule 144A offerings, the SEC Staff provided informal guidance, consistent with the long-standing non-integration principles relating to concurrent US and non-US offerings, that general solicitation activities conducted in connection with a Rule 144A offering would similarly not be viewed as constituting directed selling efforts in the context of a concurrent Rule 144A/Regulation S offering. The presence of directed selling efforts, however, is still a concern in the context of a Regulation S-only offering and the presence of general solicitation is still a concern in private placements made in reliance on the safe harbor under Rule 506(b) under the Securities Act or the statutory exemption under Securities Act Section 4(a)(2).

45 FINRA was created in July 2007 through the consolidation of the former National Association of Securities Dealers, Inc. (NASD) and the regulatory, arbitration, and enforcement operations of the New York Stock Exchange (NYSE). In connection with its oversight function, FINRA has promulgated various rules that govern the conduct of its members. Those rules are intended to protect investors and the integrity of the securities markets.

46 *Interpretation: Statement of the Commission Regarding the Use of Internet Websites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore*, Release No. 33-7516, at Section IV.A.1 (March 23, 1998).

47 *Id.* at Section IV.A.2.

48 “State securities regulation of covered securities generally is limited under Section 18(b) of the Securities Act to imposing notice filing requirements on offerings, requiring the filing of a consent to service of process, and assessing a filing fee.” *Proposed Rule: Revisions of Limited Offering Exemptions in Regulation D*, Release No. 33-8828, n.45 (August 3, 2007).

49 See FINRA Regulatory Notice 12-40 (September 2012). Offering documents filed with FINRA under this rule will not be approved or commented upon by FINRA. All information filed pursuant to the requirements of Rule 5123 will receive confidential treatment by FINRA.

50 FINRA Rule 5122 (adopted by FINRA in 2008) requires member firms to file certain information with FINRA, imposes certain specific disclosure requirements, and contains certain restrictions on use of proceeds in connection with private placements conducted by member firms in their own or an affiliate’s securities, subject to a number of exemptions similar to those contained in FINRA Rule 5123.



## CHAPTER 3

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### Unregistered Resales of Regulation S and Privately Placed Securities

#### Resales of Securities

The US securities laws regulate both the initial sale of securities as well as the resales of those securities. These laws generally require that each sale of a security (whether in connection with the security's initial issuance or a subsequent purchase) be registered with the SEC or satisfy an available exemption from such registration. Since both Section 4(a)(2) and Regulation D apply only to initial sale transactions by issuers,<sup>1</sup> a purchaser wishing to resell securities without registering the resale transaction with the SEC must look elsewhere for an appropriate exemption. Typically, a purchaser that is not itself the issuer of the security, an affiliate of the issuer, an underwriter in respect of the security, or a broker-dealer will utilize the registration exemption provided by Section 4(a)(1) of the Securities Act. A broker-dealer no longer acting as an underwriter may rely on Section 4(a)(3) of the Securities Act for resales of securities. However, in circumstances in which the securities to be resold were acquired by the purchaser in a Regulation S transaction or a private placement, there may be a question as to whether the purchaser is acting in the capacity of an underwriter and therefore unable to rely on the Section 4(a)(1) exemption (or, for broker-dealers, the Section 4(a)(3) exemption). In these cases, the purchaser will generally seek to structure the resale transaction so that it will satisfy other potentially available exemptions such as those provided by Rule 144A (discussed above), the so-called "Section 4(1½) exemption," and Rule 144. In addition, a purchaser seeking to resell securities outside the United States may look to Rule 904 of Regulation S.

#### PRACTICE POINT

Rule 904 of Regulation S and Rule 144 provide a means to effect a non-registered resale transaction on a *public* basis.

Rule 144A and Section 4(1½) provide a means to effect a non-registered resale transaction on a *private* basis.

#### Regulation S Safe Harbor for Offshore Resales

Rule 904 of Regulation S provides a safe harbor for certain offshore resales. Under Rule 904:

- resales by most non-affiliates and persons who are not distributors are subject only to the requirements that:
  - the offer or sale must be made in an "offshore transaction;" and
  - there must be no "directed selling efforts" in the United States by the seller or its affiliates;
- resales by officers and directors who are affiliates solely by virtue of their positions are subject only to the "offshore transaction" and no "directed selling efforts" requirements, provided no remuneration is paid other than customary broker's commissions; and

- for resales by dealers and persons receiving selling concessions, the following additional conditions apply if the securities being resold are of the type included within the Category 2 or Category 3 safe harbor and the resale is within the distribution compliance period imposed with respect to those securities:
  - the seller and any person acting on behalf of the seller must not knowingly offer or sell the securities to a US person; and
  - if the purchaser of the securities is also a securities professional, then the seller must deliver a confirmation or other notice stating that the securities may be offered and sold during the distribution compliance period only in accordance with Regulation S, pursuant to registration under the Securities Act, or an exemption from registration.

## “Section 4(1½)” Resales

Section 4(1½) does not actually appear in the Securities Act and is instead the name given to a practice, developed by the private securities bar, that allows the resale of securities in accordance with procedures comparable to those used in connection with Section 4(a)(2) private placements.

Typical restrictions in a Section 4(1½) transaction include that resales may only be made:

- on a nonpublic basis;
- to sophisticated investors who could have participated in the original private placement and who are buying for investment and not with a view to distribution; and
- subject to limitations on subsequent resales (such as letters of representation from purchasers or appropriate “no registration” opinions of counsel).

## Rule 144 Resales

Rule 144 provides a non-exclusive safe harbor under which non-affiliates of an issuer may resell “restricted securities” to the public without registration under the Securities Act. It also provides a non-exclusive safe harbor for public resales by affiliates of the issuer of restricted securities as well as unrestricted securities. Unrestricted securities held by an affiliate are sometimes referred to as “control securities.”

Restricted securities include:

- securities acquired directly or indirectly from an issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving a public offering;
- securities acquired from the issuer that are subject to the resale limitations of Regulation D;
- securities acquired in a Rule 144A transaction; and
- equity securities of domestic US issuers acquired in Regulation S transactions.

An “affiliate” of an issuer for these purposes is a person that, directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the issuer.

It is important to note that Rule 144 treats resales by affiliates and non-affiliates differently:

- *Resales of restricted securities by a non-affiliate:* Non-affiliates must comply with either a six-month or one-year holding period, depending on whether the issuer is an Exchange Act reporting company and whether it is current in its filings. After one year, there are no further restrictions on resale.
- *Resales of restricted securities by an affiliate:* Like non-affiliate holders, affiliate holders of restricted securities must satisfy either a six-month or one-year holding period, depending on the Exchange Act reporting status of the issuer. In addition, after expiration of the relevant holding period, the following restrictions apply:
  - *Volume limitations:* The amount of securities sold, together with all sales of restricted or other securities of the same class for the account of the affiliate within the preceding three months, must not exceed the greater of (1) 1% of the shares of the class outstanding; (2) the average weekly reported trading volume on US national securities exchanges during the prior four weeks; or (3) if the securities sold are debt securities, then 10% of the principal amount of the tranche attributable to the securities sold;
  - *Manner of sale:* If the securities to be sold are equity securities, they must be resold in (1) unsolicited brokers' transactions; (2) transactions with a market maker; or (3) riskless principal transactions;
  - *Notice of sale:* If more than 5,000 shares or \$50,000 worth of securities are resold in any three-month period, the seller must file a notice on Form 144 with the SEC, which may be filed either electronically or on paper; and
  - *Current public information:* If the issuer is an SEC reporting company, it must have filed all required SEC reports during the 12 months prior to the sale (other than current reports on Form 8-K); if the issuer is not a reporting company, it must have made public certain basic corporate information.
- *Resales of control securities by an affiliate:* There is no holding period applicable to the resale of control securities by an affiliate. But the remaining requirements of Rule 144 apply as if the affiliate were reselling restricted securities (volume limitations; manner of sale requirements; notice of sale requirements).

## ENDNOTES

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- <sup>1</sup> Securities Act Section 4(a)(2); Regulation D, Preliminary Note 4.



# CHAPTER 4

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## SEC-Registered Offerings

### Issues to Identify Before Registration

Any issuer considering a public offering in the US, a private offering with US registration rights or a listing in the US is strongly advised to consult with its auditors' SEC specialists well in advance of the first submission to the SEC to assure that required financial statements are available and complete. The availability of required financial statements often affects significantly the timing of an offering.

A first-time issuer must also compile significant amounts of non-accounting data about its business and markets, its strategy, and the regulatory environment in which it operates, and must distill this information into a clear and understandable prospectus and thoroughly check the disclosure for accuracy before submitting the registration statement to the SEC. First-time issuers will also become subject to Sarbanes-Oxley's wide-ranging requirements.

Prospective underwriters and counsel can assist the issuer in assembling this information and an assortment of disclosure documents from "comparable" issuers, but the process of preparing for a first-time registration often takes several months.

Issues to address in advance of any offering include the following:

- *Will you qualify as an EGC?* If so, you will benefit from the accommodations provided by Title I of the JOBS Act, which will make the entire IPO process easier. Most IPO issuers with less than \$1.07 billion of revenue in their most recently ended fiscal year will qualify as an EGC and be entitled to cost-saving regulatory accommodations, which we discuss in more detail below.
- *Is the right audit team in place and are the auditors ready to go?* Have all required audits been conducted in accordance with the standards of the US Public Company Accounting Oversight Board (the PCAOB)? Public company auditors need to be registered with the PCAOB, and the audits need to be conducted in accordance with PCAOB standards even in the case of an issuer using local GAAP or IFRS (whether IASB IFRS or non-IASB IFRS).<sup>1</sup> Public company auditors must also meet the SEC's and the PCAOB's rigorous independence standards.<sup>2</sup> Private companies with smaller auditors sometimes find their existing auditors are not experienced in these matters or are not enthusiastic about the prospect of their audit being part of a public registration statement. Some private companies decide to switch to a larger accounting firm in order to gain from the experience the larger firm has amassed. Also, an auditor that is considered independent for a private company may not meet the independence test for public companies. Obviously, these decisions have timing and cost implications.
- *Do you have the right law firm in your corner?* In the United States, the issuer's law firm is generally in charge of assisting the issuer in addressing the many big picture and technical aspects of completing an IPO. A strong, experienced legal team can significantly reduce the burden of the IPO drill on management. This is important because the management team will still be obligated to run the business during the time-consuming IPO process. Also, life as a public company will involve new challenges that an experienced legal team can help navigate. As with the auditors, you will want to make sure your law firm is the right fit.

- *Are the financials ready for prime time?* If you prepare financial statements based on an accounting standard other than US GAAP or IASB IFRS, what are the significant differences between local GAAP/non-IASB IFRS and US GAAP? How long will it take to prepare a reconciliation to US GAAP?
- *Are you ready for life as a public company?* Do you have the corporate governance procedures and mechanisms in place to comply with Sarbanes-Oxley's requirements (for example, management certifications, internal control over financial reporting, disclosure controls and procedures, and the appropriate audit committee functions)? Note that a first-time issuer that is not already an SEC reporting company becomes subject to Sarbanes-Oxley upon the initial public filing of its registration statement, even before the SEC declares that registration statement effective. Will changes need to be made to ownership structures, shareholder agreements, employment arrangements, and the like? Will it be necessary to hire a treasurer, a general counsel, an investor relations officer, or other individuals with public company experience? Are you ready to start turning out annual and semi-annual statements on the timeline required of public companies? Will revisions be needed to bring executive compensation arrangements in line with public company practices and those of key public competitors?
- *Have you completed any significant acquisitions or dispositions during the three full financial years or any subsequent interim period preceding the date of the offering?* Separate subsidiary financial statements and pro forma financial information may be required.
- *Will your securities be guaranteed by any company?* Guarantees in respect of a security are considered to be separate securities under the US federal securities laws that must be registered, sometimes with separate audited guarantor financial statements. If you are offering debt securities that will be secured by a pledge of the capital stock or inter-company debt of any related company, you may have to file separate financial statements for the company that issued the pledged securities.
- *Do you have a significant minority investment in any other entity or any 50/50 joint venture?* Separate financial statements may be required for such an entity and the issuer may not have access to these statements or to such entity's auditors.
- *Can material contracts be filed publicly?* The SEC requires material contracts to be publicly filed as exhibits. The definition of material contracts sweeps in many related-party agreements but excludes most ordinary-course agreements. You will, however, need to file ordinary-course contracts on which your business is "substantially dependent." You may be able to redact limited, commercially sensitive portions of filed contracts, but the need to publicly file the balance of those agreements can raise difficult business issues. Do you have any material contracts that contain commercially sensitive information, or that are subject to confidentiality agreements that would be violated if they were filed publicly? Are any third-party notices or consents required before the contracts can be filed? Note that under the SEC rules mandating electronic filing by all foreign private issuers, documents (including material contracts) generally have to be submitted in English. Does the issuer have any material contracts that must be translated into English?
- *Do you manage your business in separate segments?* If so, are your internal accounts enough to prepare financial statements that meet the SEC's "segment reporting" requirements?
- *Will there be any industry data?* The SEC requires issuers in certain types of industries (such as banking and oil and gas) to provide detailed and specific disclosure on various matters. Will the issuer be able to assemble and develop the required information? If so, you may need an expert's consent if you include or summarize an industry expert's report, valuation, or opinion in your F-1. This is separate from the consent you will need from your auditors for the inclusion of their audit report.

- *Are there “cheap stock” issues?* Have you granted stock options within the 12 months prior to filing an IPO registration statement? Was there a contemporaneous equity valuation performed at or near the time of grant? If there is a significant difference between the exercise price of those options and the expected IPO price, the grant may trigger compensation expense that could reduce net income and/or prompt the SEC to ask for a detailed explanation of the rapid change in the issuer’s valuation.<sup>3</sup>
- *Do you have a communications plan in place?* The SEC’s rules impose strict limitations on communications around a planned IPO. These rules can cause significant friction, especially for companies that are used to being transparent and have active PR programs. On the other hand, violations of the SEC’s communications restrictions – often called “gun jumping” – can cause an offering to be delayed for weeks or even months. You will need to ensure you have a plan in place to prevent unauthorized public statements during the public offering process.
- *Is there a possibility that you will wish to pursue an unregistered transaction instead of the public offering?* Based on Securities Act Rule 155, an issuer is permitted to conduct a private placement 30 days after withdrawing a public offering. Rule 155 gives general guidance that 30 days is an appropriate “quiet period” in advance of a private placement.
- *Will there be a concurrent private capital raise?* Is there a possibility that you will pursue an unregistered private placement concurrently with the IPO? If so, care must be taken to avoid taking steps that could potentially threaten the private placement or inadvertently cause offerees in the private offering to be excluded from participation in the IPO.

## Available Registration Forms

The SEC has specific forms for the registration of securities under both the Securities Act and the Exchange Act. Forms not only contain their own disclosure requirements, but also specify certain items that must be disclosed under Securities Act Regulation S-K (for textual disclosure requirements) and under Securities Act Regulation S-X (which governs financial statements).

The central form for foreign private issuers is Form 20-F. Form 20-F sets out the required disclosure for US listings and annual reports by foreign private issuers. In addition, the registration forms for public securities offerings refer extensively to Form 20-F.

For both the Securities Act and the Exchange Act, the relevant forms typically prescribe broad categories of information, rather than specific disclosures. In the case of a Securities Act registration form, the registration statement includes a prospectus containing prescribed categories of financial and non-financial disclosure, as well as additional information not included in the prospectus, including exhibits (such as corporate documents and material contracts). The registration statement, prospectus, and annual report must contain a basic package of financial statements and other financial information to illustrate the financial condition and results of operations of the issuer.

For a foreign private issuer, the primary registration forms are:

SEC Registration Forms	Description
<b>Securities Act Forms</b>	
<b>Form F-1</b>	The form for first-time issuers and all other issuers who are not eligible for Form F-3.
<b>Form F-3</b>	A short form available for certain offerings by seasoned issuers. Issuers may incorporate by reference information contained in filings made under the Exchange Act, such as an annual report on Form 20-F.
<b>Form F-4</b>	The form for business combinations and exchange offers.
<b>Form F-6</b>	The form for American Depositary Shares (ADSs) evidenced by American Depositary Receipts (ADRs).
<b>Form S-8</b>	The form for registering securities issued to employees under an employment benefit plan, and interests in such plans.
<b>Exchange Act Forms</b>	
<b>Form 20-F</b>	The form for registering outstanding securities that will be listed on the NYSE or Nasdaq, and for annual reports.
<b>Form 8-A</b>	A short form available for registering newly issued securities that will be listed on the NYSE or Nasdaq in connection with a concurrent public offering in the US. Form 8-A is used in conjunction with the applicable Securities Act registration form.

A checklist showing the non-financial information required by Forms F-1, F-3, and 20-F is attached as Annex A.

## ADRs and ADSs

Many foreign private issuers that sell equity securities into the United States do so through the use of ADRs. ADRs are issued by a depository, usually a large multinational bank, and represent a specified number of the issuer's underlying equity securities held by the depository or its custodian. Although ADR holders have essentially the same ultimate rights as holders of the underlying securities and can, with limited exceptions, exchange their ADRs for the underlying securities at any time, ADRs are denominated in US dollars, and their terms are negotiated between the issuer and the depository bank. The depository typically receives fees from holders for transactions in the underlying shares, such as withdrawals from or deposits into the ADR facility, currency exchanges in connection with the payment of dividends, and ongoing annual depository service fees.

The SEC considers ADRs to be separate securities from the underlying shares. This means that depository banks, as the issuer of the ADRs, must separately register the issuance of ADRs with the SEC on Form F-6. In addition, an issuer wishing to conduct a public offering or seeking a listing in the US must always register the underlying shares on the applicable SEC form as discussed above.

Issuances of ADRs in connection with a US public offering by the issuer are known as "Level III" ADR programs; issuances of ADRs in connection with a US listing of existing shares in the US without a public offering are known as "Level II" ADR programs; and issuances of ADRs representing existing shares that are traded only over-the-counter in the United States are known as "Level I" ADR programs.

ADR depositaries may establish a Level I ADR program to facilitate secondary trading in a foreign private issuer's previously issued shares either with the issuer's participation (a sponsored program) or without the issuer's participation (an unsponsored program).

## **NYSE and Nasdaq Listing Requirements**

To be eligible for listing on the NYSE or on Nasdaq, a foreign private issuer must meet certain quantitative listing requirements and corporate governance standards. Once listed, foreign private issuers must meet certain requirements relating to ongoing shareholder communication and disclosure. The quantitative NYSE and Nasdaq listing criteria and corporate governance standards are summarized in Annexes B and C.

NYSE and Nasdaq adopted wide-ranging changes in corporate governance requirements for listed companies in the wake of Sarbanes-Oxley. Foreign private issuers may follow home-country practice in lieu of certain of the corporate governance requirements, although they must also disclose any significant ways in which their home-country practices differ from those followed by domestic US companies.<sup>4</sup>

## **Confidentiality**

Foreign private issuers that are registering with the SEC for the first time may submit registration statements for review on a confidential basis.<sup>5</sup> Confidential submission offers a number of advantages: A foreign private issuer that decides not to proceed with the IPO past this stage will not have made public competitively sensitive information, such as financial information or key supplier or customer contracts. A foreign private issuer may continue to confidentially submit the first draft of a registration statement for 12 months following the effective date of the initial registration statement.<sup>6</sup> Confidential submissions must be substantially complete when submitted to the SEC for review, just like a publicly filed registration statement. However, a confidentially submitted draft registration statement need not include the consent of auditors or other experts and does not need to be signed because a confidential submission does not constitute a "filing" under the Securities Act.<sup>7</sup> An issuer does not need to name any underwriters in its first confidential submission, but the SEC Staff typically will not continue reviewing a draft registration statement unless underwriters are named with the second submission. The registration statements remain confidential until the point of public filing.<sup>8</sup>

In almost all other circumstances, issuers are required to file registration statements and Exchange Act reports publicly. These documents – including any exhibits, such as material contracts – become available shortly after filing through the SEC's EDGAR database. In addition, the SEC makes public both its comment letters on issuer's registration statements and required Exchange Act reports, as well as issuers' responses to those comments, within 45 days of the end of the SEC's review process.<sup>9</sup>

Issuers often wish to preserve the confidentiality of certain portions of their response to SEC comments, as well as key terms of material contracts required to be filed as exhibits. An issuer may redact from those contracts information that is confidential, immaterial to investors, and proprietary such that disclosure would result in competitive harm.<sup>10</sup> The SEC Staff may, and in the case of an IPO is likely to, supplementally request an unredacted copy of the contract, and may also subsequently request a materiality and competitive harm analysis to substantiate the redactions. The Securities Act and the Exchange Act include rules detailing how confidential treatment may be obtained for information contained in other documents that are required to be filed with the SEC – such as responses to SEC comments and materials responsive to a Staff request for additional information.<sup>11</sup> The SEC Staff has historically been unwilling to grant broad-brush requests for confidential treatment, particularly of contractual terms, so issuers should redact precisely and avoid overly broad requests.

## FINRA's Corporate Financing Rule and Related Requirements

FINRA Rule 5110 (also commonly referred to as the Corporate Financing Rule) generally applies to any public offering conducted in whole or in part in the United States in which a FINRA member firm participates as an underwriter, dealer, distributor, or in a similar capacity. Although most often Rule 5110 will come up in the context of an SEC-registered offering, the Rule also applies to public offerings that are not required to be SEC-registered, including, for example, public offerings by US banks (or US branches of foreign banks) conducted in accordance with the Securities Act Section 3(a)(2) exemption. Rule 5110, however, does not apply to offerings conducted in accordance with the private placement exemption from Securities Act registration under Section 4(a)(2) of the Securities Act, or pursuant to Regulation S or Rule 144A.

The purpose of Rule 5110 is to ensure that FINRA members do not participate in a public offering of securities in which the underwriting or other terms and arrangements relating to the distribution of securities are "unfair or unreasonable." In determining whether the compensation to be received by the underwriters for the offering is "unfair or unreasonable," FINRA will look not only at the "spread" or underwriting discount to be received by the underwriters, but also at any other "item of value" received by (or payable to) the underwriters or their affiliates and other "related persons" within the 180 days preceding the date of the initial SEC confidential submission or public filing for a registered offering as well as in the 90 days following the effective date of the registration statement or commencement of sales for the offering (this period is known as the Compensation Review Period).

In the case of an issuer's initial public offering of equity securities in the United States, as well as in respect of certain other public offerings, Rule 5110 requires that the underwriters for the offering file certain information with FINRA for review, including (among other items) the registration statement, underwriting agreement, and other documents filed by the issuer with the SEC and any other letter of intent, engagement letter, underwriting agreement, or other agreement that describes or otherwise relates to the underwriting arrangements for the offering.<sup>12</sup> With respect to documents filed with or confidentially submitted to the SEC, the FINRA filing must be made no later than the next business day after the SEC filing or confidential submission, as applicable.<sup>13</sup> In addition, IPOs and other offerings that are not otherwise exempt from FINRA's filing requirements must receive FINRA's approval (in the form of a "no objections letter") before any securities may be offered or sold to investors.<sup>14</sup> This is the case even if the SEC has indicated it has no further comments and is ready to declare the registration statement effective.<sup>15</sup> As a result, it is of critical importance to determine early on in the process whether the offering will be subject to FINRA's review and approval process and to incorporate FINRA's filing and other requirements into the anticipated timeline for the offering.

If a participating FINRA member has a "conflict of interest" in connection with the offering (which may be the case, for example, if the member is an affiliate of the issuer or the member or its affiliates will be receiving 5% or more of the net proceeds from the offering to reduce or retire an outstanding credit facility or to redeem outstanding bonds or for any other purpose), FINRA Rule 5121 will also apply and may, in certain circumstances, require the participation in the offering of a "qualified independent underwriter," or QIU. Again, early identification of the potential application of this rule and the possible need to appoint a QIU will be key to ensuring that the offering is not unnecessarily delayed.

To assist in the determination of whether, and which, FINRA rules and requirements will be applicable to a particular offering, underwriters' counsel (typically in coordination with issuer's counsel) will send to the issuer, its officers, directors, and the beneficial holders of 5% or more of the issuer's securities a detailed questionnaire designed to elicit the required information. The issuer will also be asked to identify, and similar questionnaires will be sent to, the beneficial holders of any unregistered equity securities of the issuer that were acquired within the 180-day period preceding the initial filing date for the offering. In particular, the questionnaires are designed to identify (i) other items of value that may be deemed underwriting compensation for the offering; and (ii) any association or affiliation of the issuer or any officer, director, 5% beneficial holder, or beneficial holder of recently acquired unregistered equity securities with any FINRA member participating in the offering. The information gathered in this process will be used to satisfy the requirements of Rules 5110 and 5121 and to make (if required) the associated FINRA filing, but the questionnaires themselves are not submitted to FINRA.

Although FINRA will accord confidential treatment to the documents and other information submitted to it for review under the Corporate Financing Rule,<sup>16</sup> note that certain information regarding items of underwriting compensation and other material relationships between the participating FINRA members and the issuer will nonetheless need to be disclosed in the offering document pursuant to the provisions of the FINRA rules as well as Regulation S-K (S-K).

## ENDNOTES

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- <sup>1</sup> See *Financial Reporting Manual*, Sections 4110.1 (citing PCAOB Rule 2100), 4110.5, 4210.3).
- <sup>2</sup> For the initial registration by a foreign private issuer, the auditor must be independent under applicable SEC and PCAOB standards only for the most recent audited fiscal year as long as it is independent under home-country standards for all other audited periods. See S-X Rule 2-01(f)(5)(iii).
- <sup>3</sup> Latham & Watkins and The SEC Institute discuss the issue of “cheap stock” in *Cheap Stock: An IPO Survival Guide* (August 12, 2010).
- <sup>4</sup> NYSE Rules 303A.00, 303A.11; National Association of Securities Dealers Inc. [*NASD Manual*], *Rule 435(a)(1)*.
- <sup>5</sup> A foreign private issuer undertaking its initial SEC registration has three alternatives for making a draft submission to the SEC for its IPO.
- A foreign private issuer that qualifies as an EGC may use the confidential submission procedure under Section 6(e) of the JOBS Act to the same extent and subject to the same requirements as an EGC that is not a foreign private issuer.
  - A foreign private issuer that does not qualify as an EGC may use the confidential submission procedure under the expanded policy announced by the SEC Staff in June 2017. See Staff of the Division of Corporation Finance, *Draft Registration Statement Procedures Expanded*, (June 29, 2017) [*2017 Procedures*].
  - A foreign private issuer that is already listed on a non-US stock exchange or that is concurrently listing on a non-US stock exchange in connection with its initial SEC registration may use the separate policy for dual-listed foreign private issuers. See Staff of the Division of Corporation Finance, *Non-Public Submissions from Foreign Private Issuers* (December 8, 2011, updated May 30, 2012). [*2012 Procedures*]
- <sup>6</sup> See *2017 Procedures*. The accommodation applies only to the first submission. Any response to Staff comments must be filed publicly, and, in any event, the public filing must be made at least 48 hours prior to going effective.
- <sup>7</sup> See SEC Division of Corporation Finance, *JOBS Act FAQs: Confidential Submission Process for Emerging Growth Companies* (Apr. 10, 2012), Question 7. In addition, a confidential submission does not constitute a filing for purposes of Sarbanes-Oxley.
- <sup>8</sup> Under the 2017 Procedures, any foreign private issuer that confidentially submits a draft registration statement must agree not to commence its IPO road show until at least 15 days after publicly filing the initial confidential submission and all confidentially submitted amendments. See *2017 Procedures*; SEC Division of Corporation Finance Voluntary Submission of Draft Registration Statements – FAQs (June 30, 2017) *2017 Procedures – FAQs*, Question 3. Companies that proceed under the 2012 Procedures are not required to wait 15 days after their first public filing to begin their road show, which may be an important consideration in coordinating an offering in the home country. In the case of a follow-on offering, the accommodation applies only to the first draft submission. Any response to Staff comments must be filed publicly, and, in any event, the public filing must be made at least 48 hours prior to going effective. See *2017 Procedures*.
- <sup>9</sup> *SEC Staff to Publicly Release Comment Letters and Responses* (June 24, 2005).
- <sup>10</sup> See Regulation S-K (S-K), Items 601(b)(2) and 601(b)(10)(iv). See also SEC Division of Corporation Finance, *New Rules and Procedures for Exhibits Containing Immaterial, Competitively Harmful Information* (April 1, 2019). An issuer may also omit attachments and schedules to the contract that are not material and not otherwise disclosed in the contract itself or the disclosure documents. S-K, Item 601(a)(5).
- <sup>11</sup> Securities Act Rule 406 and Exchange Act Rule 24b-2. See also SEC Division of Corporation Finance, *Staff Legal Bulletin No. 1*.
- <sup>12</sup> Because of the breadth of the definition of *item of value* in Rule 5110 and FINRA’s expansive filing requirements relating to public offerings, it is often the case that engagement letters relating to M&A transactions and other matters not directly related to the offering will need to be filed with FINRA for review if they are entered into within the Compensation Review Period.
- <sup>13</sup> FINRA has proposed an amendment to modify substantially the provisions of Rule 5110, including to change this filing window from one business day to three business days and to limit the FINRA filing requirement in respect of amendments to previously filed documents solely to those that impact the underwriting terms and arrangements for the offering. The proposed FINRA Rule 5110 amendment, if adopted, would also make additional substantive, organizational and terminology changes to the current rule. The SEC has extended the time it is required to take action on the proposed rule change from June 15 to July 30, 2019. See SEC Release No. 34-85715 (Apr. 25, 2019); SEC Release no. 34-86091 (June 12, 2019).
- <sup>14</sup> Certain offerings are not required to be reviewed and approved by FINRA under Rule 5110, but the participating FINRA members must nonetheless comply with the underwriting compensation limitations and other requirements of Rule 5110.
- <sup>15</sup> Typically, the SEC will not declare the registration statement effective until it has received an indication from FINRA that FINRA has no objection to the underwriting terms for the offering.
- <sup>16</sup> See FINRA Rule 5110(b)(3).



## CHAPTER 5

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### SEC-Registered Offerings by EGCs Under the JOBS Act

The JOBS Act significantly modified the US securities laws in ways that make the IPO process more attractive to most companies considering an IPO. Title I of the JOBS Act created a new category of issuer, called an emerging growth company or EGC. EGCs benefit from a transition period, or on-ramp, from private to public company. During this period – which can last for up to five years – EGCs are exempt from certain costly requirements of being a public company. EGCs may choose all, some, or none of the on-ramp accommodations offered by Title I of the JOBS Act.<sup>1</sup>

#### EGC Status

You can take advantage of the JOBS Act Title I accommodations only if you are an EGC. In order to qualify as an EGC, a company must have annual revenue for its most recently completed fiscal year of less than \$1.07 billion.<sup>2</sup> After the initial determination of EGC status, a company will remain an EGC until the earliest of:

- the last day of any fiscal year in which the company earns \$1.07 billion or more in revenue;
- the date when the company qualifies as a “large accelerated filer,” with at least \$700 million in public equity float;<sup>3</sup>
- the last day of the fiscal year ending after the fifth anniversary of the IPO pricing date; or
- the date of issuance, in any three-year period, of more than \$1.0 billion in non-convertible debt securities.

EGC status will ordinarily terminate on the last day of a fiscal year. However, the issuance in any three-year period of more than \$1.0 billion in non-convertible debt securities would cause an issuer to lose its EGC status immediately. Note however, that EGC status will be extended during the registration process even if the registrant's revenues exceed \$1.07 billion or the registrant issues in excess of \$1.0 billion of debt securities during the registration process. Any confidential submission or public filing by an EGC will lock in EGC status through the earlier of (i) the IPO date or (ii) one year after the issuer would have otherwise lost EGC status.<sup>4</sup>

Subject to certain limitations, a company that was previously public may be eligible for EGC status.<sup>5</sup>

#### PRACTICE POINT

##### *Scope of the EGC Lock-In*

An EGC that loses status during the registration process will get the benefit of all disclosure-related aspects of being an EGC (*e.g.*, two years of financials rather than three). But the SEC Staff has taken the position that the lock-in *does not* extend to testing the waters communications or the relaxed rules on research.<sup>6</sup>

#### Elements of the IPO On-Ramp

As long as an issuer continues to qualify as an EGC, it benefits from a temporary transition period, or on-ramp, during which its regulatory requirements phase in gradually. This phased approach eases the cost of public company compliance by allowing the EGC additional time to comply with some of the more costly requirements that apply broadly to the largest public companies. As discussed above, the on-ramp

period for any particular EGC will depend upon its revenue, public float, and issuance of debt securities but will not last beyond the last day of the fiscal year ending after the fifth anniversary of its IPO pricing date.

The on-ramp exemptions for EGCs include:

- *Section 404(b) of Sarbanes Oxley.* EGCs are exempt from the auditor attestation requirements of Section 404(b) relating to internal controls over financial reporting for as long as they qualify as EGCs.<sup>7</sup>
- *Executive compensation disclosure.* EGCs may use streamlined executive compensation disclosure and are exempt from the shareholder advisory votes on executive compensation required by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. Foreign private issuers are subject to less stringent compensation disclosure requirements and thus this JOBS Act relief is less significant for them.
- *Extended phase-in for new US GAAP.* EGCs are not required to comply with new or revised financial accounting standards under US GAAP until those standards also apply to private companies.<sup>8</sup>
- *Certain PCAOB rules.* EGCs are exempt from any PCAOB rules that, if adopted, would mandate audit firm rotation and an expanded narrative, called auditor discussion and analysis, that would appear as part of any financial statement audit.<sup>9</sup> The PCAOB has adopted a new auditor reporting standard that will significantly change the standard form of audit report used in SEC filings. EGCs are exempt from this new standard.<sup>10</sup>

## EGCs and the IPO Process

### “Testing the Waters”

EGCs and their authorized persons (including underwriters), before or after confidentially submitting or publicly filing a registration statement, are allowed to meet with large heavyweight investors, called qualified institutional buyers or QIBs, and other institutional accredited investors, or IAs, to gauge their interest in a contemplated offering.<sup>11</sup> These testing-the-waters, or TTW, meetings can include oral and written communications. The decision whether to test the waters and the timing of these meetings depends on the specific circumstances of each IPO. In our experience, the majority of TTW meetings take place after confidential submission and before public filing, but we have also seen deals where TTW meetings occur prior to any submission or during the 15-day period prior to the launch of the road show.<sup>12</sup>

#### PRACTICE POINT

##### *Testing the Waters*

The deal team should consider how much detail to include in TTW materials, based on when testing the waters occurs and bearing in mind that the antifraud provisions of the federal securities laws apply to the content of these communications. As with traditional road show materials, TTW materials should also be consistent with the information contained in the registration statement. Market participants typically do not leave written TTW materials behind, although it is common to hand out flip books at these meetings and take them back when the meeting ends. The SEC Staff routinely asks to see all materials used in TTW meetings by issuing the following comment:

*Please supplementally provide us with copies of all written communications, as defined in Rule 405 under the Securities Act, that you, or anyone authorized to do so on your behalf, present to potential investors in reliance on Section 5(d) of the Securities Act, whether or not they retain copies of the communications.*

These materials are not sent to the Staff through EDGAR but instead are provided in hard copies. The SEC provides a procedure for requesting that these materials be returned to the issuer.

## Scaled Financial Disclosures

At the time of its IPO, an EGC can provide two, rather than three, years of audited financial statements and as few as two, rather than five, years of selected financial data.<sup>13</sup> After its IPO, an EGC must phase into full compliance by adding one additional year of financial statements in each future year until it presents the traditional three years of audited financial statements plus two additional years of unaudited selected financial data.<sup>14</sup> An EGC's MD&A may address only the years for which it provides audited financial statements and any subsequent interim period.<sup>15</sup> In our experience, some EGCs choose not to take advantage of the scaled financial disclosure accommodation because they prefer to show their performance trajectory over a longer period.

## Research

The JOBS Act and subsequent FINRA rulemaking have effectively eliminated the quiet periods for pre-IPO and post-IPO research on EGCs and thus, in theory, would allow participating broker-dealers to publish research reports on an EGC before or immediately after the IPO pricing date. FINRA amended its rules in 2015 to reduce the research blackout period for non-EGC IPOs to 10 days after an IPO in which the member has acted as an underwriter or dealer, and three days after a secondary offering in which the member has acted as a manager or co-manager, although other considerations under federal securities laws with respect to the distribution of research around the time of an offering continue to apply. Accordingly, for both EGC and non-EGC IPOs, a 25-day research quiet period is still typically imposed on members of the underwriting syndicate. This syndicate-imposed research quiet period typically begins at the time an underwriter becomes a member of the syndicate and lasts until the 25th calendar day following the IPO effective date. This approach reflects the view of many industry participants that investors should be looking to the information provided in the prospectus during the prospectus delivery (or availability) period set forth in Securities Act Rule 174(d). It also provides the covering analysts with some time to prepare their first public research reports.

## ENDNOTES

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- <sup>1</sup> For a detailed discussion of the on-ramp accommodations introduced by Title I of the JOBS Act, see our Client Alerts *JOBS Act Establishes IPO On-Ramp* (March 27, 2012) and *The JOBS Act After Two Weeks: The 50 Most Frequently Asked Questions* (April 23, 2012). For a comprehensive analysis of trends in the IPO market that emerged during the first two years of the JOBS Act, see our report *The JOBS Act, Two Years Later: An Updated Look at the IPO Landscape* (April 5, 2014).
- <sup>2</sup> See JOBS Act Sections 101(a) and (b) (adding new Securities Act Section 2(a)(19) and Exchange Act Section 3(a)(80)).
- <sup>3</sup> See S-K Items 308 (a) and (b). Under Exchange Act Rule 12b-2, a “large accelerated filer” is an issuer that, as of the end of its fiscal year:
- has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates (market capitalization) of \$700 million or more (measured as of the last business day of the issuer’s most recently completed second fiscal quarter);
  - has been subject to SEC reporting under the Exchange Act for a period of at least 12 calendar months; and
  - has filed at least one annual report under the Exchange Act with the SEC.
- In addition, under Exchange Act Rule 12b-2, an “accelerated filer” is an issuer meeting the same conditions, except that it has a market capitalization of \$75 million or more but less than \$700 million (measured as of the last business day of its most recently completed second fiscal quarter).
- <sup>4</sup> Fixing America’s Surface Transportation (FAST) Act, revising Securities Act Section 6(e)(1).
- <sup>5</sup> Restrictions include that the company was not taken private for the purpose of conducting an IPO as an EGC and did not have registration of a class of its securities revoked under Exchange Act Section 12(j). See SEC Division of Corporation Finance, *Jumpstart Our Business Startups Act Frequently Asked Questions: Generally Applicable Questions on Title I of the JOBS Act* (Sept. 28, 2014) (SEC Title I FAQs), Question 54.
- <sup>6</sup> See SEC Title I FAQs, Question 3.
- <sup>7</sup> See JOBS Act Section 103 (revising Sarbanes-Oxley Section 404(b)).
- <sup>8</sup> See JOBS Act Section 102(b)(1) (adding new Securities Act Section 7(a)(2)(B)). See also SEC Title I FAQs, Question 13. An EGC wishing to opt out of the extended phase-in for new or revised financial accounting standards under US GAAP must disclose this election in the first registration statement that is submitted to the SEC, regardless of whether it is a confidential submission or a public filing.
- <sup>9</sup> See JOBS Act Section 104 (revising Sarbanes-Oxley Section 103(a)(3)).
- <sup>10</sup> The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion and Related Amendment to PCAOB Standards, PCAOB Release No. 2017-001 (June 1, 2017), PCAOB Rulemaking Docket No. 034.
- <sup>11</sup> See JOBS Act Section 105(c) (adding new Securities Act Section 5(d)). In February 2019, the SEC proposed a rule that would allow all issuers to conduct TTW meetings. The comment period for the proposed rule closed on April 29, 2019. See *Solicitations of Interest Prior to a Registered Public Offering*, Release No. 33-10607 (February 19, 2019), p. 10:
- We are proposing an exemption from the gun-jumping provisions of Section 5 of the Securities Act for test-the-waters communications by an issuer contemplating a registered securities offering. Specifically, the proposed exemption would permit any issuer or person authorized to act on behalf of an issuer, including an underwriter, either prior to or following the filing of a registration statement, to engage in oral or written communications with potential investors that are, or that the issuer reasonably believes are, QIBs or IAs, to determine whether such investors might have an interest in the contemplated offering.
- <sup>12</sup> The application of Exchange Act Rule 15c2-8(e) to TTW activities was clarified by the SEC in FAQs issued by the Division of Trading and Markets on August 22, 2013. See SEC Division of Trading and Markets, *Jumpstart Our Business Startups Act Frequently Asked Questions About Research Analysts and Underwriters* (Research FAQs). As discussed in the response to Question 1 of the Research FAQs, it should be possible for TTW activities to take place in a manner consistent with the requirements of Rule 15c2-8(e) (which generally has been interpreted to require the availability of a price range prospectus prior to soliciting orders for the registered securities). In particular, the answer to Question 1 states that an underwriter should generally be able to seek non-binding indications of interest from prospective investors (including as to the number of shares they may seek to purchase at various price ranges) so long as the underwriters are not soliciting actual orders and the investors are not otherwise asked to commit to purchase any particular securities.
- <sup>13</sup> See JOBS Act Section 102(b)(1) (adding new Securities Act Section 7(a)(2)).
- <sup>14</sup> See JOBS Act Section 102(b)(2) (modifying Exchange Act Section 13(a)).
- <sup>15</sup> See JOBS Act Section 102(c) (modifying S-K, Item 303(a)).

## CHAPTER 6

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### Gun Jumping – Restrictions on Communications in Connection With Registered Securities Offerings

#### What Is “Gun Jumping”?

Gun jumping refers generally to violations of the communications restrictions under the Securities Act. Section 5 of the Securities Act divides the registration process into three distinct time periods:

- *Pre-filing or “quiet” period.* The pre-filing or quiet period begins when a company decides to make a public offering (usually by retaining an investment bank or banks to undertake the offering) and ends when the registration statement relating to the offering is first filed publicly with the SEC. During this period, Section 5(c) of the Securities Act prohibits any person from engaging in activity that could be construed as making an “offer” of the company’s securities. Accordingly, other than TTW activities by EGCs permitted by Section 5(d) of the Securities Act, absent an exemption from registration – such as the private placement exemption of Section 4(a)(2) or an exception from the definition of offer – nothing that would be considered to be an offer of securities is permitted during the pre-filing period.<sup>1</sup>
- *Period between filing and effectiveness (also often called the “waiting period”).* The waiting period extends from the time that the registration statement is filed publicly with the SEC until the time that it is declared effective by the SEC. During this period, offers of the security are permitted by Section 5 if they are made properly (sales are not allowed until the effectiveness of the registration statement). Under Section 5(b)(1), no prospectus other than a prospectus meeting the requirements of Section 10 of the Securities Act may be used to make written offers. Because the term “prospectus” picks up nearly all forms of written offers (and many forms of oral communication, including TV broadcasts, blast voicemail messages, and the like), only certain types of oral offers and a carefully limited group of written offers may be made during the waiting period. A properly designed road show is one form of oral offer that satisfies the intricate requirements of Section 5.
- *Post-effective period.* After effectiveness of the registration statement (which occurs on the pricing date), underwriters, and other distribution participants may confirm sales of the securities by means of a final prospectus meeting the requirements of Section 10(a) of the Securities Act. In addition, underwriters will have an obligation to deliver a final prospectus during a period of time following effectiveness, even in connection with secondary market resales. Accordingly, until the later of (1) completion of the “distribution” of the securities (that is, when the securities have been sold to investors) or (2) expiration of the relevant prospectus-delivery period (typically 25 days), limitations on publicity by the issuer will remain in place.

#### Restrictions on Communications During the Quiet Period

During the quiet period, an issuer may not make offers or sales of the securities being registered, although EGCs may participate in TTW meetings. The SEC has construed the term “offer” very broadly to include communications that do not refer to the proposed offering but which may nevertheless stimulate investor or dealer interest in the issuer or its securities. General statements about the issuer’s rosy future prospects may well be considered to be offers. An issuer should generally not release publicly any forecasts, projections, or predictions relating to revenue, income, or earnings per share or concerning expected valuations, and should put in place procedures for review of public statements and press releases as soon as the offering process first gets underway.

## PRACTICE POINT

Prior to filing your registration statement, you should review your website to make sure the content is factually consistent with the statements in your registration statement and will not be considered to be an illegal offer of securities. Issuer websites are routinely reviewed by the SEC Staff during the registration process and could be construed to be an ongoing offer of securities. In addition, the Staff is looking to assess whether the issuer is presenting information about itself that is consistent, regardless of the media used.

Although an issuer may continue to advertise its products and services and issue press releases regarding factual business and financial developments in accordance with past practice,<sup>2</sup> the breadth of the SEC's definition of the term offer, coupled with the potentially significant problems flowing from gun jumping, make it advisable to tone down all public statements (or at least run them by counsel) during and immediately preceding the offering process. Meetings with, or publications targeted at, members of the investment community are particularly problematic during the quiet period.

As we mentioned above, EGCs and their authorized persons (including underwriters) may engage in oral or written communications with QIBs and other IAIs in TTW sessions that occur during (or before) the quiet period. In addition, the SEC has provided certain safe harbors from the prohibition on pre-filing offers that apply to all issuers (even non-EGCs). Under these safe harbors, an issuer may:

- conduct certain press activities outside the United States under Securities Act Rule 135e;
- take advantage of the Rule 163A safe harbor for communications that do not refer to the offering made more than 30 days prior to the filing of the registration statement;
- release a limited notice regarding the offering within the United States under Securities Act Rule 135;
- release certain factual and forward-looking information under Rule 168 or 169; and
- if it is a well-known seasoned issuer, or WKSI (defined below), make certain offers of securities under Securities Act Rule 163.

We discuss these safe harbors below.

### Offshore Press Activity – Securities Act Rule 135e

Rule 135e provides a safe harbor from the definition of offer under Section 5 of the Securities Act for offshore press activity. This safe harbor is available for registered as well as unregistered transactions.

## PRACTICE POINT

Although Rule 135e does not limit the content of offshore press announcements, the SEC Staff frequently monitors offshore press activity by companies that are in the process of a public offering in the United States. Some caution is therefore warranted in relying on this Rule. Foreign private issuers should avoid making detailed discussions of a pending offering, particularly in the English-language press outside the United States.

### The 30-Day Bright-Line Safe Harbor – Securities Act Rule 163A

Rule 163A provides all issuers (whether or not already public filers) with a non-exclusive safe harbor from Section 5(c)'s prohibition on pre-filing offers for certain communications made more than 30 days before the public filing of a registration statement that might otherwise have been considered to be an offer under Section 2(a)(3). For an EGC that confidentially submits a draft registration statement for nonpublic review by the SEC, the date of the first public filing of the registration statement, not the date of the confidential

submission, determines the availability of the Rule 163A safe harbor. Rule 163A is not available to prospective underwriters.

The requirements for Rule 163A include that:

- the communication cannot refer to the securities offering;
- the communications must be made by or on behalf of an issuer – in other words, the issuer will need to authorize or approve each Rule 163A communication (communications by an underwriter without the issuer's seal of approval will not come within the safe harbor); and
- the issuer must take “reasonable steps within its control” to prevent further distribution of the communicated information during the 30-day period before filing the registration statement (although the SEC has suggested that the issuer may maintain copies of previously published information on its website, if the information is appropriately dated, identified as historical material, and not referred to as part of the offering activities).<sup>3</sup>

### **Pre-Filing Public Announcements of a Planned Offering – Securities Act Rule 135**

Rule 135 provides that an issuer will not be deemed to make an offer of securities under Section 5(c) as a result of a public announcement of a planned registered offering that includes only the bare-bones information permitted by the Rule. A Rule 135 notice can be released at any time, including before a registration statement is filed.

Under Rule 135, the announcement must contain a legend, and no more than the limited information enumerated in the Rule, which includes:

- the name of the issuer;
- the title, amount, and basic terms of the securities offered;
- the anticipated timing of the offering; and
- a brief statement of the manner and purpose of the offering, without naming the prospective underwriters for the offering.

### **Factual Business Communications by Reporting Companies – Securities Act Rule 168**

Rule 168 is a non-exclusive safe harbor from Section 5(c)'s prohibition on pre-filing offers (and from Section 2(a)(10)'s definition of a “prospectus”) that is available only to reporting issuers with a history of making similar public disclosures. It allows a reporting issuer (and certain widely traded, non-reporting foreign private issuers) to make continued regular release or dissemination of “factual business information” and “forward-looking information,”<sup>4</sup> but not information about an offering or information released as part of offering activities. Rule 168 is not available to underwriters. In addition, voluntary filers may not rely on the rule, and instead must look to Rule 169.<sup>5</sup>

Disclosure of Rule 168 information is permitted at any time, including before and after the filing of a registration statement, but only if:

- the issuer has previously released or disseminated Rule 168 information in the ordinary course of its business; and
- the timing, manner, and form in which the information is released is materially consistent with similar past disclosures.

For the information to be considered regularly released in the ordinary course of business, the method of releasing or disseminating the information, and not just the content, will be required to be consistent in material respects with prior practice.<sup>6</sup> Therefore, under Rule 168, the issuer will need to be able to

show a record of releasing the particular type of information in the same particular manner, although the SEC has acknowledged that one prior release could establish a sufficient record.<sup>7</sup> The SEC has, however, cautioned that an issuer's release of "new types of financial information or projections just before or during a registered offering will likely prevent a conclusion" that the issuer regularly releases that information.<sup>8</sup>

## **Factual Business Communications by Non-Reporting Companies and Voluntary Filers – Securities Act Rule 169**

Rule 169 provides a non-exclusive safe harbor from both Section 5(c)'s restriction on pre-filing offers and Section 2(a)(10)'s definition of a prospectus for companies that are not yet public. Under Rule 169, non-reporting issuers are permitted to continue to release factual business information, *but not forward-looking information*. Rule 169 is available only for communications intended for customers, suppliers, and other non-investors. The SEC has nonetheless made clear that the safe harbor will continue to be available if the information released happens to be received by a person who is both a customer and an investor.<sup>9</sup>

## **Pre-Filing Offers by WKSIs – Rule 163**

Rule 163 creates a non-exclusive safe harbor for WKSIs from Section 5(c)'s prohibition on pre-filing offers. The exemption is not available to underwriters, although the SEC has proposed (but never adopted) broadening its scope to include certain underwriters and dealers authorized by an issuer to approach the market on the issuer's behalf.<sup>10</sup>

Under Rule 163, offers by or on behalf of a WKSI before the filing of a registration statement are free from the restraints of Section 5(c) if certain conditions are met. These include that any written offer must contain a prescribed legend and must be filed with the SEC promptly upon filing of the registration statement for the offering unless the communication has previously been filed with the SEC or is exempt from filing under the terms of Rule 433 (discussed below). If no registration statement is ever filed, however, a Rule 163 communication will not need to be filed.<sup>11</sup>

## **Definition of WKSI**

The definition of WKSI<sup>12</sup> includes an issuer (and its majority-owned subsidiaries under certain circumstances) that:

- meets the registrant requirements of General Instruction I.A of Form S-3 or Form F-3, which include that the issuer:
  - has securities registered with the SEC under Section 12(b) of the Exchange Act, a class of equity securities registered under Section 12(g), or is required to file reports under Section 15(d);
  - has filed at least one annual report on Form 10-K or 20-F;
  - has filed on time all material required to be filed with the SEC during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement; and
  - has not had any material defaults under debt or long-term lease agreements since the end of the last fiscal year;
- as of a date within 60 days of the determination date,<sup>13</sup> has:
  - a worldwide market value of outstanding voting and nonvoting common equity<sup>14</sup> held by non-affiliates of at least \$700 million; or
  - issued at least \$1 billion in aggregate principal amount of non-convertible securities in transactions registered under the Securities Act, other than equity securities, in primary offerings for cash during the past three years; and
  - is not an ineligible issuer<sup>15</sup> or asset-backed issuer.



## Restrictions on Communications During the Waiting Period

During the waiting period, which extends from the time that the registration statement is filed publicly with the SEC until the time that it is declared effective by the SEC, oral offers may be made but only certain types of written offers are permitted. The distinction between oral and written is not intuitive, and many forms of verbal communication, as well as TV broadcasts, blast voicemail messages, and the like, are considered written for these purposes. EGCs may continue testing the waters with QIBs and other IAIs during the waiting period through both written and oral communications.

During the waiting period, an issuer may continue to engage in activity that falls within one of the safe harbors discussed above. In addition, it may:

- publish a limited notice within the United States of its upcoming offering pursuant to the Securities Act Rule 134 safe harbor;
- circulate a preliminary prospectus (often referred to as a “red herring”) that meets the requirements of Section 10 of the Securities Act, including a price range for the offering;
- conduct a road show and solicit “buy” orders; and
- under certain circumstances, use a free writing prospectus, or FWP.

### Limited Post-Filing Communications – Securities Act Rule 134

Rule 134 provides that certain limited written communications related to a securities offering as to which a registration statement has been filed will be exempt from the restrictions applicable to written offers (because they will not be considered to be a prospectus). Rule 134 is only available once a preliminary prospectus that meets the requirements of Section 10 has been filed. IPO issuers may rely on Rule 134 before filing a price range prospectus, although the Rule does require a price range prospectus for certain specific statements, as discussed below.<sup>16</sup>

The information permitted by Rule 134 includes:

- certain basic factual information about the legal identity and business location of the issuer, including contact details for the issuer;
- the title and amounts of securities being offered;
- a brief description of the general type of business of the issuer, limited to information such as the general types of products it sells;
- the price of the security or the method for determining price (in the case of an IPO, this information cannot be provided until a price range prospectus has been filed);
- in the case of a fixed-income security, the final maturity, interest rate, or yield (in the case of an IPO, this information cannot be provided until a price range prospectus has been filed);
- anticipated use of proceeds, if then disclosed in the prospectus on file;
- the name, address, phone number, and email address of the sender of the communication, and whether or not it is participating in the offering;
- the names of all underwriters participating in the offering and their additional roles in the underwriting syndicate;
- the anticipated schedule for the offering, and a description of marketing events;
- a description of the procedures by which the underwriters will conduct the offering and information about procedures for opening accounts and submitting indications of interest, including in connection with directed share programs;

- in the case of rights offerings, the class of securities the holders of which will be entitled to subscribe, the subscription ratio, and certain additional information;
- certain additional information, including the names of selling security holders, the exchanges on which the securities will be listed, and the ticker symbols; and
- a required legend.

It is customary to have a Rule 134 press release on the first day of the road show, announcing the launch of the offering.

#### PRACTICE POINT

Rule 134 is often relied on for the press release announcing the commencement of a registered offering, as well as the “tombstone” advertisement following the closing.

### Preliminary Prospectus (Red Herring)

A “red herring” or “red” is the colloquial term for a certain type of preliminary prospectus permitted by Section 10(b) of the Securities Act. A red herring can be used to make written offers and solicit customer orders but cannot be used to satisfy the prospectus delivery obligations that apply when orders are confirmed and securities are sold. This is because a red herring is a Section 10(b) prospectus (*i.e.*, does not contain all of the information required by Section 10(a) of the Securities Act).

Securities Act Rule 430 provides that, in order to be a Section 10(b) prospectus, a red herring must include substantially all of the information required in a final prospectus, other than the final offering price and matters that depend on the offering price, such as offering proceeds and underwriting discounts.

In addition, S-K Item 501(b)(3) requires a preliminary prospectus used in an IPO to contain a “*bona fide* estimate” of the price range. The SEC Staff generally takes the position that a *bona fide* price range means a range no larger than \$2 (for ranges below \$10) or 20% of the high end of the range (for maximum prices above \$10). If a filed prospectus does not yet include a *bona fide* price range or otherwise does not comply with Rule 430, it is known in the trade as a “pink herring” – *i.e.*, a filed preliminary prospectus that is not quite a red because it does not yet meet the requirements of Section 10(b) and cannot be used to solicit customer orders.

A foreign private issuer that is already listed on a non-US stock exchange is sometimes permitted to avoid providing a price range but rather provides a recent share closing price on the non-US stock exchange, along with a US dollar convenience translation of that amount. Whether the Staff would permit this practice for a particular US IPO by a foreign private issuer, or even if permitted, whether it is appropriate from a marketing point of view, will depend on the facts and circumstances of the IPO, the nature of the non-US trading market, and several other factors.

#### PRACTICE POINT

Regulation S-K Item 501(b)(10) specifies the required “subject to completion” legend that must appear on the front cover of any preliminary prospectus. This legend is traditionally printed in red ink, and gave rise to the name “red herring.”

### Road Shows

Road shows are the duck-billed platypus of the securities world – the evolutionary missing link with traits of both oral and written offers. Securities Act Rule 433(h)(4) provides a formal definition of “road show” as an offer (other than a statutory prospectus) that “contains a presentation regarding an offering by one or more members of an issuer’s management ... and includes discussion of one or more of the issuer, such management and the securities being offered.”

You can see why a traditional road show (an intensive series of in-person meetings with key members of the buy-side community over a multi-day period in multiple cities and, sometimes, in multiple countries) would be an oral offer. But what about the slide deck that is traditionally handed out and reviewed at road show meetings? And what if the road show is recorded and broadcast over the internet?

The explanatory note to Rule 433(d)(8) states:

A communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not separately is deemed to be part of the road show. Therefore, if the road show is not a written communication, such a simultaneous communication (even if it would otherwise be a graphic communication or other written communication) is also deemed not to be written.

As a result, road show slides and video clips are not considered to be written offers as long as copies are not left behind. Even handouts are not written offers so long as they are collected at the end of the presentation. If they are left behind, however, they become an FWP and are subject to a variety of detailed requirements spelled out in Securities Act Rules 164 and 433, which we discuss further below.

It has become customary to prepare a video recording of the road show for the benefit of retail investors. The video version will not need to be filed as an FWP so long as it is available on the internet to all comers and covers the same ground as the live road show.

#### **PRACTICE POINT**

It is customary to pass out copies of the slide deck at road show meetings, but all of these flip books are retrieved at the end of the meeting so the slides do not have to be treated as an FWP.

## **Free Writing Prospectuses (FWPs)**

### **Overview**

Under Securities Act Rule 405, an FWP is any written communication that constitutes an offer to sell or a solicitation of an offer to buy the securities that are the subject of a registered offering that is used *after* a registration statement has been filed. A confidential submission does not trigger the Rule's definition of an FWP. A supplement to a statutory prospectus can be an FWP, as can press releases, emails, blast voicemails, and even press interviews.

The use of FWPs is governed by Securities Act Rules 164 and 433. Rule 164 provides that, once a registration statement has been filed, an issuer or an underwriter may use an FWP if, among other things, the issuer is an eligible issuer, the offering is an eligible offering, and the additional conditions of Rule 433 are met.<sup>17</sup> We discuss the key points of using FWPs below.

### **Why Are FWPs Permitted? – Securities Act Rule 164(a)**

Recall that, under Section 5(b)(1), no prospectus other than a prospectus meeting the requirements of Section 10 may be used to make offers. Rule 164(a) provides that an FWP meeting the requirements of Rule 433 will be a Section 10(b) prospectus – that is, a prospectus that may be used to make offers after a registration statement has been filed. However, an FWP may not be used as a *final* prospectus to satisfy the prospectus delivery requirements associated with the delivery of securities after pricing.

## Use of FWP – Securities Act Rule 433(b)

Rule 433(b) distinguishes between the use of FWPs by certain seasoned issuers on the one hand, and IPO issuers or unseasoned public companies on the other.

WKSIs, issuers eligible to use Form S-3 or F-3, and certain majority-owned subsidiaries of the foregoing may generally use an FWP after filing a registration statement that includes a Section 10 prospectus.

Things work differently for IPO issuers, as well as certain unseasoned public companies.

- For an IPO issuer, the prospectus must contain a bona fide price range in order to qualify as a Section 10(b) prospectus that can be used to solicit customer orders during the road show. An IPO issuer cannot use an FWP until it has filed a price range prospectus. The requirement to have a price range prospectus does not apply, however, in the case of a media FWP that was not published in exchange for payment and was filed with a required legend within four business days of becoming aware of its appearance in the press (more on this below).
- A Section 10 prospectus must accompany or precede the FWP, unless either:
  - a statutory prospectus has already been provided and there is no material change from the most recent prospectus on file with the SEC; or
  - the FWP is a media FWP that was not published in exchange for payment and was timely filed with a legend.

Note that an electronic FWP emailed with the proper hyperlink will obviate the need for physical delivery of a prospectus.

## What Can Be in an FWP? – Securities Act Rule 433(c)

An FWP may include information “the substance of which is not included in the registration statement.” But this information must not conflict with either:

- information contained in the registration statement; or
- information in any of the issuer’s Exchange Act reports that are incorporated by reference into the registration statement.

FWPs must also contain a prescribed legend, and may not include disclaimers of responsibility or liability that are impermissible in a statutory prospectus.<sup>18</sup> These include: disclaimers regarding accuracy, completeness, or reliance by investors; statements requiring investors to read the registration statement; language indicating that the FWP is not an offer; and, for filed FWPs, statements that the information is confidential.<sup>19</sup>

### PRACTICE POINT

An FWP is often used when changes are made to an IPO that is already on the road. Typically, these changes are implemented in an amended registration statement filed with the SEC and a concurrent distribution of an FWP to prospective purchasers in the IPO. The FWP in this circumstance is typically a short summary of the changes included in the amended registration statement with the (important) changed pages attached. Circulating the FWP to prospective purchasers is a less cumbersome way to inform the market of deal changes than circulating an entire new preliminary prospectus.

## Media FWPs – Securities Act Rule 433(f)

Rule 433(f) provides that any written offer that includes information provided, authorized, or approved by the issuer or any other offering participant that is prepared and disseminated by an unaffiliated media

third party will be deemed to be an issuer FWP. Nevertheless, the requirements for prospectus delivery, legending, and filing on the date of first use that would otherwise apply to FWPs will not apply if:

- no payment is made or consideration given for the publication by the issuer or other offering participants; and
- the issuer or other offering participant files the media FWP with the required legend within four business days after the issuer or other offering participant becomes aware of publication or dissemination (but note that the FWP need not be filed if the substance of the written communication has previously been filed).

Any filing of a media FWP in these circumstances may include information that the issuer or offering participant believes is needed to correct information included in the media FWP. In addition, in lieu of filing the media communication as actually published, the issuer or offering participant may file a copy of the materials provided to the media, including transcripts of interviews.

#### **PRACTICE POINT**

A media FWP is how the SEC's rules deal with an article containing unfortunate quotes from an issuer or other offering participant that appears at an inopportune point in the offering process. If the article could be construed to be an "offer," then treating it as a media FWP is a good compromise solution – the offer will not violate Section 5, but the issuer will be required to accept Section 12 liability for the article's contents. It is usually advisable for issuers to refrain from giving media interviews immediately prior to or during the offering process.

#### **When Must FWPs Be Filed? – Securities Act Rule 433(d)**

The general rule is that an FWP must be filed with the SEC on the day the FWP is first used. If you miss the SEC's EDGAR filing cutoff for that day (5:30 p.m. Eastern Standard Time) you should still file the FWP as soon as you can.<sup>20</sup>

Issuers must generally file any issuer FWP, which is defined broadly to include an FWP prepared by or on behalf of the issuer or an FWP used or referred to by the issuer, as well as a description of the final terms of the securities in a pricing term sheet (whether contained in an issuer or an underwriter FWP). By contrast, an underwriter only needs to file an FWP that it distributes in a manner reasonably designed to lead to its "broad unrestricted dissemination." The SEC has explained that an FWP prepared by an underwriter that is only made available on a website restricted to the underwriter's customers or a subset of its customers will not require filing with the SEC, nor will an email sent by an underwriter to its customers, regardless of the number of customers involved.<sup>21</sup>

There are certain exceptions to the requirement to file an FWP. These include:

- an FWP does not need to be filed if it does not contain substantive "changes from or additions" to a previously filed FWP;
- an issuer does not need to file issuer information contained in an underwriter FWP if that information is already included in a previously filed statutory prospectus or FWP relating to the offering; and
- an FWP that is a preliminary term sheet does not need to be filed (recall that an FWP that is a final pricing term sheet must be filed by the issuer within two days of the later of establishing the terms or the date of first use).

#### **Certain Failures to File and Failures to Include the Required Legend – Securities Act Rule 164**

Failure to comply with the conditions of Rule 433 will potentially result in a violation of Section 5(b)(1) of the Securities Act. This has serious consequences, including a potential right of rescission under Section 12(a)(1).

Rule 164 provides some welcome relief from this harsh result in the case of certain “immaterial or unintentional” deviations from the requirements of Rule 433. In particular:

- a failure to file or a delay in filing an FWP will not be a violation so long as a good faith and reasonable effort was made to comply with the filing requirement and the FWP is filed as soon as practicable after the discovery of the failure to file;
- a failure to include the required legend will not be a violation, so long as: (1) a good faith and reasonable effort was made to comply with the legending requirement; (2) the FWP is amended to include the required legend as soon as practicable after the discovery of the omitted or incorrect legend; and (3) if the FWP was transmitted without the required legend, it is subsequently retransmitted with the legend by substantially the same means as, and directed to substantially the same purchasers to whom, the original FWP was sent; and
- a failure to comply with the record retention requirements of Rule 433 will not be a violation so long as a good faith and reasonable effort is made to comply with these record retention requirements.

## **Restrictions on Communications After Effectiveness of the Registration Statement; Prospectus Delivery**

Some communications restrictions continue after the offering. After effectiveness of the registration statement, underwriters (and other dealers) will have an obligation to deliver (or make available in accordance with the “access equals delivery” protocol) a final prospectus during a period of time following effectiveness, even in connection with secondary market resales. That period is 25 calendar days in the case of an IPO that will be listed on a US exchange.<sup>22</sup> For a number of reasons, including that the prospectus being made available needs to continue to be accurate<sup>23</sup> until the expiration of the 25-day prospectus delivery period, certain limitations on other communications by the issuer during this period will remain in place. Once the 25-day prospectus delivery period has expired, Securities Act-related limitations on communications in connection with the offering can generally be eliminated.

## **Concurrent Private Offerings**

Given that the registration process can take many months, an issuer may want, or need, to pursue a private offering that is not registered with the SEC on the same schedule as the offering. Concurrent public and private offerings are permitted, but there are two primary concerns to keep in mind. First, you will not want to run afoul of Section 4(a)(2)’s restrictions on general solicitation in private offerings, in view of the public filing of the registration statement. Second, you will want to avoid inadvertently precluding offerees in the private placement from participating in the public offering by virtue of the type of information you provide them in the private process.

There are two ways to avoid tripping over the ban on general solicitation in private offerings. First, if the private offering purchasers are all QIBs, then it will not matter that the registration statement has been filed. In the *Black Box* and *Squadron Ellenoff* no-action letters, the SEC Staff laid out a limited policy exception to allow concurrent private offerings to QIBs and two or three additional large institutional accredited investors even though there was an ongoing public offering.<sup>24</sup> We call this the “who” exception. Alternatively, it is possible to structure a good private placement to investors who are not QIBs if they were attracted to the private offering by a means other than the registration statement, for example, as a result of a substantive pre-existing relationship with the issuer.<sup>25</sup> We call this the “how” exception.

The other issue that comes up in the context of concurrent public and private offerings is that potential private investors may expect information that is not typically part of the IPO disclosure package, particularly projections. Once a private investor has received projections from the issuer or placement agent in connection with the private offering, you will have to think carefully whether it will be wise to

include that investor in the public offering. In most cases of concurrent public and private offerings, it can prove difficult to keep both the public and private options open as to the same institutional investor. At some point, you and your banks will need to decide which investors are exclusively private side and which are exclusively public side.

#### **PRACTICE POINT**

Concurrent public and private offerings are permissible, but you will want to be very thoughtful about who participates in which offering process, how they are solicited, and what disclosure they are provided.

## **Research Reports**

Securities Act Rules 137, 138, and 139 set out circumstances under which a broker-dealer may publish research contemporaneously with a registered offering without running afoul of US restrictions on publicity. These safe harbors are *not* available to issuers. In addition, compliance with these rules does not obviate the need for broker-dealers to comply with other research-related requirements, such as those promulgated by FINRA.

In addition, the JOBS Act extends the principles underlying existing Securities Act Rule 139 to provide broker-dealers with an exclusion from the definition of offer in Securities Act Section 2(a)(3) for certain research reports relating to EGCs.<sup>26</sup>

#### **PRACTICE POINT**

Practices in this area continue to develop. Although we have not seen the emergence of pre-deal research on EGC IPOs by participating broker-dealers, analysts now routinely publish research reports on newly public EGCs as much as 15 days earlier than under prior law for IPOs and during some previously blacked-out periods immediately following EGC secondary offerings.

## **Definition of Research Report**

For purposes of Rules 137, 138, and 139, a “research report” is defined as a written communication that includes information, opinions, or recommendations with respect to securities or an issuer, or an analysis of securities or an issuer, whether or not it provides information reasonably sufficient for an investment decision.<sup>27</sup> The term “written communication” includes a wide variety of electronic communication, such as emails and websites. According to the SEC, the definition of research report is intended to encompass all types of research reports, whether issuer-specific or industry compendiums separately identifying the issuer.<sup>28</sup> In addition, the definition does not (and the related safe harbors do not) cover oral communications, which accordingly may be offers subject to Securities Act Section 12(a)(2) liability.<sup>29</sup>

## **Publication of Research by Non-Participating Broker-Dealers – Rule 137**

Rule 137 provides that a broker-dealer that is not a participant in a registered offering but publishes or distributes research will not be deemed to offer securities in a distribution and, therefore, will not fall within the statutory definition of “underwriter” set forth in Section 2(a)(11) of the Securities Act.

Rule 137 applies to public companies as well as non-reporting issuers such as voluntary filers. It is available only to broker-dealers that are not participating in the registered offering of the issuer’s securities and have not received compensation for participating in the securities distribution. Rule 137 also requires that the broker-dealer publish or distribute the research report in the regular course of its business.

## Publication of Research by an Underwriter on Other Securities of an Issuer – Rule 138

Rule 138 provides that an underwriter participating in a distribution of securities by an issuer that is Form S-3 or F-3 eligible (or, in the case of a foreign private issuer only, meets certain conditions of Form F-3) is not deemed to make an offer of those securities if it publishes or distributes research that is confined to a different type of security of that same issuer. For example, Rule 138 allows publication of research with respect to debt securities by an underwriter when participating in a distribution of the issuer's common stock, and vice versa.

Rule 138:

- covers research reports on reporting issuers that are current in their Exchange Act reporting (*i.e.*, it does not cover voluntary filers); and
- includes a requirement that the broker or dealer publish research reports on the types of securities in question in the regular course of its business.

The SEC has explained that the underwriter need not have a history of publishing research reports about the particular issuer or its securities, although it expressed concerns about situations in which an underwriter "begins publishing research about a different type of security around the time of a public offering of an issuer's security and does not have a history of publishing research on those types of securities."<sup>30</sup>

## Publication of Research About the Securities Being Offered by an Underwriter – Rule 139

Rule 139 provides that an underwriter participating in a distribution of securities by certain seasoned issuers can publish ongoing research about the issuer and its securities without being deemed to offer those securities by way of its research reports.<sup>31</sup> Rule 139 research can take the form of issuer-specific reports, or more general reports covering an industry sector. Rule 139 covers Form S-3 or F-3 eligible issuers that are current in their Exchange Act reporting for issuer-specific research reports; all Exchange Act reporting companies for industry research reports; and certain foreign private issuers for both types of reports. The Rule does not, however, cover voluntary filers.

- *Issuer-specific reports:* To qualify for the Rule 139(a)(1) issuer-specific research report safe harbor, the report must be published by the underwriter in the regular course of its business. That publication may not represent the initiation of publication of research about the issuer or its securities (or re-initiation of publication following discontinuation). However, the SEC has explained that this requirement will be deemed satisfied if the underwriter has previously published research on the issuer or its securities at least once or has published one such report following discontinuing coverage.<sup>32</sup> The concept of discontinuation of coverage is not defined in Rule 139.
- *Industry reports:* To satisfy the Rule 139(a)(2) industry research report safe harbor, the underwriter must publish research in the regular course of its business and, at the time of the publication of the industry research report, must include similar information about the issuer or its securities in similar reports.<sup>33</sup>

### PRACTICE POINT

Rule 139 no longer contains the prior requirement that the broker-dealer not make a recommendation in the report more favorable than that contained in previous reports, and in fact the broker-dealer need not have included any recommendation in its prior reports.<sup>34</sup>



## ENDNOTES

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<sup>1</sup> In February 2019, the SEC proposed a rule that would allow all issuers to conduct TTW meetings. The comment period for the proposed rule closed on April 29, 2019. See *Solicitations of Interest Prior to a Registered Public Offering*, Release No. 33-10607 (February 19, 2019), p. 10:

We are proposing an exemption from the gun-jumping provisions of Section 5 of the Securities Act for test-the-waters communications by an issuer contemplating a registered securities offering. Specifically, the proposed exemption would permit any issuer or person authorized to act on behalf of an issuer, including an underwriter, either prior to or following the filing of a registration statement, to engage in oral or written communications with potential investors that are, or that the issuer reasonably believes are, QIBs or IALs, to determine whether such investors might have an interest in the contemplated offering.

<sup>2</sup> See *Guidelines for the Release of Information by Issuers Whose Securities Are in Registration*, Release No. 33-5180 (August 16, 1971).

<sup>3</sup> *Securities Offering Reform Release*, pp. 76-77.

<sup>4</sup> Under Rule 168, “factual business information” means:

- factual information about the issuer, its business, or financial developments, or other aspects of its business;
- advertisements of, or other information about, the issuer’s products or services; and
- dividend notices.

“Forward-looking information” means:

- projections of an issuer’s revenues, income or loss, earnings or loss per share, capital expenditures, dividends, capital structure, or other financial items;
- statements about management’s plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;
- statements about the issuer’s future economic performance, including statements generally contemplated by the issuer’s MD&A; and
- assumptions underlying or relating to the foregoing.

<sup>5</sup> *Securities Offering Reform Release*, n.81.

<sup>6</sup> *Id.* at 63.

<sup>7</sup> *Id.* at 64.

<sup>8</sup> *Id.* at 64.

<sup>9</sup> *Id.* at n.147.

<sup>10</sup> See *Proposed Rule: Revisions to Rule 163*, Release No. 33-9098 (December 18, 2009).

<sup>11</sup> See *Securities Offering Reform Release*, p. 82.

<sup>12</sup> Securities Act Rule 405, definition of “Well-Known Seasoned Issuer,” para. (1).

<sup>13</sup> *Id.* para. (2). For purposes of determining whether an issuer qualifies as a WKSJ, the determination date is the later of: (i) the time of filing of the issuer’s most recent shelf registration statement; (ii) the time of the most recent amendment to its shelf registration statement for purposes of satisfying Section 10(a)(3); or (iii) the date of filing the issuer’s most recent annual report on Form 10-K or 20-F (if it has not filed a shelf registration statement for the prior 16 months).

<sup>14</sup> The SEC interprets “common equity” for these purposes to include a class of participating voting or non-voting preferred stock of a foreign issuer where the issuance of the preferred stock results from requirements of the applicable non-US jurisdiction and where the class of preferred stock has liquidation or dividend preferences and other terms that cause it to be the “substantial economic equivalent” of a class of common stock. See *Securities Offering Reform Release*, pp. 26-27.

<sup>15</sup> An “ineligible issuer” includes issuers that: (1) are not current in their Exchange Act reporting obligations (other than certain enumerated Form 8-K filings); (2) are blank check companies, shell companies, penny stock issuers, or limited partnerships offering other than through a firm commitment underwriting; (3) have filed for bankruptcy within the past three years, although ineligibility will terminate if an issuer has filed an annual report with audited financial statements subsequent to its emergence from bankruptcy; (4) within the past three years, have been convicted of any felony or misdemeanor under certain provisions of the Exchange Act; (5) within the past three years, were made the subject of any judicial or administrative decree or order arising out of a government action that prohibits certain conduct or activities regarding (including future violations of) the US federal securities laws, requires them to cease and desist from violating the antifraud provisions of the US federal securities laws or determines that they have violated those antifraud provisions; or (6) have had any registration statement subject to a refusal order or stop order within the past three years. See Securities Act Rule 405, definition of “Ineligible Issuer.”

<sup>16</sup> See *Securities Offering Reform Release* at n.185.

17 Ineligible issuers include blank check companies and shell companies, while ineligible offerings include business combinations.  
See Rules 164(e), (f), and (g).

18 *Securities Offering Reform Release*, pp. 111-112.

19 *Id.*

20 See C&DI, Securities Act Rules, Question 232.02.

21 *Securities Offering Reform Release*, n.267.

22 Securities Act Rule 174(d).

23 See *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1095-1096 (2d Cir. 1972).

24 See Division of Corporation Finance no-action letters to *Black Box Incorporated* (June 26, 1990) and *Squadron Ellenoff, Pleasant & Lehrer* (Feb. 28, 1992). The SEC stated in 2007 guidance that the *Black Box* and *Squadron Ellenoff* no-action letters remain valid. See *Revisions of Limited Offering Exemptions in Regulation D*, Release No. 33-8828 (Aug. 3, 2007) (*2007 Regulation D Release*), n.126.

25 *2007 Regulation D Release*, pp. 55-56; see also C&DI 139.25 (discussing the SEC's 2007 guidance).

26 See JOBS Act Section 105(a) (revising Securities Act Section 2(a)(3)).

27 Securities Act Rules 137(e), 138(d), 139(d). Note that this definition of "research report" is not the same as the definition set forth in Regulation AC or the FINRA rules.

28 *Securities Offering Reform Release*, p. 158.

29 *Id.* at 160.

30 *Id.* at 164.

31 On October 6, 2017, the Fair Access to Investment Research Act (the FAIR Act) was signed into law. The FAIR Act required the SEC to amend Rule 139 to cover certain investment fund research reports. On November 30, 2018, in response to the FAIR Act's mandate, the SEC adopted Rule 139b under the Securities Act to establish a non-exclusive safe harbor for broker-dealers that participate in offerings by certain funds to publish or distribute research reports on such funds without those research reports being deemed offers to sell the fund's securities. Rule 139b went into effect on January 14, 2019.

32 *Securities Offering Reform Release*, p. 167.

33 Given that, at the time of the publication of an industry research report, the report must include similar information about the issuer or its securities in similar reports, the Rule 139 industry report safe harbor also effectively requires that the industry report not represent the initiation of research coverage on the issuer or its securities.

34 *Securities Offering Reform Release*, p. 168.

# CHAPTER 7

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## Issuer Financial Statements

### Background to Financial Statement Requirements

Public securities offerings registered with the SEC under the Securities Act generally require the filing of a registration statement with the SEC and the distribution of a prospectus in connection with the offering. The registration statement and prospectus must contain certain financial statements and other financial information regarding the issuer's financial condition and results of operations. The financial statement requirements for registration statements of foreign private issuers are found in Items 3, 8, 17, and 18 of Form 20-F, and in Regulation S-X (S-X).

#### PRACTICE POINT

Compliance with the SEC's financial information requirements is usually the most difficult challenge for foreign private issuers seeking to access the US public markets. The requirements are technical and SEC-experienced members of the issuer's audit team must be involved at the earliest possible stage.

Financial statements contained in the offering circular for many types of unregistered offerings (such as Rule 144A transactions) will typically track the financial statement requirements for a public prospectus closely, although market practice may permit deviations in certain circumstances. We discuss practice in the Rule 144A market below under "Special Considerations in Rule 144A Transactions."

### What Financial Statements Must Be Included in Public Offerings?

The following tables summarize the basic financial statement requirements for issuers in registered offerings.<sup>1</sup> Note that much of the basic information can be incorporated by reference for issuers eligible to use Form F-3, and for certain issuers filing a registration statement on Form F-1.<sup>2</sup>

#### PRACTICE POINT

Although an issuer may be eligible for incorporation by reference, it should nonetheless consult its underwriters before electing to incorporate all required financial information. For marketing purposes, it may be desirable to provide the financial information directly in the printed offering document.

## The Basic Requirements for Public Offerings

### Annual Audited Financial Statements

Consolidated annual audited financial statements of the issuer consisting of:<sup>3</sup>

- balance sheet;
- statements of comprehensive income (or a statement of net income if there was no other comprehensive income);
- statement of changes in equity;
- statement of cash flows;
- related notes and schedules required by the system of accounting under which the financial statements were prepared; and
- if not included in the primary financial statements, a note analyzing the changes in each caption of shareholders' equity presented in the balance sheet.

Audited financial statements included in a registration statement (or annual report) must be prepared in accordance with:

- US GAAP;
- IASB IFRS; or
- local GAAP/non-IASB IFRS reconciled to US GAAP, as described below.<sup>4</sup>

Audited financial statements must cover each of the latest three fiscal years,<sup>5</sup> with certain exceptions:

- if the issuer has been in existence less than the required three years, financial information covering the issuer's predecessor entities (if any) may need to be provided;<sup>6</sup>
- if a jurisdiction outside the United States does not require a balance sheet for the earliest year of the three-year period, that balance sheet may be omitted;<sup>7</sup>
- in an initial registration statement, if the financial statements are presented in accordance with US GAAP (rather than reconciled to US GAAP), the earliest of the three years of financial statements may be omitted if that information has not previously been included in a filing made under the Securities Act or the Exchange Act.<sup>8</sup> This accommodation does not apply to financial statements presented in accordance with IASB IFRS unless the issuer is applying IASB IFRS for the first time;<sup>9</sup> and
- in an EGC IPO registration statement, as discussed below.

Under certain circumstances, audited financial statements may cover nine to 12 months rather than a full fiscal year for one of the required years.<sup>10</sup>

Audited financial statements must be accompanied by an audit report covering each of the audited periods.<sup>11</sup>

Audited financial statements for an issuer must be accompanied by an audit report issued by independent public accountants that are registered with the Public Company Accounting Oversight Board (the PCAOB) under auditing standards promulgated by the PCAOB.<sup>12</sup> The accountants must meet SEC and PCAOB standards for independence.<sup>13</sup> The SEC Staff will not object if the audit report states that the audit was also conducted in accordance with home-country generally accepted accounting standards.<sup>14</sup>

## Interim Unaudited Financial Statements

If a registration statement becomes effective more than nine months after the end of the last audited fiscal year, the issuer must provide consolidated interim financial statements.<sup>15</sup>

Those financial statements:

- may be unaudited but must be prepared in accordance with US GAAP or IASB IFRS,<sup>16</sup> or local GAAP/non-IASB IFRS if reconciled to US GAAP;<sup>17</sup>
- must cover at least the first six months of the fiscal year;
- should include a balance sheet, statement of comprehensive income, statement of cash flows, statement of changes in equity, and selected note disclosures;
- may be in condensed form, as long as they contain the major line items from the latest audited financial statements and include the major components of assets, liabilities, and equity (in the case of the balance sheet), income and expenses (in the case of the statement of comprehensive income), and the major subtotals of cash flows (in the case of the statement of cash flows); and
- should include comparative interim statements for the same period in the prior fiscal year, except that the requirement for comparative balance sheet information may be met by presenting the year-end balance sheet.<sup>18</sup>

## EGC Offerings

An EGC may conduct its initial public equity offering using two years, rather than three years, of audited financial statements and as few as two years, rather than five years, of selected financial data.<sup>19</sup>

After its IPO, an EGC phases into full compliance by adding one additional year of financial statements in each future year until it presents the traditional three years of audited financial statements plus two years of selected financial data.<sup>20</sup> The required MD&A would cover only the years for which audited financial statements are provided.<sup>21</sup>

## Selected Financial Information

A registration statement must include selected historical financial information, comprising statements of comprehensive income and balance sheet data for each of the last five fiscal years (or such shorter period as the issuer has been in operation), with the following exceptions:<sup>22</sup>

- selected financial data for either or both of the two earliest years may be omitted if the issuer represents to the SEC in the review process that such information cannot be provided, or cannot be provided on a restated basis, without unreasonable effort or expense;<sup>23</sup> and
- EGCs may present less than five years of selected financial information, as discussed above.

Financial information may be prepared based on US GAAP or IASB IFRS, or on the same basis used in the primary financial statements (that is, local GAAP/non-IASB IFRS) with a reconciliation to US GAAP.<sup>24</sup> As we discuss below, that reconciliation need only cover (i) those periods for which the issuer is required to reconcile its primary financial statements and (ii) any interim periods.<sup>25</sup>

A foreign private issuer that uses US GAAP in its US IPO registration statement but has available selected financial information covering the five-year period under local (non-IFRS) GAAP will generally be required to include that local GAAP selected financial information.

If interim unaudited financial statements are included, the selected financial data should be updated for that interim period, and comparative data from the same period in the prior fiscal year should be provided.<sup>26</sup>

Selected financial data should be presented in the same currency as the financial statements.<sup>27</sup>

### Acquired Company Financial Information and Pro Forma Financial Information

Depending on the size of the acquisition and its significance to the issuer (which is measured in various ways – not all of them intuitive), audited annual financial statements for the most recent one, two, or three fiscal years must be included, plus appropriate unaudited interim financial statements under S-X Rule 3-05, as described in more detail below. An EGC need only provide two years of acquired company financials, even for acquisitions at the highest level of materiality.

Under S-X Article 11, when acquired company financial statements are included in a registration statement (and in certain other instances), pro forma financial information under S-X must also be included, covering the most recently completed fiscal year and the interim period in the current fiscal year.

### Statement of Capitalization and Indebtedness

A registration statement must include a statement of capitalization and indebtedness.<sup>28</sup> Although the rules require the capitalization table to be as of a date no earlier than 60 days prior to the date of the registration statement,<sup>29</sup> the SEC Staff will not object if a foreign private issuer presents the statement as of the same date as the most recent balance sheet required in the registration statement.<sup>30</sup> If, however, there have been or will be significant subsequent changes in capitalization (for example, securities issuances including the proposed IPO), those changes should be reflected in “as adjusted” columns or footnotes to the table.<sup>31</sup>

## What Financial Statements Must Be Included to Begin SEC Review?

Normally, a registration statement must include – as of the date of filing – all of the financial statements listed in the tables above. However, foreign private issuers that are EGCs and registering with the SEC for the first time may submit draft registration statements for *confidential* review, which is protected from disclosure under the Freedom of Information Act (FOIA).<sup>32</sup> Foreign private issuers that are not EGCs may also submit draft registration statements for *nonpublic* review, which affords more limited protection from FOIA.<sup>33</sup>

During this review process, financial statements may become “stale” (*i.e.*, are too old and must be updated, as described below). Consequently, a foreign private issuer that is an EGC may omit from its confidential submissions annual and interim financial data that it reasonably believes will not be required *at the time of the offering*.<sup>34</sup> It must, however, include in its public filings<sup>35</sup> any interim information that at the time of the offering will be subsumed in a then-required longer interim or annual historical period.<sup>36</sup>

A foreign private issuer that is not an EGC may omit from its nonpublic submissions the annual and interim financial data it reasonably believes will not be required *at the time the issuer files publicly*.<sup>37</sup>

In addition, an EGC or a non-EGC may omit from its confidential or nonpublic submissions the financial statements of an acquired business required by S-X Rule 3-05 that the issuer reasonably believes will not be required at the time of the offering.<sup>38</sup> The SEC Staff has signaled a more flexible approach in reviewing requests to omit financial information under S-X Rule 3-13, based on an issuer's specific circumstances.<sup>39</sup>

## When Does Financial Information Go “Stale”?

Understanding the timing requirements for the provision of financial statements is almost as critical as understanding the scope of the financial information required. The determination of when financial statements go “stale” is sure to come up at the all-hands meeting, and planning to have the necessary financial information prepared on time is an essential part of the offering process. Among other considerations, the SEC Staff has a policy against commencing review of a filing unless the financial statements in the filing are not stale on the filing date.<sup>40</sup>

The following tables summarize financial statement staleness requirements, measured by the number of days between the effective date of the registration statement (or, by analogy, the pricing date of a Rule 144A offering if the transaction is intended to mirror SEC requirements) and the date of the financial statements in the filing.<sup>41</sup> For any of the time frames noted below, if the last day before the financial statements go stale is a Saturday, Sunday, or US federal holiday, Securities Act Rule 417 allows the filing to be made on the next business day, thereby effectively postponing the staleness date.

### Staleness of Annual Audited Financial Statements

The last year of audited financial statements cannot be more than 15 months old at the time of the offering or listing, subject to the two exceptions listed below.<sup>42</sup> This means that an issuer with a December 31 fiscal year-end must have its registration statement “go effective” before **March 31**, or else annual audited financial statements for the year just ended must be included.

In the case of a registration statement relating to an IPO, the audited financial statements must be as of a date not older than 12 months prior to the time the document is filed.<sup>43</sup> In other words, an IPO issuer with a **December 31** fiscal year-end cannot file a registration statement after **January 1** without including audited financial statements for the year just ended (or audited financial statements as of an interim date less than 12 months prior to the filing). However, if the issuer is already public in another jurisdiction, the 12-month rule does not apply.<sup>44</sup> In addition, an issuer may comply with the 15-month rule in an IPO where it is able to represent that it is not required to comply with this requirement in any other jurisdiction outside the United States and that complying with the requirement is impracticable or would involve undue hardship.<sup>45</sup>

In the case of a registration statement relating to an offering of securities (i) upon the exercise of outstanding rights granted *pro rata* to all existing security holders of the applicable class, (ii) pursuant to a dividend or interest reinvestment plan, or (iii) upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants, the financial statements may be up to 18 months old at the time of the offering.<sup>46</sup> This means that an issuer with a **December 31** fiscal year-end must have its registration statement for these types of transactions go effective before **June 30**, or else annual audited financial statements for the year just ended must be included.

### Staleness of Interim Unaudited Financial Statements

If a registration statement becomes effective more than nine months after the end of the last audited fiscal year (e.g., **September 30**, in the case of an issuer with a **December 31** fiscal year-end) the issuer must provide unaudited interim financial statements either in accordance with, or reconciled to, US GAAP, or in accordance with IASB IFRS, in either case covering at least the first six months of the year.

In addition, if an issuer publishes interim financial statements that are more current than those required, it must include the more current information in its registration statement.<sup>47</sup> For example, if an issuer with a fiscal year ending **December 31** publishes first quarter information and does a securities offering in July, it must include the first quarter information in its registration statement. Likewise, if such an issuer had already included six months' information in connection with an offering in November and then published third quarter information, it must include the third quarter information.

The more current interim financial information (the first quarter information in the example above) generally need not be reconciled to US GAAP. However, except for financial information prepared in accordance IASB IFRS, a narrative explanation of differences in accounting principles should be provided, and material new reconciling items should be quantified.<sup>48</sup>

## MD&A

Registration statements for foreign private issuers must contain or incorporate by reference an "Operating and Financial Review and Prospects," which contains essentially the same information as the MD&A (so we will refer to this as MD&A).<sup>49</sup> The MD&A requirements for US issuers are set out in S-K Item 303.

### PRACTICE POINT

The purpose of the MD&A is to provide investors with the information necessary to an understanding of an issuer's financial condition, changes in financial condition, and results of operations. It is the place where management interprets the financial statements for investors. A well-written MD&A will focus on trends and uncertainties in the marketplace and will identify the key "drivers" of the issuer's results of operations.<sup>50</sup> It will explain the issuer's business as management sees it, separately discussing each segment's performance if material to an understanding of the business as a whole, and will identify and discuss the key metrics that management uses to evaluate the business' performance and financial health. Many MD&A sections include a general discussion of the issuer's future prospects under a subheading such as "Outlook," and some issuers even go so far as to give specific guidance for the following quarter or the current or following fiscal year. Drafting the MD&A section requires close coordination among the issuer's financial team, its accountants, and counsel and can be a time-consuming exercise.

The SEC has steadily expanded the line-item disclosure requirements for the MD&A, adding specific requirements for off-balance sheet arrangements, long-term contractual obligations,<sup>51</sup> certain derivatives contracts and related-party transactions,<sup>52</sup> as well as critical accounting policies.<sup>53</sup> For an explanation of the SEC's view of required liquidity and capital resources disclosure, see the guidance release from September 2010,<sup>54</sup> and for a sweeping explanation of the purpose of MD&A disclosure, see the guidance release from December 2003.<sup>55</sup>



We summarize MD&A requirements in more detail in Annex D below.

## Using IFRS Without Reconciliation

A foreign private issuer may generally file financial statements prepared in accordance with IASB IFRS without reconciliation to US GAAP.<sup>56</sup> In order to take advantage of this:

- the accounting policy footnote must state compliance with IASB IFRS and the auditor's report must opine on compliance with IASB IFRS, although the issuer may state, and the auditor may opine on, compliance with both IASB IFRS and home-country standards (such as EU IFRS) if there is no difference;<sup>57</sup> and
- published interim financial information must also be prepared using IASB IFRS (and if the effective date of the registration statement or post-effective amendment is more than nine months after the end of the fiscal year, the issuer must explicitly state compliance with International Accounting Standard (IAS) 34).<sup>58</sup>

Note that reconciliation to IASB IFRS in lieu of full compliance with IASB IFRS is not permitted. In addition, foreign private issuers that voluntarily file on domestic US forms (such as Form 10-K) may file financial statements under IASB IFRS, but should prominently disclose that the company meets the foreign private issuer test and is voluntarily filing on domestic forms.<sup>59</sup>

## Reconciliation to US GAAP

### Annual Audited and Interim Unaudited Financial Statements

#### Reconciliation Requirements – Annual and Interim Financial Statements

Annual audited and interim unaudited financial statements in a registration statement may be prepared using either US GAAP, IASB IFRS, or local GAAP.<sup>60</sup> If local GAAP or non-IASB IFRS is used in the preparation of the financial statements, the consolidated financial statements (both annual and interim) must include a reconciliation to US GAAP.<sup>61</sup>

Reconciliation comprises both disclosure of the material variations between local GAAP/non-IASB IFRS, on the one hand, and US GAAP, on the other hand, as well as a numerical quantification of those variations.<sup>62</sup> In the case of registered offerings, the reconciliation must meet Item 18 of Form 20-F (discussed in more detail below).

A foreign private issuer registering for the first time must reconcile only the two most recently completed fiscal years (and any interim period).<sup>63</sup>

Items that frequently require discussion and quantification as a result of the reconciliation requirements include stock compensation, restructuring charges, impairments, deferred or capitalized costs, investments, foreign currency translation, deferred taxes, pensions, derivatives, consolidation, asset retirement obligations, research and development, and revenue recognition.

## Selected Financial Information

### Reconciliation Requirements – Selected Financial Information

Required selected financial information prepared in local GAAP or non-IASB IFRS must be reconciled to US GAAP.<sup>64</sup>

A reconciliation to US GAAP of local GAAP or non-IASB IFRS selected financial information must cover (i) those periods for which the issuer is required to reconcile its primary financial statements and (ii) any interim periods.<sup>65</sup> So, for example, a first-time registrant reporting in local GAAP or non-IASB IFRS would only need to reconcile the most recent two years of its selected financial information (and any interim periods).<sup>66</sup>

If a first-time registrant prepares its primary financial statements in accordance with US GAAP (rather than reconciling to US GAAP), it may present five years of selected financial information under local GAAP or non-IASB IFRS without reconciliation if US GAAP financial data is not available for the oldest three years.<sup>67</sup>

## MD&A

A foreign private issuer's MD&A disclosure should focus on its primary financial statements, whether those statements are prepared in accordance with US GAAP, local GAAP, IASB IFRS, or non-IASB IFRS.<sup>68</sup> To the extent those statements are prepared under local GAAP or non-IASB IFRS, a discussion should be included of the reconciliation to US GAAP and any differences between local GAAP/non-IASB IFRS and US GAAP not otherwise discussed in the reconciliation and needed for an understanding of the financial statements as a whole.<sup>69</sup>

## Audit Reports

Audited financial statements must be accompanied by an audit report, covering each of the audited periods.<sup>70</sup> The SEC will generally not accept a disclaimer of an opinion or an audit report containing a qualification.<sup>71</sup>

Note that the audit report must state that the audit has been conducted in compliance with PCAOB standards, although the SEC Staff will not object if the audit report states that the audit was also conducted in accordance with home-country generally accepted auditing standards or International Standards on Auditing.<sup>72</sup> In addition, an accounting firm (US or non-US) that prepares or issues any audit report with respect to any issuer, or plays a substantial role in the preparation or furnishing of an audit report with respect to any issuer, must be registered with the PCAOB.<sup>73</sup>

In 2017, the PCAOB adopted an auditor reporting standard that requires the auditor's report to address critical audit matters and information about the auditor's tenure in serving as the issuer's independent accounting firm and independence. Provisions relating to a discussion of critical audit matters took effect for large accelerated filers for audits for fiscal years ending on and after June 30, 2019, and for all other companies subject to the requirement, will take effect for fiscal years ending on or after December 15, 2020. Issuers that are EGCs are not subject to the standard.<sup>74</sup>

## Currency Translation; Exchange Rates

Foreign private issuers may state amounts in their financial statements in any currency they deem appropriate (reporting currency),<sup>75</sup> although (except for companies operating in a hyperinflationary environment) operations should generally be measured using the currency of the primary economic environment to measure transactions.<sup>76</sup> The reporting currency must be prominently disclosed on the

face of the financial statements.<sup>77</sup> The issuer must also disclose if dividends will be paid in a different currency as well as any material exchange restrictions or controls relating to the reporting currency, the currency of the issuer's domicile, or the currency in which dividends will be paid.<sup>78</sup>

If the reporting currency is not the US dollar, US dollar-equivalent financial statements or "convenience translations" are not permitted to be included, except that an issuer may present a translation of the most recent fiscal year and any subsequent interim period.<sup>79</sup> The exchange rate used for any convenience translations should be as of the most recent balance sheet date included in the registration statement, except where the exchange rate of the most recent practicable date would yield a materially different result.<sup>80</sup>

## Recent and Probable Acquisitions

### Overview

In addition to financial statements of the issuer, registration statements generally require inclusion of audited financial statements for a significant acquisition of a "business" that has taken place 75 days or more before the offering, or, in the case of the most material acquisitions, as soon as the acquisition becomes "probable."<sup>81</sup> These requirements can be found in S-X Rule 3-05. In addition, where a material acquisition has occurred, or is probable, pro forma financial information complying with S-X Article 11 for the most recent fiscal year and the most recent interim period will generally also be required in the registration statement.<sup>82</sup>

### What Is a "Business"?

The SEC defines the term "business" to include an operating entity or business unit, but excludes machinery and other assets that do not generate a distinct profit or loss stream.<sup>83</sup> It is important to note that the definition of a business under US GAAP (and potentially other GAAPs) differs from the SEC's definition. Accordingly, an acquisition may be a business under US GAAP but not for SEC purposes, and vice versa.

### What Is "Probable"?

Evaluating whether a given transaction is probable involves looking at the facts and circumstances. The SEC Staff has taken the general view that an acquisition becomes probable at least upon the signing of a letter of intent,<sup>84</sup> and has also stated that an acquisition is probable "where registrant's financial statements alone would not provide adequate financial information to make an investment decision."<sup>85</sup> In practice, unless there were significant conditions relating to a proposed acquisition, an issuer would not want to be in the position of arguing and disclosing that an important acquisition is not probable.

### Significance Tests

Whether financial statements for recent and probable acquisitions must be included in the filing also depends upon the "significance" of the acquisition. Significance of an acquired business is evaluated under S-X Rule 3-05 based upon three criteria (which in turn are derived from S-X Rule 1-02(w)):

- the amount of the issuer's investment in the acquired business compared to the issuer's total assets;
- the issuer's share of the total assets of the acquired business compared to the issuer's total assets; and
- the issuer's share of "pre-tax income"<sup>86</sup> from continuing operations of the acquired business compared to the issuer's pre-tax income from continuing operations;

in each case, based on a comparison between the issuer's and the target's most recent annual audited financial statements (which need only be audited for the issuer).

Note that if a US domestic issuer has made a significant acquisition subsequent to its latest fiscal year-end and filed a current report on Form 8-K that included all of the financial statements for the periods required by S-X Rule 3-05 (or included those financial statements in a non-IPO registration statement), the test for a subsequent acquisition may, at the issuer's option, be based upon the S-X Article 11 pro forma amounts for the issuer's latest fiscal year included in the Form 8-K (or the registration statement) rather than the historical amounts for the latest fiscal year.<sup>87</sup> It remains an open question whether a Form 6-K submission by a foreign private issuer will accomplish the same result.

Acquisitions of related businesses are treated as a single acquisition for purposes of the significance tests. Businesses are considered "related" if they are owned by a common seller or under common management, or where the acquisition of one business is conditioned upon the acquisition of each other business or a single common event.<sup>88</sup>

Generally:

- if the acquired business exceeds 20% of any of the three significance criteria, then one year of audited financial statements are required, as well as the interim financial periods that would be required under S-X Rules 3-01 and 3-02;<sup>89</sup>
- if it exceeds 40%, then two years of audited financial statements and the appropriate interim financial periods are required;<sup>90</sup> and
- if it exceeds 50% of any of the three criteria (or if securities are being registered to be offered to the security holders of the acquired business), then three years of audited financial statements and the appropriate interim financial periods are required; however, if the issuer is an EGC, then two years of audited financials for the acquired business may be presented, regardless of whether the issuer presents two or three years of its own financial statements.<sup>91</sup>

## Summary of Financial Statement Requirements

The following table summarizes the general rules for an acquisition that occurred more than 75 days before the offering.

Acquisition Scenario	Reporting Requirement
1. Individual acquisition at or below the 20% significance level.	1. No requirement to include audited or interim financial statements.
2. Individual acquisition (or multiple acquisitions of "related businesses," as described above) in excess of the 20% significance level, but not above the 40% level.	2. Audited financial statements for the most recent fiscal year of the acquired business must be included. Unaudited interim financial statements may need to be included, depending on the time of year that the offering takes place.
3. Multiple acquisitions of unrelated businesses below the 20% significance level individually, but aggregating in excess of the 50% level of significance.	3. Audited financial statements for the most recent fiscal year will be required for a substantial majority of the individually insignificant acquisitions. Unaudited interim financial statements may need to be included, depending on the time of year that the offering takes place.

Acquisition Scenario	Reporting Requirement
4. Individual acquisition (or multiple acquisitions of “related businesses,” as described above) in excess of the 40% significance level, but not above the 50% level.	4. Audited financial statements for the two most recent fiscal years of the acquired business must be included. Unaudited interim financial statements may need to be included, depending on the time of year that the offering takes place.
5. Individual acquisition above the 50% significance level.	5. Audited financial statements for the three most recent fiscal years of the acquired business must be included (or, if the issuer is an EGC, audited financial statements for the two most recent fiscal years of the acquired business must be included). This requirement also applies to acquisitions of this size that have closed within the 75-day period prior to the offering or are “probable” at the time of the offering. However, audited financial statements for the earliest of the three fiscal years required may be omitted if net revenues reported by the acquired business in its most recent fiscal year are less than \$50 million. Unaudited interim financial statements may need to be included, depending on the time of year that the offering takes place.

Note that:

- The permitted age of financial statements of an acquired or soon-to-be-acquired business is generally determined by looking to the “staleness” rules that apply to its financial statements (rather than the staleness rules applicable to the financial statements of the acquiring company).<sup>92</sup> In other words, you need to determine whether the acquired company is, for example, a large accelerated filer, an accelerated filer, or an initial filer, and then analyze the dates on which its financial statements go stale.<sup>93</sup>
- Below the 50% significance level, no audited financial statements are required in the offering document for probable acquisitions or for completed acquisitions consummated up to 74 days before the date of the offering.<sup>94</sup> The commitment committees of some financing sources may, however, require at least a one-year audit of the acquired company in this situation together with historical pro forma financial information, even if the 74-day grace period has not yet expired.
- When a “foreign business”<sup>95</sup> is acquired, the financial statements of the acquired business may be in accordance with US GAAP, IASB IFRS, or another local home-country GAAP. No US GAAP reconciliation is required for the inclusion of financial statements of an acquired foreign business where that business uses IASB IFRS<sup>96</sup> or when the acquired business is below the 30% level for all significance tests. At or above 30%, a reconciliation to US GAAP must be included for the annual and interim periods presented, although this reconciliation need only meet the requirements of Item 17, not Item 18, of Form 20-F.<sup>97</sup>
- If the acquired company is not already an SEC-reporting company, its financial statements need not be audited by a PCAOB-registered firm, and the audit report need not refer to PCAOB standards.<sup>98</sup> However, the audit must be conducted in accordance with US generally accepted auditing standards.
- The amounts used for these calculations must be determined on the basis of US GAAP (for issuers that file their financial statements in accordance with or provide a reconciliation to US GAAP) or IASB IFRS (for foreign private issuers that file their financial statements in accordance with IASB IFRS) rather than local GAAP or non-IASB IFRS.<sup>99</sup>

## Exceptions to the Financial Statement Requirements for Acquired Businesses

There are a number of exceptions to the requirement to provide separate financial statements of acquired businesses.

### Exceptions to the Requirement to Provide Financial Statements of Acquired Businesses

Separate financial statements for an acquired business do not need to be presented once the operating results of the acquired business have been included in the issuer's audited consolidated financial statements for at least nine months unless the financial statements have not been previously filed by the issuer or unless the acquired business is of such significance to the issuer that omission of such financial statements "would materially impair an investor's ability to understand the historical financial results of the registrant."<sup>100</sup> Where the acquired business met at least one of the significance tests at the 80% level, the statements of comprehensive income of the acquired business should normally continue to be furnished.<sup>101</sup> This rule means that financial statements for major acquisitions at the highest level of materiality may be required for subsequent securities offerings, even those unrelated to the financing of the original acquisition.

A single audited period of nine, 10, or 11 months may count as a year for an acquired business in certain circumstances.<sup>102</sup>

## Industry Roll-Ups and Operating Real Estate

Staff Accounting Bulletin No. 80 provides a special interpretation of S-X Rule 3-05 for initial public offerings of businesses that have been built by the aggregation of discrete businesses that remain substantially intact after acquisition (*i.e.*, industry roll-ups).<sup>103</sup> SAB 80 allows first-time issuers to consider the significance of businesses recently acquired or to be acquired based on the pro forma financial information for the issuer's most recently completed fiscal year. While compliance with this interpretation requires an application of SAB 80's guidance and examples on a case-by-case basis, the policy is to allow currently insignificant business acquisitions to be excluded from the financial statement requirements while still ensuring that the registration statement will include not less than three, two and one year(s) of financial statements for not less than 60%, 80%, and 90%, respectively, of the constituent businesses of the issuer.<sup>104</sup>

The acquisition or probable acquisition of operating real estate property is subject to a different set of disclosure requirements under S-X Rule 3-14, which addresses income-producing real estate such as apartment houses and shopping malls. In comparison, where real estate is merely incidental to the service provided by a business, as for example in the case of a hotel, the regular S-X Rule 3-05 requirements would apply. S-X Rule 3-14(a) requires that audited statements of comprehensive income must be provided for the three most recent fiscal years for any such acquisition or probable acquisition that would be "significant" (generally, that would account for 10% or more of the issuer's total assets as of the last fiscal year-end prior to the acquisition). S-X Rule 3-14(a) also requires certain variations from the typical form of statement of comprehensive income and allows for only one year of statements of comprehensive income to be provided if the property is not acquired from a related party and certain additional textual disclosure is made.<sup>105</sup>

## MD&A for Acquisitions

Whenever historical financial statements of an acquired business (or probable acquisition) are included in the offering document, the registrant will need to consider whether a separate MD&A section discussing those financial statements is appropriate. Although there is no specific line item requiring that a second MD&A be included, it is not uncommon for registrants to interpret Securities Act Rule 408<sup>106</sup> to

require a full discussion and analysis of the financial statements of an acquired business (or probable acquisition), particularly where it exceeds 50% on any of the three significance criteria discussed above.

## Pro Forma Financial Information

As noted above, where a material acquisition has occurred, or is probable, that would trigger the need for acquired business financial statements under S-X Rule 3-05, pro forma financial information complying with S-X Article 11 must also be included. Pro forma financial information is intended to illustrate the continuing impact of a transaction by showing how the specific transaction might have affected historical financial statements had it occurred at the beginning of the issuer's most recently completed fiscal year.

In particular, S-X Article 11 requires:<sup>107</sup>

- a pro forma condensed balance sheet<sup>108</sup> as of the end of the most recent period for which a consolidated balance sheet of the issuer is required, unless the transaction is already reflected in that balance sheet;<sup>109</sup> and
- a pro forma condensed statement of comprehensive income<sup>110</sup> for the issuer's most recently completed fiscal year and the most recent interim period, unless the historical statement of comprehensive statement reflects the transaction for the entire period.<sup>111</sup>

S-X Article 11 also requires pro forma financial information in a number of other situations, such as:

- certain dispositions at a greater than 10% significance level (measured under the tests summarized above) that are not fully reflected in the financial statements of the issuer included in the prospectus;<sup>112</sup>
- acquisition of certain investments accounted for under the equity method;<sup>113</sup> and
- other events or transactions for which disclosure of pro forma financial information would be material to investors.<sup>114</sup>

S-X Article 11 provides extensive specific requirements for the content of pro forma financial information, including those set out in the following table.<sup>115</sup>

### Pro Forma Financial Information – Certain Key Content Requirements

#### Content Requirements

Pro forma adjustments related to the pro forma condensed statement of comprehensive income must include adjustments that give effect to events that are:

- directly attributable to the transaction;
- expected to have a continuing impact on the issuer; and
- factually supportable.<sup>116</sup>

As a result, adjustments for expected future synergies and cost savings that are not expressly mandated by the acquisition documents will generally not be permitted.

Pro forma condensed statements of comprehensive income should be presented using the issuer's fiscal year-end.<sup>117</sup> If the most recent fiscal year-end of the acquired company differs from that of the issuer by more than 93 days, the acquired company's fiscal year-end should be brought up to within 93 days of the issuer's fiscal year-end (if practicable).<sup>118</sup>

Pro forma financial information should be based on the accounting used by the issuer.<sup>119</sup> However, if the issuer's primary financial statements are prepared using local GAAP or non-IASB IFRS, then pro forma financial information should be reconciled to US GAAP<sup>120</sup> or prepared on a US GAAP basis.<sup>121</sup> Reconciliation of pro forma financial information to US GAAP is required even if the historical financial statements of the acquired business are not required to be reconciled (for example, because they are below the 30% significance threshold).<sup>122</sup>

## PRACTICE POINT

Even if pro forma financial information for an acquired business is not required to be included in the prospectus, the underwriters may nevertheless request that pro forma financial information be included in the disclosure document. This situation arises where the underwriters want to show the expected higher “run rate” operating results of the combined companies for marketing reasons even though there is no specific requirement to do so.

## Guarantor Financial Statements

A guarantee of a security (such as a guarantee of a debt or preferred equity security) is itself a security that must be registered under the Securities Act, absent an applicable exemption.<sup>123</sup> As a result, under S-X Rule 3-10(a), the general rule is that guarantors are required to present the same financial statements as the issuer of the guaranteed securities.<sup>124</sup> Fortunately, S-X Rules 3-10(b)-(f) contain a number of important exceptions that permit issuers to disclose financial information about guarantors in a condensed format using a footnote to their own financial statements.<sup>125</sup> Although the footnote approach can involve a fair amount of effort, it is far less burdensome than providing separate audited financial statements for every guarantor, which would be prohibitively expensive in many cases. S-X Rules 3-10(c), (e), and (f) go even further, dispensing with any additional information requirement for guarantors in the case of a parent company or subsidiary issuer where the parent company does not have independent assets or operations of its own, all of the direct and indirect non-guarantor subsidiaries are “minor”<sup>126</sup> (generally, less than 3% of the consolidated parent), and each guarantee is full and unconditional. A footnote US GAAP reconciliation is required when the parent company’s consolidated financial statements are not prepared under US GAAP or IASB IFRS.<sup>127</sup>

In the table below, we review the provisions of S-X Rule 3-10 as they apply to the following five common situations:

- parent company issuer of securities guaranteed by one or more subsidiaries;
- operating subsidiary issuer of securities guaranteed by parent company;
- finance subsidiary issuer of securities guaranteed by parent company;
- subsidiary issuer of securities guaranteed by parent company and one or more other subsidiaries of parent company; and
- recently acquired subsidiary issuer or subsidiary guarantor.

Note that the amounts used for these calculations must be determined on the basis of US GAAP or IASB IFRS rather than local GAAP/non-IASB IFRS.



Guarantee Scenario	Financial Statement Requirements
<p>1. Parent company issuer of securities guaranteed by some or all of issuer's subsidiaries, where:</p> <ul style="list-style-type: none"> <li>• the subsidiary guarantors are 100% owned<sup>128</sup> by the parent company issuer;</li> <li>• each guarantee is full – the amount of the guarantee may not be less than the underlying obligation;<sup>129</sup></li> <li>• each guarantee is unconditional – holders must be able to take immediate action against the guarantor after a default on the underlying obligation; and</li> <li>• the guarantees are joint and several (if there are multiple guarantors).<sup>130</sup></li> </ul>	<p>1. No separate financial statements for subsidiaries required under S-X Rules 3-10(e) and (f) if the parent's annual audited and interim unaudited financial statements are filed for the periods required, and those financial statements include a footnote (audited for the periods for which audited financial statements are required) with condensed, consolidating financial information<sup>131</sup> for each such period, with separate columns for:</p> <ul style="list-style-type: none"> <li>• the parent company;</li> <li>• the subsidiary guarantor (or subsidiary guarantors on a combined basis);<sup>132</sup></li> <li>• any non-guarantor subsidiaries on a combined basis;</li> <li>• consolidating adjustments; and</li> <li>• total consolidated amounts.</li> </ul> <p>Note 2 to S-X Rule 3-10(e) and Note 1 to S-X Rule 3-10(f) allow a conditional exemption from providing this footnote if the parent company has no independent assets or operations, the non-guarantor subsidiaries are “minor” (generally, less than 3% of the consolidated parent), and there is a footnote to that effect in the parent financial statements that also notes that the guarantees are full and unconditional and joint and several. Under S-X Rule 3-10(h)(5), “a parent company has no independent assets or operations if each of its total assets, revenues, income from continuing operations before income taxes, and cash flows from operating activities (excluding amounts related to its investment in its consolidated subsidiaries) is less than 3% of the corresponding consolidated amount.”</p>

Guarantee Scenario	Financial Statement Requirements
<p>2. Operating subsidiary<sup>133</sup> issuer of securities guaranteed by parent company, where:</p> <ul style="list-style-type: none"> <li>• the operating subsidiary issuer is 100% owned by the parent company guarantor;</li> <li>• the guarantee is full and unconditional; and</li> <li>• no other subsidiary of the parent is a guarantor.</li> </ul>	<p>2. No separate financial statements for the operating subsidiary required under S-X Rule 3-10(c) if the parent's audited annual and unaudited interim financial statements are filed for the periods required and they include a footnote (audited for the periods for which audited financial statements are required) with condensed, consolidating financial information<sup>134</sup> for each such period, with separate columns for:</p> <ul style="list-style-type: none"> <li>• the parent company;</li> <li>• the operating subsidiary issuer;</li> <li>• any non-guarantor subsidiaries on a combined basis;<sup>135</sup></li> <li>• consolidating adjustments; and</li> <li>• total consolidated amounts.</li> </ul> <p>Note 3 to S-X Rule 3-10(c) provides that this exception is also available if an operating subsidiary issuer meets these requirements except that the parent is a co-issuer with the subsidiary, rather than a guarantor.</p>
<p>3. Finance subsidiary issuer of securities guaranteed by parent company, where:<sup>136</sup></p> <ul style="list-style-type: none"> <li>• the finance subsidiary issuer is 100% owned by the parent company guarantor;</li> <li>• the guarantee is full and unconditional; and</li> <li>• no other subsidiary of the parent is a guarantor.</li> </ul>	<p>3. No separate financial statements for the finance subsidiary required under S-X Rule 3-10(b) if the parent's audited annual and unaudited interim financial statements are filed for the periods required and they include a footnote (audited for the periods for which audited financial statements are required) with:</p> <ul style="list-style-type: none"> <li>• a statement that the finance subsidiary issuer is a 100%-owned finance subsidiary of the parent; and</li> <li>• the parent has fully and unconditionally guaranteed the securities.</li> </ul> <p>This exception is also available if a finance subsidiary issuer meets these requirements except that the parent is a co-issuer with the subsidiary, rather than a guarantor.<sup>137</sup></p>

Guarantee Scenario	Financial Statement Requirements
<p>4. Operating or finance subsidiary issuer of securities guaranteed by parent company and one or more other subsidiaries of parent company, where:</p> <ul style="list-style-type: none"> <li>• the issuer and all subsidiary guarantors are 100% owned by the parent company guarantor;</li> <li>• the guarantees are full and unconditional; and</li> <li>• the guarantees are joint and several.<sup>138</sup></li> </ul>	<p>4. No separate financial statements for subsidiaries required under S-X Rule 3-10(d) if the parent's audited annual and unaudited interim financial statements are filed for the periods required and they include a footnote (audited for the periods for which audited financial statements are required) with condensed, consolidating financial information<sup>139</sup> for each such period, with separate columns for:</p> <ul style="list-style-type: none"> <li>• the parent company;</li> <li>• the subsidiary issuer;</li> <li>• the guarantor subsidiaries on a combined basis;</li> <li>• any non-guarantor subsidiaries on a combined basis;<sup>140</sup></li> <li>• consolidating adjustments; and</li> <li>• total consolidated amounts.</li> </ul> <p>This exception is also available if a subsidiary issuer meets these requirements except that the subsidiary is not a joint-and-several guarantor. In that case, the condensed, consolidating financial information should include a separate column for the subsidiary.<sup>141</sup></p>
<p>5. Recently acquired subsidiary issuer or subsidiary guarantor, where:</p> <ul style="list-style-type: none"> <li>• the subsidiary has not been included in the audited consolidated results of the parent company for at least nine months of the most recent fiscal year;<sup>142</sup> and</li> <li>• the purchase price or net book value (as of the most recent fiscal year-end prior to the acquisition),<sup>143</sup> whichever is greater, of the subsidiary (or group of subsidiaries that were related prior to the acquisition)<sup>144</sup> is 20% or more of the principal amount of the securities being registered.</li> </ul>	<p>5. Separate financial statements are required under S-X Rule 3-10(g) for each such subsidiary, including:</p> <ul style="list-style-type: none"> <li>• audited financial statements for the subsidiary's most recent fiscal year prior to the acquisition; and</li> <li>• unaudited financial statements for any required interim periods.<sup>145</sup></li> </ul> <p>These requirements apply even if (i) the recently acquired subsidiary would otherwise be eligible for the use of condensed, consolidating footnote presentation,<sup>146</sup> or (ii) S-X Rule 3-05 would not require financial statements. In addition, note that the auditors of the recently acquired subsidiary must be PCAOB registered, and the audit report must refer to PCAOB standards, even in the case of a newly acquired entity that is not an SEC reporting company (<i>i.e.</i>, where S-X Rule 3-05 would otherwise permit use of a non-PCAOB-registered auditor).<sup>147</sup></p>

## PRACTICE POINT

A standstill period after a default before investors can pursue a guarantor (as is common in upstream guarantee structures in Europe) will not satisfy the “full and unconditional” requirement, and will result in a requirement for separate financial statements.

Also, the 100% ownership requirement is strictly interpreted. The Staff has given relief from this requirement only in unique circumstances (e.g., local law requires that directors own a small number of shares of a subsidiary so that it is not 100% by the parent).

## Secured Offerings

S-X Rule 3-16 generally requires separate audited and interim financial statements for an issuer's affiliate if the securities of that affiliate are pledged as collateral for the offering and those securities constitute a “substantial portion” of the collateral for the securities being registered.<sup>148</sup> Securities of the affiliate are deemed to constitute a “substantial portion” of the collateral if the aggregate principal amount, par value, or book value of the pledged securities (as carried by the issuer), or the market value of the pledged securities, whichever is the greatest, equals 20% or more of the principal amount of the securities that are being secured.<sup>149</sup>

If this test is met, the affiliate must file the same financial statements that it would be required to file if it were the issuer.<sup>150</sup> However, the affiliate's financial statements do not need to be filed if they are otherwise separately included (which may be through incorporation by reference, if incorporation is otherwise permitted). This very burdensome requirement to produce separate audited financial statements for large subsidiaries if their stock is pledged to secure a bond deal often makes it uneconomical to secure publicly offered bonds with stock pledges.

## Investments Accounted for Under the Equity Method

S-X Rule 3-09 generally requires the inclusion of separate audited financial statements for significant investments that are accounted for under the equity method.<sup>151</sup> S-X Rule 3-09 applies whether the investee is held by an issuer, a subsidiary, or another investee.<sup>152</sup> Note that if the investee is not already an SEC-reporting company, its financial statements need not be audited by a PCAOB-registered firm, and the audit report need not refer to PCAOB standards (although in some circumstances, such as when the principal auditor of the issuer is making reference in its report to the investee auditor's report, the audit must be carried out in accordance with PCAOB standards).<sup>153</sup> However, the audit must be conducted in accordance with US auditing standards (US GAAS).

For investees, significance is evaluated under S-X Rule 1-02(w) based on the following two criteria:<sup>154</sup>

- whether the amount of the issuer's (and its other subsidiaries') investment in and advances to the investee exceeds 20% of the total assets of the issuer and its subsidiaries on a consolidated basis as of the end of the most recently completed fiscal year (Test 1);<sup>155</sup> and
- whether the equity of the issuer (and its other subsidiaries) in the pre-tax income from continuing operations of the equity investee exceeds 20% of such income of the issuer and its subsidiaries on a consolidated basis for the most recently completed fiscal year (Test 2).<sup>156</sup>

If either of the above tests is met, separate financial statements of the investee must be filed.<sup>157</sup> Insofar as practicable, those financial statements must be as of the same dates and for the same periods as the required audited annual financial statements of the issuer, but need only be audited for those

fiscal years in which either Test 1 or Test 2 is met at or above the 20% level.<sup>158</sup> Regardless of whether it presents two or three years of its own financial statements, an EGC may present two years of investee financial statements.<sup>159</sup> Note that the amounts used for these calculations must be determined on the basis of US GAAP or IASB IFRS rather than local GAAP/non-IASB IFRS.<sup>160</sup>

US GAAP permits the use of the “fair value option” for certain investments that would otherwise be accounted for under the equity method. If an issuer elects the fair value option, Test 2 above is altered to compare the change in fair value of the investee (as reflected in the issuer’s financial statements) to the issuer’s consolidated pre-tax income for the most recently completed fiscal year.

For equity investees that meet any of the three S-X Rule 1-02(w) criteria at the greater than 10% but not more than the 20% significance level, S-X Rule 4-08(g) requires the presentation of summary financial information as described by S-X Rule 1-02(bb).

Financial statements of equity investees that are presented under local GAAP or non-IASB IFRS to comply with S-X Rule 3-09 do not have to be reconciled to US GAAP unless either of the Test 1 or Test 2 criteria is greater than 30% (calculated on a US GAAP basis).<sup>161</sup> That reconciliation may be done under the less comprehensive requirements of Item 17 of Form 20-F rather than Item 18.<sup>162</sup> A description of the differences in accounting methods is required, however, regardless of the significance levels.<sup>163</sup> Equity investees using IASB IFRS do not need to include a reconciliation.<sup>164</sup>

Summary financial information for a foreign business provided under S-X Rule 4-08(g) must be presented under the same GAAP used by the issuer. For example, a US company would report summarized information for a foreign investee under US GAAP no matter what basis of accounting is used by the foreign investee to prepare its own financial statements.<sup>165</sup>

## Segment Reporting

In addition to all the consolidated financial information required to be included in an offering document, companies that are engaged in more than one line of business or operate in more than one geographic area may also be required to include separate revenue and operating data for each of their business lines or geographic areas. This requirement is a function of whether the company’s business is comprised of more than one operating segment as defined by US GAAP. S-K Item 303 requires certain financial reporting and textual disclosure in the MD&A for each relevant, reporting segment or other subdivision of the business if the discussion would be appropriate to understanding the business.<sup>166</sup> FASB Accounting Standards Codification 280, “Segment Reporting” (or ASC 280), provides detailed guidance for when a component of a larger enterprise constitutes an operating segment and how its discrete financial information must be reported. Note that the IFRS standard for segment reporting (IFRS 8, Operating Segments) has substantially the same requirements as ASC 280.

Generally, an operating segment is a component of a larger 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<sup>167</sup> to make decisions about resources to be allocated to the segment and assess its performance; and
- for which discrete financial information is available.

The aim of segment reporting is to align public financial reporting with a company's internal reporting in order to permit financial analysts and the public to see the overall enterprise the same way management sees it. The most critical factor in determining whether an issuer has more than one operating segment is how management runs its business.<sup>168</sup> Whether an issuer can aggregate operating segments is highly fact-specific and depends on factors such as economic similarity, the similarity of the products or services sold, the nature of the production process, customer type, distribution methods, and the regulatory environment for the business. The determination is very subjective and is often the subject of much discussion with the company's accountants and, through the SEC comment process, with the SEC Staff.

Once a segment has been identified, the issuer must provide information about the segment if it meets any of the following 10% thresholds:

- its reported **revenue** (including both sales to external customers and intersegment sales) is 10% or more of the combined revenue (internal and external) of all reported operating segments;
- the absolute amount of its reported **profit or loss** is 10% or more of the greater, in absolute amount, of (i) the combined profit of all operating segments that did not report a loss or (ii) the combined loss of all operating segments that did report a loss; or
- its **assets** are 10% or more of the combined assets of all operating segments.<sup>169</sup>

Note that, for purposes of applying the 10% significance criteria, an issuer whose primary financial statements are prepared under local GAAP or non-IASB IFRS should use the basis of accounting used for internal management reporting in determining whether segments are reportable.

A company with more than one segment (or aggregated segments) in excess of any of these thresholds must disclose for each such segment the revenues from external customers, a measure of profit or loss<sup>170</sup> and the total assets attributable to that segment, as well as a reconciliation to the corresponding consolidated amounts. Additional information on items such as equity investments and capital expenditures may be required under ASC 280 (or IFRS 8) if such amounts are reviewed by the chief operating decision maker of the company on a segment basis. For interim periods, disclosure must include a measure of profit or loss for each segment, reconciliations, and material changes to total assets. Financial disclosure for segments will typically be included in the financial statements and may be part of a discussion on operating segments in the MD&A if the company concludes such information is necessary to understand the business. The effect of these requirements is to force disclosure of profitability by segment, which many issuers are reluctant to do for competitive reasons.

#### PRACTICE POINT

The identification and reporting of financial information for operating segments will be critical in the offering process, as the time to prepare such information, the effect on textual disclosure, and the impact on enterprise valuation may all be significant. The need for segment reporting is always considered carefully when a company is issuing securities for the first time. However, the issue should be revisited whenever the company has entered into new business lines or if management has begun to analyze its business in a new way that may impact the original segment analysis. Because the guidance of ASC 280 (and IFRS 8) is complex and its application very fact-specific, it is important to begin an early dialogue with the independent auditors when there may be segment reporting issues.

## Supplemental Schedules for Certain Transactions

S-X Rule 5-04 requires a number of supplemental schedules for particular industries and circumstances.<sup>171</sup> Each schedule contains additional financial information that must be audited and provided, typically including:

- *Schedule I – Condensed Financial Information of Registrant (known as “parent-only” financial statements)*: requires condensed balance sheets and statements of comprehensive income and cash flows on a non-consolidated basis as of the end of the latest fiscal year if the amount of restricted net assets of subsidiaries exceeds 25% of the issuer’s consolidated net assets at the end of the most recently completed fiscal year. “Restricted net assets” are the issuer’s proportionate share of net assets of consolidated subsidiaries (after intercompany eliminations) which as of the end of the most recent fiscal year may not be transferred to the parent company by subsidiaries in the form of loans, advances, or cash dividends without the consent of a third party (i.e., lender, regulatory agency, foreign government, etc.).<sup>172</sup>
- *Schedule II – Valuation and Qualifying Accounts*: requires an analysis of each valuation and qualifying account (e.g., allowance for doubtful accounts, allowance for obsolescence).
- *Schedule III – Real Estate and Accumulated Depreciation*: requires real estate operating and investment companies to disclose certain financial details regarding each of their properties.
- *Schedule IV – Mortgage Loans on Real Estate*: requires real estate operating and investment companies to disclose details of each mortgage loan which accounts for 3% or more of the carrying value of all of the issuer’s mortgages.
- *Schedule V – Supplemental Information Concerning Property-Casualty Insurance Operations*: requires disclosure as to liabilities on property-casualty insurance claims if the issuer, its subsidiaries, or 50%-or-less owned equity basis investees have such liabilities. However, the schedule may be omitted if reserves for unpaid property-casualty claims and claims adjustment expenses did not, in the aggregate, exceed 50% of common stockholders’ equity of the issuer and its consolidated subsidiaries as of the beginning of the fiscal year.

Note that issuers in specific industries may have schedule requirements that vary from those listed above. In addition, an issuer may provide the schedule information separately or in the notes to the audited financial statements.

## Industry Guides

S-K Item 801 sets out five industry “guides” requiring enhanced disclosure of financial and operational metrics for issuers in certain industries:<sup>173</sup>

- *Guide 3 – Statistical Disclosure by Bank Holding Companies*: requires disclosure of analyses of interest earnings, investment and loan portfolios, loan loss experience, deposit types, returns on equity and assets, and short-term deposits.
- *Guide 4 – Prospectuses Relating to Interests in Oil and Gas Programs*: requires enhanced disclosure relating to the offering terms and participation in costs and revenues among investors and others, as well as a 10-year financial summary of any drilling programs by the issuer and its associates, including recovery on investment for investors in those programs.
- *Guide 5 – Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships*: requires a summary of the financial performance of any other real estate investment programs sponsored by the general partner and its affiliates.
- *Guide 6 – Disclosure Concerning Unpaid Claims and Claim Adjustment Expenses of Property-Casualty Insurance Underwriters*: requires disclosure of details of reserves and historical claim data if reserves for unpaid property-casualty claims and claim adjustment expenses of the issuer, its consolidated and unconsolidated subsidiaries, and equity investees exceed 50% of the common stockholders’ equity of the issuer and its consolidated subsidiaries.

- *Guide 7 – Description of Property by Issuers Engaged or to Be Engaged in Significant Mining Operations*: requires disclosure of information relating to each of the mines, plants, and other significant properties owned or operated (or intended to be owned or operated) by the issuer, including location of the property, brief description of the title, claim, or lease to the property, a history of previous operations, and a description of the present condition and operations on the property.<sup>174</sup>

In addition, as part of a 2008 initiative for modernizing oil and gas reporting, former Guide 2 was removed from Item 801 and largely recodified in S-K Item 1200. S-K Item 1200 requires enhanced disclosure of oil and gas reserves (including from non-traditional sources), the company's progress in converting proved undeveloped reserves into proved developed reserves, technologies used in establishing reserves, the company's internal controls over reserves estimates, and disclosure based on geographic area (as defined). Required disclosure also includes information regarding proved undeveloped reserves; oil and gas production; drilling and other exploratory and development activities; present activities; delivery commitments; and oil and gas properties, wells, operations, and acreage. Finally, disclosure of probable and possible reserves and oil and gas reserves' sensitivity to price is optional under S-K Item 1200.<sup>175</sup>

#### **PRACTICE POINT**

Compiling the information required by these industry guides and S-K Item 1200 may be a significant undertaking, and the issuer's financial and operating management should consult with its professional advisors early in the process if an industry guide applies to the offering.

## **Quantitative and Qualitative Disclosure About Market Risk**

Item 11 of Form 20-F sets out various specific requirements for quantitative and qualitative disclosure about market risk sensitive instruments (such as derivatives). This disclosure can be significant for companies with substantial trading portfolios or that engage in extensive hedging.

## **Reconciliation to US GAAP – Item 18 Versus Item 17**

Form 20-F provides two levels of financial statement disclosure: Item 17 and Item 18.<sup>176</sup> Item 18 requires a more thorough adaptation of the issuer's financial statements to US GAAP and the requirements of S-X than does Item 17.<sup>177</sup> The distinction between Items 17 and 18 is based on a classification of the requirements of US GAAP and S-X into those that specify the methods of measuring the amounts shown on the face of the financial statements, and those prescribing disclosures which explain, modify, or supplement the accounting measurements.<sup>178</sup> Disclosures that are required by US GAAP but not local GAAP or IFRS need not be furnished for Item 17<sup>179</sup> (although they might need to be disclosed under MD&A).

Securities Act registration statements, Exchange Act annual reports on Form 20-F and Exchange Act registration statements for secondary listings or spin-offs must generally comply with Item 18.<sup>180</sup> Item 17 is available in certain specific circumstances, including required financial statements of significant acquired foreign businesses,<sup>181</sup> significant equity method investees,<sup>182</sup> entities whose securities are pledged as collateral,<sup>183</sup> and guarantors.<sup>184</sup>

## **Additional Financial Information That Is Typically Included**

In addition to the formal requirements of Form 20-F and S-X, it is customary to include additional operational and other metrics in the offering document to help investors understand the issuer's business. This information is usually included at the end of the Selected Financial Data section under a caption labeled "Other Financial Data." The three most common examples are described below.



## Other Financial Data

A page of summary financial data is always included in the “summary box” in the offering document. Although there are no specific line item requirements for this key marketing page, it usually contains the same line items as the “Selected Financial Data” page that appears later in the disclosure document, including the additional operational and other metrics included in the “Other Financial Data” section. These additional metrics will vary with the type of issuer and its industry, and will be selected based on the criteria that management and the investment community monitor to evaluate performance or liquidity. Typical examples include comparable store sales data for a retailer, capital expenditures for a manufacturer, and subscriber numbers for a cable television company. The “Other Financial Data” section is also typically where non-GAAP measures, such as Adjusted EBITDA, are presented.

## Recent Financial Results

If a significant amount of time has passed since the most recent financial statements included in the offering document, it may be appropriate to include a summary of recent financial results in the summary box. Examples of “recent results” disclosures are most common after a quarter or half year (depending on how frequently the issuer reports) is completed but before financial statements concerning that quarter/half year have become available. The issuer and the underwriters will want to tell investors as soon as possible about any positive improvement in operating trends, while if the recent results are negative, recent results disclosure may be advisable to avoid any negative surprises for investors when the full quarterly/half yearly numbers become available.

## Recent Developments

To the extent material, the likely consequences of material recent developments may be disclosed in the “summary box” or the MD&A. For example, it is customary to discuss a material recent or pending and probable acquisition in the MD&A section of the offering document, whether or not audited financial statements of the acquired or to-be-acquired business are required to be presented. This practice will often result in a discussion of the impact of pending or recent acquisitions on margins, debt levels, etc., in a section of the MD&A labeled “Overview,” “Impact of the Acquisition,” or a similar title. The textual disclosure may include a discussion of any special charges or anticipated synergies expected to result from the acquisition or other pending event.

## Non-GAAP Financial Measures

Many issuers choose to disclose measures of financial performance or liquidity that, while derived from GAAP figures presented in a company’s financial statements, are not themselves calculated in accordance with GAAP. EBITDA is perhaps the best-known (and most widely used) non-GAAP financial measure.

The SEC’s rules (adopted in response to Section 401(b) of Sarbanes Oxley) limit the use of non-GAAP financial measures in various ways. First, Regulation G applies to any public disclosure of non-GAAP financial measures.<sup>185</sup> Second, Item 10(e) of S-K lays on additional requirements for disclosures in Securities Act and Exchange Act filings (and earnings releases furnished to the SEC under Item 2.02 of Form 8-K).<sup>186</sup>

## Regulation G

A non-GAAP financial measure under Regulation G is broadly defined as a numerical measure of financial performance that excludes (or includes) amounts that are otherwise included in (or excluded from) the comparable measure calculated and presented in the financial statements under GAAP.<sup>187</sup>

For purposes of Regulation G, "GAAP" generally means US GAAP. However, in the case of a foreign private issuer whose primary financial statements are prepared in IFRS or local GAAP, "GAAP" means the accounting principles under which the financial statements were prepared, unless the measure in question is derived from US GAAP (in which case GAAP means US GAAP).<sup>188</sup>

The term "non-GAAP financial measure" carves out certain items including:

- operating measures and ratios or statistical measures calculated using financial measures determined in accordance with (1) GAAP (*e.g.*, GAAP sales per square foot and operating margin calculated by dividing GAAP revenues into GAAP operating income) or (2) measures that are not themselves non-GAAP financial measures;<sup>189</sup> or
- financial measures required to be disclosed by GAAP, SEC rules, or an applicable system of regulation of a government, governmental authority, or a self-regulatory organization (*e.g.*, segment measures required by ASC 280 or IFRS 8).<sup>190</sup>

Under Regulation G, if a public company discloses a non-GAAP financial measure, it must:<sup>191</sup>

- present the most directly comparable financial measure calculated in accordance with GAAP; and
- quantitatively reconcile the differences between the non-GAAP financial measure and the most directly comparable GAAP financial measure.<sup>192</sup>

In addition, Regulation G contains an antifraud prohibition – that is, an issuer may not make any non-GAAP financial measure public if the measure contains a material misstatement or omission.<sup>193</sup>

A foreign private issuer need not comply with Regulation G with respect to a specific non-GAAP financial measure if:<sup>194</sup>

- its securities are listed or quoted outside the United States;
- the non-GAAP financial measure being used is not derived from or based on a measure calculated and presented in accordance with US GAAP; and
- the disclosure is made outside the United States.

### **S-K Item 10(e)**

For purposes of Item 10(e), the term "non-GAAP financial measures" has the same meaning as under Regulation G.<sup>195</sup> Under Item 10(e), if a public company includes a non-GAAP financial measure in an SEC filing, it must also include:<sup>196</sup>

- a presentation, with equal or greater prominence, of the most directly comparable GAAP financial measure;
- a quantitative reconciliation of the differences between the non-GAAP financial measure and the most directly comparable GAAP financial measure;
- a statement why management believes the non-GAAP financial measure provides useful information for investors; and
- to the extent material, a statement of the additional purposes for which management uses the non-GAAP financial measure.

Furthermore, Item 10(e) prohibits in SEC filings, among other things:<sup>197</sup>

- non-GAAP measures of liquidity that exclude items requiring cash settlement, other than EBIT and EBITDA;
- non-GAAP measures of performance that eliminate or smooth items characterized as non-recurring, unusual, or infrequent when it is reasonably likely that a similar charge or gain will recur within two years, or there was a similar charge or gain within the prior two years;

- the presentation of non-GAAP financial measures on the face of the financial statements, in the accompanying notes, or on the face of any pro forma financial information required to be disclosed by Article 11 of S-X; and
- using a name for non-GAAP financial measures that is the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

Item 10(e) contains an exemption from these prohibitions for a foreign private issuer if the non-GAAP financial measure relates to the local GAAP used in the issuer's primary financial statements, is required or expressly permitted by the standard-setter that establishes the local GAAP and is included in the issuer's annual report for its home jurisdiction.<sup>198</sup>

The SEC Staff monitors the use of non-GAAP financial measures and has issued several interpretations of SEC rules. The guidance covers a range of topics including: giving equal or greater prominence to GAAP measures; presentation of per-share measures; omission of reconciliation for forward-looking, non-GAAP financial measures; exclusion of recurring items; changing what charges are included in or excluded from a non-GAAP financial measure from period to period; and tailored recognition and measurement methods for financial statement line items (such as revenue).<sup>199</sup>

## Interactive Data

The SEC has adopted rules that require foreign private issuers that prepare their financial statements in accordance with US GAAP or IASB IFRS to supplement their filed financial statements with financial statements formatted in eXtensible Business Reporting Language (XBRL). XBRL is a form of electronic communication whose main feature includes interactive electronic tagging of both financial and non-financial data. On June 28, 2018, the SEC adopted a rule requiring all operating company filers (including foreign private issuers) to embed XBRL data directly into the body of an SEC filing, rather than tag the information in a separate exhibit. The requirement to adopt inline XBRL began June 15, 2019 for large accelerated filers that prepare their financial statements in accordance with US GAAP (including foreign private issuers). It begins June 15, 2020 for accelerated filers that prepare their financial statement in accordance with US GAAP (including foreign private issuers), and June 15, 2021 for all other filers.<sup>200</sup>

A previously non-reporting company is not required to include XBRL financial statements in its initial Securities Act registration statement (*i.e.*, an IPO on Form F-1 or an initial exchange offer on Form F-4) or its initial Exchange Act registration statement (*i.e.*, Form 20-F).<sup>201</sup> Once having provided its first XBRL financial statements, the company would include XBRL financial statements in a subsequent Securities Act registration statement, but only if it includes a price or price range (and not if it merely incorporates financial statements by reference).<sup>202</sup> This means, for example, that XBRL financial statements are not needed in a base registration statement for a shelf offering.

There is a narrow exception to the XBRL rules relevant to foreign private issuers: the rules only apply to foreign private issuers that prepare their financial statements in accordance with US GAAP or IASB IFRS – *i.e.*, they do not apply to foreign private issuers that prepare their financial statements in accordance with local GAAP.<sup>203</sup> However, there are only a very small number of foreign private issuers that use local GAAP in their SEC filings, and so this exception is of limited use.

## Special Considerations in Rule 144A Transactions

The disclosure document in a Rule 144A offering is typically modeled after a public prospectus. This holds true for financial statement requirements as well: although the line item disclosure rules of the Securities Act do not strictly apply to private offerings under Rule 144A, it has become standard practice to follow these rules as if they applied to Rule 144A offerings, with only limited exceptions. In many

situations, the commitment committees of the major financing sources will insist on including financial disclosure in the Rule 144A offering circular that is in all material respects consistent with the financial statement requirements that would apply to a registration statement filed with the SEC. Rule 144A offerings are typically sold to buyers who expect levels of disclosure substantially equivalent to what they would receive in a public deal. Additionally, in the case of a Rule 144A offering with registration rights, the Rule 144A circular will be followed by a registered exchange offer prospectus, and the buyers of the offered securities will thereby receive full Securities Act disclosure after the closing. Therefore, Rule 144A offering circulars typically follow the public offering rules described above in all material respects.

Foreign private issuers tend to take a flexible approach to financial statements in unregistered transactions depending on a variety of factors, including the type of transaction, local market practice, deal size, underwriter practice, investor expectations, and other marketing issues. It is not uncommon for a working group on a Rule 144A deal to decide to dispense with a particular financial statement requirement if the group determines that that particular item will not materially alter the total mix of information provided, or if there is another way to disclose the issue that the S-X requirement is targeting. After all, Rule 144A(d)(4)'s information requirement is very modest and calls only for "the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available)." A more flexible approach can also be justified by the fact that the liability standards of Sections 11 and 12 of the Securities Act do not apply to Rule 144A deals. Although Rule 10b-5 does apply to Rule 144A offerings, it is more difficult for disgruntled purchasers to demonstrate the requisite *scienter* required to establish a valid 10b-5 claim.<sup>204</sup> As a result, it is not uncommon to provide only two years of audited financial statements in a Rule 144A transaction where a registration statement would require three years. This is true both for the issuer and for material acquired businesses. We have seen this decision taken in a number of deals, particularly where the issuer is already in its third or fourth fiscal quarter, since the third year of audits will likely be completed in the natural course before the exchange offer registration statement is required to be filed. Other working groups have elected to exclude some of the finer elements of the financial information requirements where they have determined that such additional information would not materially alter the total mix of information presented. Examples include some of the details of the required guarantor footnotes described above, the separate financial statements of subsidiaries in secured deals, and some of the details of executive compensation. Although the industry custom is to follow the public offering rules as if they applied to the 144A deal, there is no requirement in Rule 144A to do so, and some working groups will conclude that not every detail of the information called for in a registration statement is required to present 144A investors with full and fair disclosure.

#### PRACTICE POINT

As the full impact of Sarbanes-Oxley has made itself felt upon issuer's accessing the US capital markets, "144A-for-life" debt financings have become typical. These transactions are identical to regular Rule 144A offerings, except that they do not offer bond investors any registration rights, and they do not require the bond issuers to become or remain voluntary filers of Exchange Act reports. Because these offerings will not be followed by a registered exchange offer prospectus that is fully compliant with S-X, some deal teams are concluding that "144A-for-life" disclosure documents can more freely dispense with non-core S-X requirements than would be the case in a traditional Rule 144A offering with registration rights.

## ENDNOTES

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- <sup>1</sup> We do not cover financial statements in M&A transactions. When securities are registered on Form S-4 or F-4 in connection with a stock-for-stock acquisition, different requirements might apply.
- <sup>2</sup> In particular, Form F-1 allows an issuer to incorporate information by reference from its previously filed Exchange Act reports if the issuer:
- is required to file Exchange Act reports;
  - has filed all required reports and other materials under the Exchange Act during the prior 12 months (or for such shorter period that the issuer was required to file such reports and materials);
  - has filed an annual report for its most recently completed fiscal year;
  - is not, and during the past three years neither the issuer or any of its predecessors was, a blank check issuer, shell company, or penny stock issuer; and
  - makes its Exchange Act reports readily available on its website (including by way of hyperlink to the reports).
- See Form F-1, General Instructions.
- <sup>3</sup> See Form 20-F, Item 8.A.1.
- <sup>4</sup> See *id.* at Items 17(c), 18.
- <sup>5</sup> See Form 20-F, Item 8.A.2.
- <sup>6</sup> See Form 20-F, Instruction 1 to Item 8. See also S-X Rule 3-02(a) (noting if the issuer has been in existence less than the prescribed number of years, it is sufficient to provide statements of comprehensive income for the life of the issuer and its predecessors); *Financial Reporting Manual*, Section 6220.5 (a foreign private issuer that has been in existence less than a year must include an audited balance sheet that is not more than nine months old; if the issuer has commenced operations, it must include audited statements of income, stockholders' equity, and cash flows for the period from the date of inception to the date of the audited balance sheet). Financial information of a registrant's predecessor is required for all periods prior to the registrant's existence, with no lapse in audited periods or omission of other information required about the registrant. *Financial Reporting Manual*, Section 1170. The term *predecessor* is broadly defined. See Securities Act Rule 405.
- <sup>7</sup> See Form 20-F, Instruction 1 to Item 8.A.2.
- <sup>8</sup> See *id.* at Instruction 3 to Item 8.A.2; see also *Financial Reporting Manual*, Section 6410.2.
- <sup>9</sup> See Form 20-F, General Instruction G(a); see also *Financial Reporting Manual*, Section 6340.1.
- <sup>10</sup> See S-X Rule 3-06. Under this rule, the SEC will accept financial statements for periods of not less than nine, 21, and 33 consecutive months as substantial compliance with the requirement to provide financial statements for one, two, and three years, respectively. In particular, whenever audited financial statements are required for a period of one, two, or three years, a single audited period of nine to 12 months may count as a year if:
- the issuer has changed its fiscal year during the period;
  - the issuer has made a significant business acquisition for which financial statements are required under S-X Rule 3-05 and the financial statements covering the interim period pertain to the business being acquired; or
  - the SEC grants permission to do so under Rule 3-13, provided that financial statements are filed that cover the full fiscal year or years for all other years in the time period.
- See *id.* Note that historically the SEC Staff has been reluctant to grant this relief. See *Financial Reporting Manual*, Note to Section 1140.8 (issuer must show unusual circumstances). On June 29, 2017, the SEC Staff signaled that it might be willing to grant permission if an issuer is able to argue that the information is not necessary for investor protection. See *2017 Procedures*:
- While an issuer should take all steps to ensure that a draft registration statement is substantially complete when submitted, we will not delay processing if an issuer reasonably believes omitted financial information will not be required at the time the registration statement is publicly filed. In addition, we will consider an issuer's specific facts and circumstances in connection with any request made under Rule 3-13 of Regulation S-X.
- <sup>11</sup> See Form 20-F, Item 8.A.1., Item 8.A.3.
- <sup>12</sup> See *Financial Reporting Manual*, Section 4110.5 (accounting firm must be PCAOB registered and auditor's report must refer to PCAOB standards); Section 4110.1 (citing PCAOB Rule 2100, which requires each firm to register with the PCAOB that prepares or issues any audit report with respect to any issuer, or plays a substantial role in the preparation of furnishing of an audit report with respect to any issuer).
- <sup>13</sup> See *Financial Reporting Manual*, Section 4130.1 (audit reports that refer to PCAOB standards must comply with both the SEC's and PCAOB's independence rules).
- <sup>14</sup> See *Financial Reporting Manual*, Section 6820.2; see also Form 20-F, General Instruction E(c).
- <sup>15</sup> See Form 20-F, Item 8.A.5.

- <sup>16</sup> See *IFRS Reconciliation Release*, Section III.A.2. For pre-effective registration statements and post-effective amendments with annual financial statements less than nine months old, published interim financial statements need not be reconciled to US GAAP if audited annual financial statements included or incorporated by reference for all required periods are prepared in accordance with IASB IFRS. For pre-effective registration statements and post-effective amendments with annual financial statements more than nine months old, reconciliation is not required for an interim period where the issuer complies with and explicitly states compliance with IAS 34, and audited annual financial statements are prepared in accordance with IASB IFRS. See *Financial Reporting Manual*, Section 6330.
- <sup>17</sup> See Form 20-F at Items 17(c) and 18; see also *Final Rule: First-Time Application of International Financial Reporting Standards*, Release No. 8567 (April 12, 2005) [*First-Time Application of IFRS Release*] (discussing the applicable exceptions).
- <sup>18</sup> See generally Form 20-F, Item 8.A.5.
- <sup>19</sup> See JOBS Act Section 102(b)(1) (adding new Securities Act Section 7(a)(2)).
- <sup>20</sup> See JOBS Act Section 102(b)(2) (modifying Exchange Act Section 13(a)).
- <sup>21</sup> See JOBS Act Section 102(b)(3) (modifying Regulation S-K, Item 303(a)).
- <sup>22</sup> See Form 20-F, Item 3.A.1. The selected financial statements must include at least each of the following line items: “net sales or operating revenues; income (loss) from operations; income (loss) from continuing operations; net income (loss); net income (loss) from operations per share; income (loss) from continuing operations per share; total assets; net assets; capital stock (excluding long-term debt and redeemable preferred stock); number of shares adjusted to reflect changes in capital; dividends declared per share in both the currency of the financial statements and the host country currency, including the formula used for any adjustments to dividends declared; and diluted net income per share.” Form 20-F, Item 3.A.2. The selected financial statements may also include any additional items that would enhance an understanding of the issuer’s financial condition and results of operations.
- <sup>23</sup> See Form 20-F, Item 3.A.1.
- <sup>24</sup> See *id.* at Instruction 2 to Item 3.A. An issuer that adopted IASB IFRS during the past three years is only required to provide selected financial data for the periods that it prepared its financial statements in accordance with IASB IFRS. *Id.*
- <sup>25</sup> See *id.*
- <sup>26</sup> See Form 20-F, Item 3.A.1. The requirement for comparative balance sheet data may be met by presenting the year-end balance sheet information. See *id.*
- <sup>27</sup> See Form 20-F, Item 3.A.1.
- <sup>28</sup> See Form 20-F, Item 3.B.
- <sup>29</sup> See *id.*
- <sup>30</sup> SEC Division of Corporation Finance, *International Reporting and Disclosure Issues*, Section III.B.f (Nov. 1, 2004).
- <sup>31</sup> See *id.*
- <sup>32</sup> JOBS Act, Section 106(e)(1), adding Securities Act Section 6(e)(1). The confidential submission is automatically exempt from disclosure under the Freedom of Information Act (FOIA). JOBS Act, Section 106(e)(2), adding Securities Act Section 6(e)(2).
- <sup>33</sup> See 2017 Procedures. Prior to the end of the 12th month following the effective date of the initial registration statement, these issuers may also submit the first draft of a follow-on registration statement for nonpublic review. *Id.* A foreign private issuer may choose instead to use the procedures adopted in 2011 for foreign private issuers, which are limited to a foreign private issuer that is filing with the SEC for the first time that:
- qualifies as an emerging growth company under the JOBS Act (which would be treated as a confidential submission as described above);
  - is listed or is concurrently listing its securities on a non-US securities exchange – *i.e.*, a foreign private issuer that is not solely listing in the United States;
  - is being privatized by a foreign government; or
  - can “demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.”
- See Staff of the Division of Corporation Finance, *Non-Public Submissions from Foreign Private Issuers* (December 8, 2011, updated May 30, 2012) [2012 Procedures].
- Nonpublic submissions are not automatically exempt from FOIA, and issuers are advised to request confidential treatment under SEC Rule 83. 2017 Procedures, at n.1. Making a Rule 83 request does not guarantee that the information will be protected from public disclosure; the issuer simply puts the SEC on notice that it wants the information kept confidential. The SEC will resolve whether to honor a confidentiality request only when disclosure of the information is requested under FOIA. See *Confidential Treatment Procedures Under the Freedom of Information Act*, 17 C.F.R. 200.83.
- <sup>34</sup> FAST Act Section 71003, adding new JOBS Act Sections 102(d)(1) and (2); Fast Act Compliance and Disclosure Interpretations (C&DIs), Question 1. See also Securities Act Forms C&DIs, Question 101.04 (August 17, 2017).

35 An EGC must publicly file its registration statement and all previous confidential submissions at least 15 days before commencing its road show or, absent a road show, 15 days prior to effectiveness. FAST Act Section 71001, amending Securities Act Section 6(e)(1); see also Jumpstart Our Business Startups Act Frequently Asked Questions – Confidential Submission Process for Emerging Growth Companies (updated December 21, 2015) [*JOBS Act FAQs*], Questions 8 and 9.

36 Securities Act Forms C&DIs, Question 101.04; Fast Act C&DIs, Question 1 (August 17, 2017).

37 See 2017 Procedures; SEC Division of Corporation Finance, Voluntary Submission of Draft Registration Statements - FAQs (June 30, 2017), Question 7. See also Securities Act Forms C&DIs, Question 101.05 (August 17, 2017). A non-EGC must publicly file its registration statement and all previous nonpublic submissions at least 15 days before commencing any road show or, absent a road show, 15 days prior to effectiveness. 2017 Procedures. The 15-day requirement does not apply to submissions made under the 2012 Procedures by a non-EGC or by an EGC that has chosen not to take advantage of any of the accommodations available to an EGC under the JOBS Act. However, the public filing must be made prior to the start of the road show. See 2012 Procedures; see also Staff of the Division of Corporation Finance, *Jumpstart Our Business Startups Act Frequently Asked Questions Generally Applicable Questions on Title I of the JOBS Act* (April 16, 2012, updated May 3, 2012 September 28, 2012, and December 15, 2015) [*JOBS Act Title I FAQs*], Question 9. In the case of a follow-on offering, the public filing must be made at least 48 hours prior to effectiveness. 2017 Procedures.

38 Fast Act C&DIs, Question 2 (December 15, 2015).

39 2017 Procedures.

40 See *Financial Reporting Manual*, Section 1210.

41 See Form 20-F, Instruction 1 to Item 8.A.4. The rules regarding the age or “staleness” of the required financial statements for foreign private issuers vary a great deal from those applicable to US domestic issuers. Generally speaking, the financial statements for US domestic issuers go “stale” at a much faster rate.

42 See Form 20-F, Item 8.A.4.

43 See Form 20-F, Item 8.A.4. (requiring IPO issuers to provide audited financial statements “as of a date not older than 12 months at the time the document is filed” and noting that the audited financial statements in such cases “may cover a period of less than a full year”).

44 See *Financial Reporting Manual*, Section 6220.3.

45 See Form 20-F, Instruction 2 to Item 8.A.4; see *Financial Reporting Manual*, Section 6220.3.

46 See Form 20-F, Instruction 2 to Item 8; see also *Financial Reporting Manual*, Section 6220.2.

47 See Form 20-F, Item 8.A.5. This requirement applies to any publication of financial information that includes, at a minimum, revenue and income information, even if that information is not published as part of a complete set of financial statements. See Form 20-F, Instruction 3 to Item 8.A.5.

48 See *Financial Reporting Manual*, Section 6220.6.

49 See Form 20-F, Item 5.

50 See S-K Item 303(a).

51 See *Final Rule: Disclosure in Management’s Discussion and Analysis about Off-Balance Sheet Arrangements and Aggregate Contractual Obligations*, Release No. 33-8182 (January 28, 2003).

52 See *Other Orders and Notices: Commission Statement about Management’s Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33-8056 (January 22, 2002).

53 See *Proposed Rule: Disclosure in Management’s Discussion and Analysis about the Application of Critical Accounting Policies*, Release No. 33-8098 (May 10, 2002); see also *Other Orders and Notices: Cautionary Advice Regarding Disclosure About Critical Accounting Policies*, Release No. 33-8040 (December 12, 2001).

54 See *Interpretive Release: Commission Guidance on Presentation of Liquidity and Capital Resources Disclosure in Management’s Discussion and Analysis*, Release No. 33-0144 (September 17, 2010).

55 See *Interpretive Release: Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33-8350 (December 19, 2003).

56 See *IFRS Reconciliation Release*; *Financial Reporting Manual*, Section 6310.1.

57 See Form 20-F, Item 17(c); *Financial Reporting Manual*, Section 6310.2.

58 See Form 20-F, Instructions 3 and 4 to Item 8.A.5; *Financial Reporting Manual*, Sections 6330.1 and 6330.2.

59 See *Financial Reporting Manual*, Section 6120.6.

60 See Form 20-F, Item 17(c).

61 See *IFRS Reconciliation Release*.

62 See Form 20-F, Item 17(c).

63 See *Financial Reporting Manual*, Section 6410.2.

64 See Form 20-F, Instruction 2 to Item 3.A.

65 See *Id.*

66 See *Financial Reporting Manual*, Section 6410.2.

67 See *Financial Reporting Manual*, Section 6410.2.c.

68 See Form 20-F, Instruction 2 to Item 5.

69 See *id.*

70 See Form 20-F, Item 8.A.1; Item 8.A.3. (noting audit reports must cover each period of required disclosure).

71 See Form 20-F, Instruction to Item 8.A.3. See also SAB 103, Topic 1.E.2 (financial statements on which the auditors' opinions are qualified because of a limitation on the scope of the audit do not meet the requirements of S-X Rule 2-02(b); financial statements for which the auditors' opinions contain qualifications relating to the acceptability of accounting principles used or the completeness of disclosures made are also unacceptable); *Financial Reporting Manual*, Section 4220 (discussing qualified audit reports generally).

72 See *Financial Reporting Manual*, Section 6820.2; see also Form 20-F, General Instruction E(c) (referring to US GAAS, the precursor to PCAOB auditing standards for public companies).

73 See *Financial Reporting Manual*, Section 4110.1 (citing PCAOB Rule 2100).

74 The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion and Related Amendment to PCAOB Standards, PCAOB Release No. 2017-001 (June 1, 2017), PCAOB Rulemaking Docket No. 034.

75 See S-X Rule 3-20(a).

76 See *Financial Reporting Manual*, Section 6610.1.

77 See S-X Rule 3-20(b).

78 See *id.*; see also S-K Item 301, Instruction 5.C (noting if equity securities are being registered, a five-year summary of dividends per share stated in both the currency in which the financial statements are denominated and US dollars must be included, based on the exchange rates at each respective payment date).

79 See S-X Rule 3-20(b) (providing that "[i]f the reporting currency is not the US dollar, dollar-equivalent financial statements or convenience translations shall not be presented, except a translation may be presented of the most recent fiscal year and any subsequent interim period presented using the exchange rate as of the most recent balance sheet included in the filing, except that a rate as of the most recent practicable date shall be used if materially different").

80 See *id.*; see also *Financial Reporting Manual*, Section 6600 (discussing reporting currency generally).

81 See Form F-1, Item 4(b); see also Form F-3, Item 5(b)(1)(i). This requirement does not apply to annual reports. See Form 10-K, Item 8 Paragraphs 1. Also, when securities are registered on Form S-4 or F-4 in connection with a stock-for-stock acquisition, somewhat different requirements apply for the financial statements of the company being acquired.

82 On May 3, 2019, the SEC proposed to change the financial statement requirements relating to acquired company and related pro forma financial statements. See *Proposed Rule: Amendments to Financial Disclosures about Acquired and Disposed Businesses*, Release No. 33-10635. The comment period for the proposal closed on July 29, 2019.

83 See S-X Rule 11-01(d). The question whether an acquisition is of a "business" should be evaluated in light of the facts and circumstances involved and whether there is sufficient continuity of the acquired entity's operations prior to and after the transactions so that disclosure of prior financial information is material to an understanding of future operations. A presumption exists that a separate entity, a subsidiary, or a division is a business. However, a lesser component of an entity may also constitute a business. Among the facts and circumstances to consider in evaluating whether an acquisition of a lesser component of an entity constitutes a business are:

- whether the nature of the revenue-producing activity of the component will remain generally the same as before the transaction; or
- whether any of the following attributes remain with the component after the transaction: (i) physical facilities, (ii) employee base, (iii) market distribution system, (iv) sales force, (v) customer base, (vi) operating rights, (vii) production techniques, or (viii) trade names.

See *id.*

84 However, a different conclusion may be reached depending upon the customary practice for an industry or a particular issuer. For example, an issuer may be submitting a letter of intent as one of many parties in a bidding process, or a roll-up entity may routinely sign letters of intent to further its due diligence investigations of multiple potential targets, but with the acquisition of only a minority of those companies becoming probable.

85 See *Financial Reporting Manual*, Section 2005.4.

86 By "pre-tax income" we mean the income from continuing operations before income taxes. See S-X Rule 1-02(w)(3). If the acquired business had a net loss, then the absolute value of the negative amount is generally used for the test. See *Financial Reporting Manual*, Section 2015.9.



87 See S-X Rule 3-05(b)(3). The tests may not be made by “annualizing” data. *Id.*

88 See S-X Rule 3-05(a)(3) (governing whether businesses are “related”); Rule 11-01(d) (governing whether an acquisition involves a “business”).

89 See S-X Rule 3-05(b)(2)(ii).

90 See *id.* at Rule 3-05(b)(2)(iii).

91 See S-X Rule 3-05(b)(2)(iv) (50% test); S-X Rule 3-05(b)(1) (registration of securities to be offered to security holders of acquired business); *The Center for Audit Quality SEC Regulations Committee Highlights* (March 19, 2013) (an EGC may include only two years of financial statements of the Rule 3-05 acquiree, even in situations where an EGC voluntarily provides a third year of financial statements).

92 See S-X Rule 3-05(a)(1) (financial statements of acquired businesses must be prepared and audited in accordance with S-X).

93 Although the staleness date for an acquired company’s financial statements is determined based on the status of the acquired company (e.g., as an accelerated or non-accelerated filer), an interesting wrinkle may emerge where the acquiring company is on a faster track than the acquired company. In that fact pattern, the separate requirement to include pro forma financial information under Article 11 of S-X can effectively accelerate the need for the acquired company’s financial information. The acquiring company will need to produce financial statements for the acquired business if the acquiring company wants to go to market with “last twelve months” pro forma financials after the date on which its own year-end financials are due but before the due date for the acquired company’s financials.

94 See S-X Rule 3-05(b)(4)(i). The date of an offering will be deemed to be the date of the final prospectus or prospectus supplement filed pursuant to Rule 424(b). See *id.* By analogy, the pricing date would be the date of an offering in a Rule 144A transaction.

95 “Foreign business” is defined in S-X Rule 1-02(l) as a business that is majority owned by persons who are not citizens or residents of the United States and is not organized under US law, and either:

- more than 50% of its assets are located outside the United States; or
- the majority of its executive officers or directors are not US citizens or residents.

In determining the majority ownership of a business, the SEC Staff will consider the ultimate parent entity that would consolidate the business under US GAAP (or IFRS for IASB IFRS issuers) and the parent’s controlling shareholders. See *Financial Reporting Manual*, Section 6110.4. The implication of this is that a non-US subsidiary of a US company would likely not be considered a “foreign business.”

96 See Form 20-F, Item 17(c)(2)(v).

97 See S-X Rule 3-05(c) (financial statements of an acquired non-US business can meet Item 17 of Form 20-F); Form 20-F, Item 17(c)(v) (financial statements of an acquired business may omit reconciliation below the 30% significance level).

98 See *Financial Reporting Manual*, Section 4110.5.

99 See S-X Rule 1-02(w).

100 See S-X Rule 3-05(b)(4)(iii).

101 See *id.* In certain situations the SEC Staff will apply a 70% significance test. See *Financial Reporting Manual*, Section 2040.2.

102 See S-X Rule 3-06.

103 SAB 80 was recodified, with slight modifications in *SEC Staff Accounting Bulletin: Codification of Staff Accounting Bulletins*, Topic 1.J. For a discussion of SAB 80, see generally *Financial Reporting Manual*, Section 2070.

104 See *id.* In order for the pre-acquisition statements of an acquiree to be omitted from the registration statement, each of the following conditions must be met:

- the combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than nine months may not exceed 10%;
- the combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 21 months may not exceed 20%; and
- the combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 33 months may not exceed 40%.

Combined significance is the total, for all included companies, of each individual company’s highest level of significance under the three tests of significance (investment, assets, and pre-tax income). For a serial acquirer going public, the application of SAB 80 is likely to allow for the exclusion of financial statements for an increasing number of acquired companies for each period prior to the IPO. See *id.*

105 See S-X Rule 3-14(a). The additional disclosure includes (i) material factors considered by the issuer in assessing the property, including sources of revenue (including, but not limited to, competition in the rental market, comparative rents, occupancy rates) and expenses (including, but not limited to, utility rates, *ad valorem* tax rates, maintenance expenses, and capital improvements anticipated) and (ii) an indication that, after reasonable inquiry, the issuer is not aware of any material factors relating to the property other than those discussed in (i) that would cause the reported financial information not to be necessarily indicative of future operating results. See S-X Rule 3-14(a)(1).

106 Securities Act Rule 408 states that, “In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.”

107 See S-X Rule 11-01(a)(1) (noting pro forma financial information required for a “significant” business acquisition); see S-X Rule 11-01(b)(1) (noting a “significant” acquisition means an acquisition above the 20% significance level); see S-X Rule 11-01(c) (no pro forma financial information is needed if separate financial statements of the acquired business not included).

108 See S-X Rule 11-02(b)(1).

109 See S-X Rule 11-02(c)(1). The pro forma condensed balance sheet should be prepared as if the transaction had occurred on the date of the latest historical balance sheet. See S-X Rule 11-02(b)(6).

110 See S-X Rule 11-02(b)(1).

111 See S-X Rule 11-02(c)(2)(i). The pro forma condensed statements of comprehensive income should be prepared as if the transaction had taken place at the beginning of the latest fiscal year included in the filing. See S-X Rule 11-02(b)(6).

112 See S-X Rule 11-01(a)(4). A “significant” disposition for these purposes is one where the business would be a “significant subsidiary” under S-X Rule 1-02(w).

113 See S-X Rule 11-01(a)(1) and *Financial Reporting Manual*, Section 3110.1.

114 See S-X Rule 11-01(a)(8).

115 See generally S-X Rule 11-02.

116 See S-X Rule 11-02(b)(6).

117 See S-X Rule 11-02(c)(3).

118 See *id.* This updating could be accomplished by adding subsequent interim period results to the most recent fiscal year-end information and deducting the comparable preceding year interim period results. See *id.* Another common approach is to use the acquired company’s most recent quarterly information.

119 See *Financial Reporting Manual*, Section 6360.1.

120 See *id.* Section 6410.11.

121 See *id.* Section 6510.9.

122 See *id.*

123 On July 24, 2018, the SEC proposed to change the financial statement requirements relating to guarantor financial statements. See *Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant’s Securities*, Release No. 33-10526. The comment period for the proposal closed on December 3, 2018.

124 See S-X Rule 3-10(a). In the case of a foreign private issuer, these will be the financial statements required by Item 8.A of Form 20-F. See also S-X Rule 3-10(a)(3). Note that S-X Rule 3-10 typically does not apply to credit enhancements that are not guarantees. However, in certain cases, the financial condition of the party providing the credit enhancement could be material to investors and subject to disclosure. See *Final Rule: Financial Statements and Periodic Reports for Related Issuers and Guarantors*, Release No. 33-7878 at n.50 (Aug. 15, 2000) [*Guarantors Release*].

125 The modified financial information permitted by S-X Rules 3-10(b)-(f) is available only for guaranteed debt and debt-like instruments. See *Guarantors Release*, Section III.A.4.b. Substance is determinative, and the characteristics that identify a guaranteed security as debt or debt-like for these purposes are: (i) the issuer has a contractual obligation to pay a fixed sum at a fixed time; and (ii) where the obligation to make such payments is cumulative, a set amount of interest must be paid. See *id.*

126 Under S-X Rule 3-10(h)(6), a subsidiary is “minor” if each of its total assets, stockholders’ equity, revenues, income from continuing operations before income taxes, and cash flows from operating activities is less than 3% of the parent company’s corresponding consolidated amount. See also *Financial Reporting Manual*, Note to Section 2515.3 (“minor” definition applies to both direct and indirect subsidiaries of the parent; non-guarantor subsidiaries that are more than minor prevent the use of the narrative approach, whether owned directly by parent or indirectly through another subsidiary).

127 See S-X Rule 3-10(i)(12). The reconciliation may be based on Item 17 of Form 20-F. See *id.*; see also *IFRS Reconciliation Release*, Section III.D.3.

128 Under S-X Rule 3-10(h)(1), a subsidiary is 100% owned if all of its outstanding voting shares are owned, directly or indirectly, by its parent company. The term “voting shares” includes all rights, other than as affected by events of default, to vote for election of directors, and the sum of all interests in an unincorporated person. See S-X Rule 1-02(z). Convertible securities and options to buy voting shares would typically be considered voting shares. Note that this standard is different from the definition of “wholly owned subsidiary” under S-X Rule 1-02(aa), which is “a subsidiary substantially all of whose outstanding voting shares are owned by its parent and/or the parent’s other wholly owned subsidiaries.”

129 The Latham & Watkins standard form indenture includes a “savings clause” to limit the guarantee to the extent necessary for the guarantee not to constitute a fraudulent conveyance under insolvency laws. This exception does not vitiate the guarantee in the view of the SEC. Guarantees may also have different subordination terms than the guaranteed security.

130 Note 3 to S-X Rule 3-10(f) provides that if any of the subsidiary guarantees is not joint and several with the guarantees of the other subsidiaries, then each subsidiary guarantor whose guarantee is not joint and several need not include separate financial statements, but the condensed, consolidating financial information must include a separate column for each subsidiary guarantor whose guarantee is not joint and several.

131 S-X Rule 3-10(i) provides guidance for the preparation of the condensed, consolidating financial information in the footnote.

132 The column for non-guarantor subsidiaries may be omitted if the parent has independent assets or operations and the non-guarantor subsidiaries are minor. See Note 3 to S-X Rule 3-10(e); see also Note 2 to S-X Rule 3-10(f).

133 A subsidiary is an operating subsidiary if it is not a “finance subsidiary.” See S-X Rule 3-10(h)(8). In turn, a subsidiary is a finance subsidiary “if it has no assets, operations, revenues, or cash flows other than those related to the issuance, administration, and repayment of the security being registered and any other securities guaranteed by its parent company.” S-X Rule 3-10(h)(7).

134 Note 1 to S-X Rule 3-10(c) allows a conditional exemption from providing the footnote if the parent company has no independent assets or operations, the guarantee is full and unconditional, the non-guarantor subsidiaries are minor, and there is a footnote to this effect in the parent financial statements.

135 The column for non-guarantor subsidiaries may be omitted if the parent has independent assets or operations and the non-guarantor subsidiaries are minor. See Note 2 to S-X Rule 3-10(c).

136 As noted above, a subsidiary is a finance subsidiary “if it has no assets, operations, revenues, or cash flows other than those related to the issuance, administration, and repayment of the security being registered and any other securities guaranteed by its parent company.” S-X Rule 3-10(h)(7).

137 See Note to S-X Rule 3-10(b).

138 Pursuant to Note 4 to S-X Rule 3-10(d), if any of the subsidiary guarantees is not joint and several with the guarantees of the parent company or the guarantees of the parent company and the other subsidiaries, each subsidiary guarantor whose guarantee is not joint and several need not include separate financial statements, but the condensed, consolidating financial information must include a separate column for each subsidiary guarantor whose guarantee is not joint and several.

139 For a finance subsidiary only, instead of providing this condensed, consolidating financial information, the parent company’s financial statements may include a footnote stating (if true) that the parent company has no independent assets or operations, the issuer is a 100%-owned finance subsidiary, the parent company, and all of the parent company’s subsidiaries other than the issuer have guaranteed the securities, and the guarantees are full and unconditional and joint and several. See Note 5 to S-X Rule 3-10(d).

140 The column for non-guarantor subsidiaries may be omitted if the non-guarantor subsidiaries are minor.

141 See Note 4 to S-X Rule 3-10(d).

142 See S-X Rule 3-10(g)(1)(i).

143 See Instruction 1 to S-X Rule 3-10(g)(1).

144 See Instruction 3 to S-X Rule 3-10(g)(1).

145 The audited and unaudited financial statements must comply with all aspects of S-X except for the filing of supporting schedules. See S-X Rule 3-10(g)(2)(ii). If the subsidiary is a non-US business, financial statements of the subsidiary meeting the requirements of Item 17 of Form 20-F will suffice. See *id.*

146 See S-X Rule 3-10(g)(1).

147 See *Financial Reporting Manual*, Section 4110.5.

148 See *Financial Reporting Manual*, Section 2600.1.

149 See S-X Rule 3-16.

150 See *Financial Reporting Manual*, Section 2600.2.

151 See ASC 323, *Investments – Equity Method and Joint Venture*; see also *Financial Reporting Manual*, Section 5210.

152 See SAB 103, Topic 6.K.4.

153 See *Financial Reporting Manual*, Section 4110.5.

154 See S-X Rule 3-09(a).

155 Note this test is derived from S-X Rule 1-02(w)(1).

156 Note this test is derived from S-X Rule 1-02(w)(3).

157 See S-X Rule 3-09(a).

158 See S-X Rule 3-09(b).

159 *The Center for Audit Quality SEC Regulations Committee Highlights* (March 19, 2013) (EGC may include only two years of financial statements of the Rule 3-09 investee, even in situations where an EGC voluntarily provides a third year of financial statements).

160 See Note to paragraph (w) of S-X Rule 1-02(w).

161 See Form 20-F, Item 17(c)(vi).

162 See S-X Rule 3-09(d).

163 See Form 20-F, Item 17(c).

164 See *id.*

165 See *Financial Reporting Manual*, Note to Section 6410.6.

166 See S-K Item 303(a).

167 ASC 280 uses the term “chief operating decision maker” to identify a function rather than a specific person; the “chief operating decision maker” could be the CEO, CFO, or a group of senior managers, depending upon the circumstances. IFRS 8 (“Operating Segments”) uses similar language: “The term ‘chief operating decision maker’ identifies a function, not necessarily a manager with a specific title. That function is to allocate resources to and assess the performance of the operating segments of an entity. Often the chief operating decision maker of an entity is its chief executive officer or chief operating officer but, for example, it may be a group of executive directors or others.”

168 In practice there is a great variety of ways in which management may view its business and there is no one right answer within a given industry.

169 See ASC 280 10-50-12 (quantitative thresholds).

170 Under ASC 280, the details provided in reporting a “measure of profit or loss” depend upon the information that is actually reviewed by the chief operating decision maker and may include revenues from external vs. internal customers, interest revenue and expense, depreciation and amortization, and unusual items, among others.

171 See *generally* S-X Rule 5-04(c).

172 Where restrictions on the amount of funds that may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary may be used. Redeemable preferred stocks and non-controlling interests are deducted in computing net assets for purposes of this test. See S-X Rules 5-04 and 1-02(dd).

173 See *generally* S-K Item 801.

174 On October 31, 2018, the SEC adopted amendments to modernize property disclosure requirements for mining registrants, including foreign private issuers. The final rules provide a two-year transition period so that a registrant will not be required to begin to comply with the new rules until its first fiscal year beginning on or after January 1, 2021. However, registrants may voluntarily comply with the new rules earlier.

The changes align the SEC’s rules more closely with global standards, as embodied by the Committee for Reserves International Reporting Standards. When fully effective, the rules will rescind Industry Guide 7 and remove Item 4.D of Form 20-F. Most of the disclosure requirements for registrants with material mining operations, including foreign private issuers, will be consolidated in new subpart 1300 of S-K. See *Final Rule: Modernization of Property Disclosures for Mining Registrants*, Release No. 33-10570 (Oct. 31, 2018).

175 See *Interpretive Release: Modernization of Oil and Gas Reporting*, Release No. 33-8995 (December 31, 2008).

176 See *Financial Reporting Manual*, Section 6510 (Item 17), Section 6520 (Item 18).

177 Compare Form 20-F, Item 17(b) (financial statement must disclose information “substantially similar” to financial statements complying with US GAAP and S-X) with *id.* at Item 18 (an issuer must provide all Item 17 information plus all other information required by US GAAP and S-X unless those requirements do not apply to foreign private issuers, subject to certain exceptions).

178 See SAB 103, Topic 1.D.1.

179 See *id.*

180 See Form 20-F, General Instruction E(c)(2).

181 See S-X Rule 3-05.

182 See S-X Rule 3-09.

183 See S-X Rule 3-16.

184 See S-X Rule 3-10.

185 See Regulation G, Rule 100(a).

186 See Form 8-K, Item 2.02, Instruction 2 (requirements of S-K Item 10(e)(1)(i) apply to Item 2.02 disclosures).

187 See Regulation G, Rule 101(a)(1).

188 See *id.* at Rule 101(b).

189 *See id.* at Rule 101(a)(2).  
190 *See id.* at Rule 101(a)(3).  
191 *See id.* at Rule 100(a).  
192 *See id.* at Rule 100(a)(2). In the case of forward-looking, non-GAAP measures, a quantitative reconciliation need only be provided to the extent available without unreasonable efforts. *Id.*  
193 *See id.* at Rule 100(b).  
194 *See id.* at Rule 100(c).  
195 *See* S-K, Items 10(e)(2), 10(e)(4), and 10(e)(5).  
196 *See id.* at Item 10(e)(1)(i), including in an earnings release furnished under Form 8-K Item 2.02.  
197 *See id.* at Item 10(e)(1)(ii), but not in an earnings release furnished under Form 8-K Item 2.02.  
198 *See id.* at Item 10, Note to Paragraph (e).  
199 *See generally* Non-GAAP Financial Measures C&DIs (last updated April 4, 2018).  
200 *See Final Rule: Inline XBRL Filing of Tagged Data*, Release No. 33-10514 (June 28, 2018).  
201 *See* S-K Item 601(b)(101)(i).  
202 *See id.*  
203 *Final Rule: Interactive Data to Improve Financial Reporting*, Release No. 33-9002, p. 1 (January 30, 2009).  
204 Under the relevant Rule 10b-5 case law, a plaintiff must show more than a simple misstatement or omission. A showing of *scienter* or recklessness is also required to establish liability.



# CHAPTER 8

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## Equity Derivatives

Derivatives are financial instruments whose value derives from that of something else. Equity derivatives, as distinguished from other types of derivatives such as credit derivatives or foreign currency derivatives, derive their value from underlying equity securities. In other words, the value of an equity derivative is linked to the value of the underlying security or securities. Equity derivatives, as described in this chapter, also encompass a variety of transaction formats. Those formats include (i) over-the-counter transactions executed on ISDA documentation “platform,” like accelerated share repurchases, various swaps, forwards, and options, to capital markets instruments, for example, mandatory and optional convertible and exchangeable securities, and (ii) M&A and financing transactions, like margin loans, other types of equity-based financings, and certain derivative products used in structured acquisition trades.

Equity derivatives mainly allow parties to acquire or dispose of economic exposure by transferring the risks and benefits of owning the underlying equity securities. Equity derivatives are thus commonly used as a means of obtaining a synthetic position in an underlying security without having to own it. The synthetic position can be *long*, meaning that the derivative has a direct relationship to the value of the underlying security, and therefore replicates the economics of an investment in the underlying security. The synthetic position can also be *short*, meaning that the derivative has an inverse relationship to the value of the underlying security, and therefore replicates the economics of a sale in the underlying security.

The practice of managing uncertainty by balancing long positions against short positions is commonly known as *hedging*. Hedging allows investors to tailor their payoffs to their desired risk profile. Hedging also allows banks or dealers to be in the business of buying and selling derivatives (and collecting the associated fees) without taking a particular directional view with regard to the value of the underlying security.

An increasing number of issuers, both US and foreign, have chosen to use equity derivatives linked to their own stock to facilitate capital-raising transactions, to minimize potential dilution to their equity, and to optimize their capital structure. Derivatives or derivative-related issues play a role in a number of transactions that seem fairly ordinary, whether in capital markets products or financing transactions.

## Examples of Corporate Equity Derivatives Transactions

### Structured Share Repurchases

An issuer with listed shares can repurchase its own shares in an open-market share repurchase program or through the use of equity derivatives. A common type of derivative used by issuers is an accelerated share repurchase, or ASR. Many variants of the structure exist, but in a typical ASR an issuer will give to a dealer an up-front cash payment (reflecting the then-current market price of the shares plus a commission) in exchange for the immediate delivery of an agreed number of shares that the dealer has borrowed from the market. During the term of the transaction the dealer will buy shares from the open market and return them to its stock lenders to close out its open positions. If at the end of the transaction, the price of the shares (determined pursuant to a method specified in the agreement) is greater than the initial price at which the dealer sold the shares to the issuer, the issuer will pay the difference (either in cash or by delivering shares) to the dealer. If the price is lower than the initial price, the dealer will deliver additional shares to the issuer.

An issuer may choose to enter into an ASR for a variety of reasons, such as:

- the issuer believes that its stock is undervalued;
- the repurchase and reduction in the number of shares outstanding generally will immediately positively impact earnings per share because relevant accounting rules may allow the issuer to immediately recognize the full number of shares as having been retired on the ASR's trade date; or
- it needs the shares for other purposes, for example, to satisfy its obligations under its employee stock option plans.

ASRs are also beneficial in that they allow issuers to effectively repurchase their shares at an average price, thereby lessening the impact of price volatility.

## **Convertible/Exchangeable Bond Hedge Transactions**

Convertible bonds are a type of a debt instrument that, subject to satisfaction of any specified conditions or the occurrence of any specified contingencies, the holder may convert into shares of the issuer at a specified conversion price and conversion rate. Because this embedded call option, an equity derivative in its own right, may itself have value to the holder of the bond, convertible bonds typically pay lower interest than straight corporate debt. From the point of view of the issuer, the ideal convertible bond would have low coupon payments, to minimize cost of financing, and a high conversion price, so as to minimize the potential dilutive impact upon conversion. However, a high conversion price often negatively impacts the marketability of the bond. A high conversion price also means the option is farther out of the money and would have less value. Investors would therefore want to be compensated for this with a higher coupon. To solve this problem, the issuer might enter into a call spread transaction to synthetically raise the conversion price of the bond and also potentially offer certain tax advantages.

In a call spread transaction, an issuer buys a call option (bond hedge) from a dealer that matches the terms of the embedded call option in the convertible bond. When and if the holders of the convertible debt exercise their options, the issuer can look to the dealer to provide the deliverable shares. The issuer has therefore hedged its obligation under the equity portion of the convertible bonds. To offset the cost of the call option purchased from the dealer, the issuer can sell a call (warrant) to the dealer with a higher strike price and longer maturity than the bond hedge. With the equity portion of the convertible debt and the bond hedge canceling each other out, the issuer's payoff would now resemble that of issuing convertible debt at the terms of the sold warrant. The dealer will hedge the equity risk by entering into cash-settled total return swaps or purchasing the underlying shares, and then it will dynamically adjust its hedge positions for the term of the call spread.

## **Margin Loans**

Margin loans are an attractive instrument for borrowers who want to monetize a large equity position. It allows them to raise funds upfront and participate in share price appreciation while still retaining voting control of the stock collateral.

The classic margin loan is the purchase of stock on margin in a margin account. The discussion here instead focuses on corporate margin loans on large equity stakes. In such a margin loan, a borrower receives financing from a bank and pledges stock to secure its obligations. During the term of the transaction, cash margin is posted or released depending on the value of the stock collateral. The borrower is also responsible for interest payments on the loan. Meanwhile, the bank will pass along any dividends and other collateral proceeds or the dividends will be kept in a collateral account as cash collateral. At the settlement of the loan, the borrower repays the full amount of the loan, and the bank releases the equity collateral. If the borrower defaults under the loan, the lender will foreclose



on and liquidate the stock collateral and apply the liquidation proceeds to satisfy the borrower's obligations under the loan.

It is important to note that, unlike standard financing transactions, margin lenders only secondarily focus on the borrower's credit quality. The primary risk emphasis of margin loans is on the "quality" of pledged collateral, particularly its trading characteristics – liquidity, free float, volatility, essentially factors that are relevant to lender's ability to promptly exit the position by disposing of collateral in public securities markets. For similar reasons, any legal restrictions, whether under applicable securities and other laws, or any contractual limits on the secured party's ability to dispose of that collateral, are also a crucial element of structuring and executing a margin loan. It is also the reason that margin loans are effectively marketed and structured by bankers who are usually equities and equity derivatives specialists rather than finance experts.

## Equity Swaps

Equity swaps, also known as delta one swaps, provide full economic exposure to an underlying equity security without actually owning it. There are two basic types of equity swaps, a total return swap, or TRS, and a price return swap. The difference is that in a TRS the payoff for the long party includes any returns, such as dividends, from the underlying equity security, whereas such amounts are not included in a price return swap. In a typical transaction, the long party will post cash collateral equal to a fraction of the notional amount of the swap. During the term of the transaction, the collateral is either increased or released depending on the price of the underlying security. Meanwhile, the long party will also pay floating amounts representing the financing cost of the underlying security. On the other side of the transaction, the short party (*e.g.*, a dealer) will usually buy the actual equity security from the market to neutralize its short exposure under the swap. At settlement, if the equity price is below the predetermined swap price, the long party will pay the dealer the difference between the swap price and the stock price. If the stock price is above the swap price, then the dealer pays the long party the difference between the stock price and the swap price. Importantly, in cash-settled TRSs where there is no express or implied agreement between the parties with respect to voting rights or disposition of the dealer's hedge, there is no transfer of any type of legal ownership. As a result, the long party will not have any sort of voting rights with respect to the underlying security.

An issuer might wish to enter into an equity swap for a variety of reasons. Since the position of the long party is economically equivalent to that of a party that has borrowed from the dealer to finance the acquisition of the shares, the TRS gives the long party the ability to take leveraged exposure to the shares without an up-front cash payment and without the limitations imposed by the margin regulations discussed below. Another reason is to hedge against short exposure under its own employee stock options plan. By entering into the swap as the long party, the issuer can neutralize its equity price risk under the options.

## Variable Share Forwards and Collars

Variable share forwards and collars with embedded financing are examples of hedging and monetization transactions. In a typical transaction, a holder of securities enters into a forward agreement for delivery of those securities at a future date. A number of shares for final delivery are often subject to variance depending on the price of the underlying security at the time of settlement. The transaction is accompanied by the dealer prepaying the value of the future deliverable and by the counterparty pledging the maximum number of shares underlying the transaction. The dealer can hedge its exposure to the forward or the collar by entering into a corresponding short position in the underlying securities and dynamically managing that position throughout the term of the transaction.

As an economic matter, the security holder entering into this transaction hedges its exposure to the underlying security and, to the extent it receives financing from the dealer, it monetizes its equity position. If the counterparty accepts a degree of variability in its delivery obligation, it may also retain a portion of the upside in the underlying securities. That variability may also convey certain tax and/or accounting benefits to the holder. The bank's position in the transaction, assuming its comfort with the collateral position, leaves the bank with little, if any, credit risk to the counterparty, even with the financing component. The bank's upside exposure to the value of the shares is secured with the collateral consisting of identical shares and its downside exposure is protected by its short position.

## Synthetic Acquisition Structures

Derivatives are often used in order for a counterparty to acquire exposure to the underlying equity securities in lieu of directly acquiring such securities. These transactions often are in a form of forwards, swaps, options, or any combination of these. They also differ depending on the type of settlement, that is, some are cash-settled only, so they convey just economic exposure to the underlying shares, while some allow for physical settlement, thus allowing a counterparty to acquire the underlying securities at expiration or at any time during the term of the transaction. Some of these structures also provide for an ability to acquire relevant exposure on an accelerated basis by sourcing the shares in the stock loan market.

Unlike in hedging transactions, acquisition structures provide a counterparty with a *long* position to the underlying asset and necessitate an acquisition of a long hedge position by the dealer. In that sense, these transactions are often viewed and analyzed as akin to the acquisition of the underlying securities. They are effected, however, to utilize different benefits of financial engineering – they may embed financing, provide price protection and expediency in establishing the position. Also, because they are in different forms and often convey different economic positions than purchasing securities outright, corresponding legal analysis is more nuanced.

## Common Regulatory Issues

Derivatives relating to equity securities raise issues under securities laws and commodities laws that differ from those raised by other kinds of derivatives. To complicate matters, because of the complex allocation of jurisdiction between the SEC and the Commodity Futures Trading Commission, or CFTC, the distinction between different types of derivatives has a greater regulatory significance than with other derivatives. To the extent that equity derivatives are deemed securities or transactions in securities, they are subject to the same rules and regulations as more traditional securities products under the Securities Act and the Exchange Act. This section summarizes and analyzes certain major regulatory issues that commonly appear in this practice area.

### Registration Under the Securities Act

US securities registration issues are relevant in the context of certain derivatives transactions, as well as in connection with related hedging activities. If an issuer, or a shareholder that is an affiliate of the issuer, or a holder of restricted securities, enters into an equity derivative transaction with a dealer that results in the dealer having an economic long position, and the dealer sells shares into the US public market to hedge the transaction, the issue arises as to whether these sales by the dealer should be subject to the same registration requirement as sales made directly by the issuer or shareholder. As a result, most hedging transactions are structured in a manner complying with relevant registration requirements or applicable exemptions. Importantly, in addition to domestic exemptions like Rule 144 and Rule 144A, transactions in securities of foreign private issuers may provide greater latitude because the parties may avail themselves of certain jurisdictional exemptions, particularly under Regulation S.

Similarly, the key to structuring and execution of equity-based financing transactions, like margin loans, is the analysis around the secured party's ability to access resale public markets. In that sense, understanding the relevant elements of applicable resale exemptions – like Rule 144, private placement resales, and even Regulation S secondary sales – is essential to these deals.

### **Insider Trading Rules and Rule 10b5-1 Safe Harbor**

Equity derivatives transactions are subject to the same general fraud and insider trading prohibitions as securities transactions. For example, entering into or terminating a swap transaction while in possession of material nonpublic information could subject both the issuer and the dealer to liability under the antifraud rules. Similarly, if a dealer is involved in dynamic hedging, whereby it is buying and selling the issuer's stock throughout the term of the transaction, it could face liability if it was in possession of material nonpublic information about the issuer, regardless of whether it actually used such information. As an aside, margin loans also entail elements of this analysis, as lenders want to be comfortable that they will be able to access public markets in the event of foreclosure without any concerns about insider trading liability. To address these problems, parties typically choose to document equity derivative transactions as plans meeting the requirements of the affirmative defense provided by Exchange Act Rule 10b5-1. The transaction documentation will also usually include representations by the party that it is not in possession of material nonpublic information and that if it does come into possession of such information, it will not disclose such information to the dealer.

### **Market Manipulation**

Section 9 of the Exchange Act prohibits transactions intended to create, or that actually create, "a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security." Generally, if any person is purchasing or selling securities in the market, especially if an issuer is purchasing its own shares, it should take care to do so in a manner that is not deemed manipulative within the meaning of Section 9. Correspondingly, if a party enters into an equity derivative transaction with a dealer that results in the dealer having an economic short position under the transaction and the dealer buys shares to hedge the transaction, the issue arises as to whether those purchases by the dealer raise the same manipulation concerns as purchases made directly by the issuer.

### **Exchange Act Section 13 Reporting Requirements**

Just like in the context of an acquisition of a physical position in equity securities, an equity derivative transaction might implicate reporting requirements under Section 13 of the Exchange Act and related rules. Those rules (as well as Section 16 and related rules that are not applicable to equity securities of foreign private issuers) contain a number of requirements governing the reporting of derivative positions in underlying securities subject to the same regime. The issue arises whether the position should be reported under Section 13, and also whether the transaction or related agreements would result in the bank or end user becoming a member of a reporting group. Therefore, dealers carefully monitor the size of positions they set up for their counterparties and their hedging positions. In transactions where dealers expect to have a long hedge position, dealers typically ask for provisions and use hedging techniques that mitigate the risk of being subject to any reporting obligations.

### **Regulation M**

Regulation M generally prohibits an issuer engaging in a distribution of its securities, and others that have an interest in such distribution, from purchasing or bidding for securities of the same class as, or related to, the securities being distributed during a specified restricted period applicable to the

distribution. If an issuer or selling shareholder enters into an equity derivative transaction that will result in the dealer purchasing shares to hedge its exposure under the transaction, and such issuer or selling shareholder is, or will be, engaged in a distribution of shares during the term of the transaction, the issue arises as to whether such purchases of the shares by the dealer during the distribution period could violate Regulation M.

## **Margin Regulations**

While the application of the US margin rules may be fairly straightforward to standard financings collateralized with equity securities, many equity derivative transactions present more complicated issues. Many long derivatives may be deemed to constitute equivalent financings and involve credit exposure of one party to another and/or pledges of underlying shares as collateral (or could be recharacterized as such). Such transactions raise the question of whether they could be viewed as extensions of credit that would also be subject to the limitations imposed by the aforementioned margin rules. In general, market participants take the position that a typical long swap, in which the counterparty has no ownership rights in any shares and no right or agreement (formal or informal) with the dealer to acquire any shares, is not subject to the margin regulations.

## **Anti-Takeover/Antitrust and State Takeover Regulations**

Similar to the analysis under Sections 13 and 16 of the Exchange Act, establishment and termination of derivatives that do not contemplate physical ownership generally do not convey such ownership under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or HSR. Even physically settled derivatives ordinarily would not trigger HSR obligations prior to their settlement. Nevertheless, parties should exercise special care in connection with any long derivative transactions, particularly with respect to any agreements related to voting rights since such arrangements might trigger an acquisition under HSR.

In addition, state corporate laws also often restrict transfers of large ownership stakes. States may have anti-takeover or control share statutes, which prohibit business combinations with the target corporation and/or disable the ability to vote the shares acquired by specified acquirers. Thus, similar to the analysis under Section 13 and Section 16 of the Exchange Act, a synthetic derivative such as a swap that does not bestow any voting rights or the rights to dispose of the shares should not qualify the total return receiver as an owner or an interested stockholder. Nonetheless, unlike federal securities laws where there are multiple rules and precedents elaborating on the concept of beneficial ownership, there is very little case law regarding the interpretation of ownership under state corporate statutes. Moreover, states have different statutes accompanied by particular definitions and general jurisprudence, thereby further complicating the determination of ownership.

## **The Dodd-Frank Act**

As the impact of derivatives legislation brought about by Dodd-Frank has set in, it has become clear that the establishment and maintenance of certain long equity derivatives positions will become subject to the requirements established under new rules issued by the SEC and the CFTC, and other regulators. Title VII of Dodd-Frank has amended the Securities Act and the Exchange Act to substantially expand the regulation of the security-based swap market by establishing a new regulatory framework intended to make the market more transparent, efficient, fair, accessible, and competitive. Dodd-Frank provides that certain swaps based on single securities, single loans, or narrow-based security indexes will qualify and be regulated as security-based swaps.

To date, the SEC has proposed and adopted rules in various areas, including rules prohibiting fraud and manipulation, rules regarding trade reporting, and rules relating to the registration process and business conduct for security-based swap dealers. The SEC has also adopted a final rule that establishes procedures for its review of certain clearing agency actions. As a result, even if the SEC rulemaking is still ongoing, certain elements of new regulations exposing security-based swaps to the new regime have gradually become effective, although some rules are still to be finalized in the near future.

## **Conclusion**

Equity derivatives raise complex and often unexpected issues under US law. This chapter has only scratched the surface of the issues presented, many of which are complicated and subtle, and does not contemplate issues relating to matters such as insolvency, collateral analysis, and short selling regulations. Courts and regulators in the United States have provided very little guidance to market participants regarding the treatment of equity derivatives under US law. Many of the practices followed by market participants in the United States have emerged from the collective judgment of sophisticated US counsel based on limited formal and informal guidance from regulators. These practices are constantly evolving as new equity derivative structures are introduced and new guidance is given.



## CHAPTER 9

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### Cross-Border Tender and Exchange Offers – the Tier I and Tier II Exemptions; Rule 802

Tender offers, exchange offers, and business combinations involving a non-US target with US securities holders potentially trigger a variety of provisions of the US federal securities laws.<sup>1</sup> Depending principally on the level of US ownership of the target, certain exemptions from this regulatory scheme (the Tier I and Tier II exemptions) may be available.<sup>2</sup> We summarize below the requirements and scope of the Tier I and Tier II exemptions, as well as the related exemption from Rule 14e-5. We also summarize the exemption from Securities Act registration provided by Rule 802 for securities issued in connection with cross-border transactions.

#### The Regulatory Scheme

Cross-border M&A transactions are regulated by certain provisions of the Exchange Act and the SEC's rules, including Exchange Act Sections 13(d), 13(e), 14(d), 14(e), and 14(f), and Regulation 13D-G, Rule 13e-3, Rule 13e-4, Regulation 14D, and Regulation 14E under the Exchange Act. In addition, to the extent securities will be issued as consideration in the transaction, the registration requirements of the Securities Act will apply.

#### The Tier I Exemption

##### Tier I Relief

Tier I relief is sweeping. A tender offer for the equity securities of a foreign private issuer that meets the requirements of the Tier I exemption is exempt from most of the disclosure, filing, and procedural requirements of the Exchange Act.

Specifically, a Tier I-eligible tender offer is exempt from:<sup>3</sup>

- Sections 14(d)(1) through 14(d)(7) of the Exchange Act;
- Regulation 14D (Rules 14d-1 through 14d-10) under the Exchange Act;
- Schedules TO and 14D-9 under Regulation 14D;
- Rules 14e-1 and 14e-2 of Regulation 14E; and
- Rules 13e-3 and 13e-4 (in the case of a "going-private" transaction or an issuer self-tender offer).

A Tier I tender offer that meets certain additional requirements is also exempt from Rule 14e-5, which generally prohibits a bidder in a tender or exchange offer from purchasing the targeted security outside the offer.<sup>4</sup>

Tier I transactions remain subject to the antifraud provisions of the US federal securities laws, including Section 14(e) of the Exchange Act (applicable to tender and exchange offers).<sup>5</sup> Both US and non-US bidders may rely on the Tier I exemption.

## Tier I Requirements

The Tier I exemption is available if the following conditions are met:<sup>6</sup>

### Foreign Private Issuer

The target must be a foreign private issuer.<sup>7</sup>

### 10% Limit<sup>8</sup>

US securities holders must hold 10% or less of the class of securities sought in the tender offer. However, the 10% limitation does not apply in the case of a tender offer commenced during the pendency of a prior Tier I tender offer.

- *Calculation of 10% limit:* A US securities holder is a person resident in the United States.<sup>9</sup> In determining whether a holder is a US resident, a bidder must look through the record ownership of securities held by brokers, dealers, banks, and other nominees located in the United States, the target company's jurisdiction of incorporation and the jurisdiction that is the primary trading market of the target securities.<sup>10</sup> The Tier I eligibility calculation may be made any time within the period commencing 60 days prior to and ending 30 days after the date of announcement of the transaction.<sup>11</sup> Securities held by persons (whether US or foreign) owning more than 10% of the class of securities sought in the tender offer are no longer excluded from the Tier I eligibility calculation (whereas securities held by the bidder and securities convertible into or exchangeable for the subject securities are still excluded).<sup>12</sup>
- *Alternative average daily trading volume test:* There is an alternative Tier I eligibility test based on trading volume to determine US ownership in limited situations where an issuer or bidder is unable to complete the "look-through" analysis of the percentage of holders of the subject securities who are resident in the United States.<sup>13</sup> To qualify, among other things, the average daily trading volume for the subject securities in the United States over a 12-month period ending no more than 60 days before the announcement of the transaction must not be more than 10% of the average daily trading volume on a worldwide basis, information indicating otherwise must not be in annual information published by the target, and the acquiror must not have a reason to know that target's US ownership levels do not qualify.<sup>14</sup>

### Equal Treatment of US Securities Holders

The bidder must permit US securities holders to participate in the offer on terms at least as favorable as those offered to other holders.<sup>15</sup> Notwithstanding this requirement, certain exceptions are available in the case of exchange offers:

- *Blue sky exemption:* If the bidder offers securities registered under the Securities Act, the bidder need not extend the offer to holders in those US states that prohibit the offer (after the bidder has made a "good faith effort" to register or qualify the offer in that state), except that the bidder must offer the same cash alternative to holders in that state that it has offered to holders in any other state.<sup>16</sup> In addition, if the bidder offers securities exempt from registration under Securities Act Rule 802 (discussed below), it need not extend the offer to holders in those US states that require registration, except that the bidder must offer the same cash alternative to holders in that state that it has offered to holders in any other state.<sup>17</sup>
- *Cash-only consideration:*<sup>18</sup> US securities holders may be offered only cash as consideration for the tender offer, even if non-US securities holders are offered consideration consisting in whole or in part of securities of the bidder. The bidder must have a reasonable basis to believe that the cash is "substantially equivalent" to the value of the consideration offered to non-US securities holders, and must meet certain additional conditions.
- *Disparate tax treatment; loan notes:*<sup>19</sup> If a bidder offers loan notes solely to give sellers tax advantages not available in the US, and these notes are neither listed on an organized securities market nor registered under the Securities Act, the loan notes need not be offered to US securities holders.



## Informational Documents in the United States

Three requirements apply to offering documents used in connection with a tender offer.

- *Comparable basis:*<sup>20</sup> Bidders must disseminate “any informational document” to US securities holders, in English, on a “comparable basis” to that provided to security holders in the home jurisdiction.
- *Publication:*<sup>21</sup> If the bidder disseminates by publication in its home jurisdiction, it must publish the information in a manner “reasonably calculated” to inform US securities holders of the offer.
- *Form CB:*<sup>22</sup> In the case of a tender offer that otherwise would be subject to Regulation 14D (generally, an offer for equity securities registered under the Exchange Act), or an issuer self-tender offer subject to Rule 13e-4, the bidder must furnish an English-language translation of the offering materials to the SEC under cover of Form CB by the first business day after publication or dissemination. A non-US offeror also must file a consent to service of process on Form F-X.

## Limitation on Investment Companies

The issuer of the securities that is the subject of a Tier I tender offer may not be an investment company within the meaning of the Investment Company Act that is registered or required to be registered under that Act (other than a registered closed-end investment company).<sup>23</sup>

## The Tier II Exemption

### Tier II Relief

Tier II relief is considerably more limited than that available under Tier I. It is available for issuer self-tender offers subject to Rule 13e4 as well as third-party tender offers governed by Regulation 14D, and covers certain areas of frequent conflict between US and foreign regulatory requirements.

These include:

- *All-holders rule – loan notes and separate US and non-US offers:* Tier II tender offers are exempt from the all-holders rule of Exchange Act Rule 14d-10 (and related Exchange Act Rule 13e-4(f)(8) for issuer self-tender offers) in two ways. First, if a bidder offers loan notes solely to give sellers tax advantages not available in the United States and these notes are neither listed on an organized securities market nor registered under the Securities Act, the loan notes need not be offered to US securities holders.<sup>24</sup> Second, under amendments to the cross-border tender offer rules adopted by the SEC in 2008, a bidder may split its offer into multiple separate offers, one made to US securities holders (including ADR holders) and one or more separate offers made to non-US securities holders.<sup>25</sup> In addition, the separate US offer can now include non-US securities holders, thereby accommodating the inclusion of all the target's ADRs in the US offer.<sup>26</sup> The offer to US securities holders must be on terms at least as favorable as those offered to any other holders of the target securities.<sup>27</sup>
- *Notice of extension:*<sup>28</sup> Notice of extension of the length of a tender offer made in accordance with home jurisdiction law or practice will be deemed to satisfy the requirements of Rule 14e-1(d) (which specifies how notice of extensions must be given).
- *Prompt payment:*<sup>29</sup> Payments made in accordance with home jurisdiction law or practice will be deemed to satisfy the prompt payment requirements of Rule 14e-1(c).<sup>30</sup>

## Tier II Requirements

The Tier II exemption is available if the following conditions are met:

- *Forty percent limit:*<sup>31</sup> US securities holders must hold 40% or less of the class of securities sought in the tender offer, calculated in the same manner as the 10% limit of Tier I. The 40% limitation does not apply in the case of a tender offer commenced during the pendency of a prior Tier II tender offer.
- *Alternative average daily trading volume test available for certain negotiated and non-negotiated transactions:*<sup>32</sup> Similar to Tier I, there is an alternate Tier II eligibility test based on average daily trading volume to determine US ownership for the Tier II exemption, calculated in the same manner – and subject to the same conditions and limitations – as the 10% limit of Tier I, except that the relevant threshold is 40% instead of 10%.
- *Foreign private issuer; not an investment company:*<sup>33</sup> The target must be a foreign private issuer but must not be an investment company within the meaning of the Investment Company Act that is registered or required to be registered under that Act (other than a registered closed-end investment company).

Although the Rules and the 1999 Cross-Border Release do not state this explicitly, it appears that US and non-US bidders may rely on Tier II.<sup>34</sup>

## Restrictions on Purchases Outside the Tender Offer – Rule 14e-5

### Tier I Offers

Rule 14e-5 generally prohibits a bidder, its affiliates, and certain persons acting on their behalf in a tender or exchange offer from purchasing target equity securities outside the offer. Tier I tender offers are generally exempt from Rule 14e-5, if, in addition to meeting the Tier I requirements (and the requirements of its home jurisdiction):<sup>35</sup>

- the offering documentation provided to US securities holders prominently discloses the possibility of purchases outside the tender offer and the manner in which any information about such purchases will be disclosed; and
- the bidder discloses information in the US regarding these purchases in a manner comparable to the disclosure it makes in its home jurisdiction.

### Tier II Offers

Tier II tender offers are also exempt from Rule 14e-5 if certain conditions are met, as follows:

- *Purchases by a bidder and its affiliates or an affiliate of the financial advisor.* Rule 14e-5(b)(12) provides for a broad exception from Rule 14e-5 for a bidder and its affiliates or an affiliate of a financial advisor that are permissible under and will be conducted in accordance with the law of the target company's home jurisdiction if the following conditions are satisfied:
  - the target is a foreign private issuer;
  - the covered person reasonably expects that the tender offer qualifies as a Tier II tender offer;
  - no purchases other than pursuant to the tender offer are made in the United States;
  - the US offering documents disclose the possibility of purchasing securities outside the tender offer, and all such purchases are publicly disclosed in the United States;
  - in the case of purchases by an offeror or its affiliates, the tender offer price must be increased to match any consideration paid outside the tender offer that is greater than the tender offer price; and

- in the case of purchases by an affiliate of a financial advisor:
  - the financial advisor and the affiliate maintain and enforce written policies and procedures reasonably designed to prevent the transfer of information among the financial advisor and affiliate that might result in a violation of US federal securities laws and regulations through the establishment of information barriers;
  - the financial advisor has an affiliate that is registered as a broker or dealer under Exchange Act Section 15(a);
  - the affiliate has no officers or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor that direct, effect, or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services; and
  - the purchases or arrangements to purchase are not made to facilitate the tender offer.
- *Purchases pursuant to a foreign tender offer.* Rule 14e-5(b)(11) provides a more targeted exemption designed to allow a bidder to purchase the securities through a US tender offer and a concurrent foreign offer, if the following conditions are satisfied:
  - both the US tender offer and the concurrent foreign offer qualify as Tier II tender offers;
  - the economic terms and consideration in the US tender and concurrent foreign offer are the same;
  - the procedural terms of the US offer are at least as favorable as the concurrent foreign offer;
  - the intention of the bidder to purchase the securities pursuant to the foreign tender offer is disclosed in the US offering documents; and
  - purchases by the bidder in the foreign tender offer are made solely pursuant to the foreign tender offer and not on the open market or in private transactions.

## All Tender Offers

In a tender offer for the securities of a non-US issuer (whether Tier I, Tier II, or otherwise) purchases by “connected exempt market-makers” and “connected exempt principal traders” in accordance with the UK City Code on Takeovers and Mergers are generally exempt from Rule 14e-5 (subject to certain additional requirements).<sup>36</sup>

## Securities Issued in Cross-Border M&A Transactions – Rule 802

Securities Act Rule 802 provides an exemption from registration for offers and sales in any exchange offer for a class of securities of a foreign private issuer, or in an exchange of securities for the securities of a foreign private issuer in any business combination. The term “exchange offer” means a tender offer in which securities are issued as consideration, while the term “business combination” means a statutory amalgamation, merger, arrangement, or other reorganization requiring the vote of security holders of one of the participating companies, as well as statutory short-form mergers that do not require a vote.<sup>37</sup>

Rule 802 does not impose a dollar limitation on the value of securities sold to US investors in an exempt transaction, and both domestic US issuers and foreign private issuers may rely on Rule 802.<sup>38</sup> Rule 802 provides an exemption only for the issuer of securities and not for affiliates of the issuer or any person who seeks to resell the securities.<sup>39</sup> Securities issued pursuant to the Rule 802 exemption will take on the restricted or unrestricted status (for purposes of Rule 144) to the same extent and proportion of the securities for which they were exchanged.<sup>40</sup> Accordingly, resales of securities acquired pursuant to Rule 802 may be restricted depending on their restricted or unrestricted status.

## Requirements

The requirements of Rule 802 are as follows:

- *Limitation on US ownership:* US holders of securities must hold 10% or less of the class of securities that is the subject of the exchange offer or business combination. The SEC Staff has taken the position, however, that Rule 802 is not available if the target has no US shareholders.<sup>41</sup>
  - *Calculation of 10% limit:* A “US holder” is defined as a person resident in the US.<sup>42</sup> In determining whether a holder is a US resident, a bidder must look through the record ownership of securities held by brokers, dealers, banks, and other nominees located in the US, the target company’s jurisdiction of incorporation, and the jurisdiction that is the primary trading market of the target securities (if different).<sup>43</sup> If, after reasonable inquiry, a bidder is unable to obtain information about the amount of securities held by US residents, it may assume that the customers are residents of the jurisdiction in which the nominee has its principal place of business.<sup>44</sup> The calculation date is a date no more than 60 days before or 30 days after the public announcement of the business combination.<sup>45</sup> If the bidder is unable to make the calculation within these time frames, the calculation may be made as of the most recent practicable date before the public announcement, but in no event earlier than 120 days before the public announcement.<sup>46</sup> The calculation excludes securities held by the bidder.<sup>47</sup>
  - *Alternative average daily trading volume test:* There is an alternative test based on trading volume to determine US ownership in limited situations where a bidder is unable to complete the “look-through” analysis of the percentage of holders of the subject securities who are resident in the US.<sup>48</sup> To qualify, among other things, the average daily trading volume for the subject securities in the United States over a 12-month period ending no more than 60 days before the announcement of the transaction must not be more than 10% of the average daily trading volume on a worldwide basis, information indicating otherwise must not be in annual information published by the target, and the acquiror must not have a reason to know that the target’s US ownership levels do not qualify.<sup>49</sup>
  - *Equal treatment of US holders; blue sky:*<sup>50</sup> The bidder must permit US holders of securities to participate in the exchange offer or business combination on terms at least as favorable as those offered to other holders, but it is not required to extend the offering into any US state that would require registration or qualification of the transaction.
  - *Informational documents in the United States:*<sup>51</sup> If the bidder publishes or otherwise disseminates an informational document to security holders in connection with the exchange offer or business combination, it must furnish an English-language translation of that document to the SEC under cover of Form CB by the first business day after publication or dissemination and also file a consent to service of process on Form F-X (regardless of whether the equity securities of the target are registered under the Exchange Act, in contrast to the Tier I exemption relating to tender offers described above). It must disseminate any informational document to US security holders, in English, on a comparable basis to that provided to security holders in the home jurisdiction. In addition, if the bidder disseminates information by publication in its home jurisdiction, it must publish the information in a manner reasonably calculated to inform US security holders of the offer.
  - *Legends:*<sup>52</sup> Any US offering documentation must contain a legend regarding the non-US nature of the transaction and the bidder’s disclosure practices, and it must state that investors may have difficulty in enforcing rights against the bidder and its officers and directors.
  - *Restricted securities:*<sup>53</sup> The securities acquired in a Rule 802 transaction will be restricted securities to the same extent and proportion as the target securities sought in the exchange offer and business combination (in other words, restricted securities will yield restricted securities, and unrestricted securities will yield unrestricted securities).

- *Not an investment company*: Rule 802 does not apply to an exchange offer or business combination by an investment company within the meaning of the Investment Company Act that is registered or required to be registered under that Act (other than a registered closed-end investment company).<sup>54</sup>

### **State Blue Sky Issues in Rule 802 Transactions**

Securities issued in connection with cross-border exchange offers under Rule 802 do not qualify for federal preemption. Accordingly, it is necessary to review the securities laws of each of the states where existing security holders are resident to determine if there is any applicable state exemption.

## ENDNOTES

- 1 Cross-border M&A transactions may also implicate the securities laws of the various US states (the so-called “blue sky” laws), and other areas of US federal law, such as the reporting requirements of the US Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended. These laws are not discussed here. We also do not discuss liability issues in connection with tender and exchange offers, and in particular the key antifraud provision in this area, Section 14(e) of the Exchange Act. Section 14(e) has been interpreted in largely the same way as Rule 10b-5 under the Exchange Act, although the Rule 10b-5 requirement that there be a purchase or sale of securities to trigger liability is not present in the context of actions under Section 14(e). See *Piper v. Chris-Craft Indus., Inc.*, 430 US 1, 38-39 (1977). This is so despite the similarities in wording between Rule 10b-5 and Section 14(e). See, e.g., *Schreiber v. Burlington Northern, Inc.*, 472 US 1, 9-10 (1985) (Section 14(e) was modeled on Rule 10b-5).
- 2 See *Final Rule and Interpretation: Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions*, Release No. 33-8957 (September 19, 2008) [2008 Cross-Border Release]; *Final Rule: Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, Release No. 33-7759 (October 22, 1999) [1999 Cross-Border Release].
- 3 See Exchange Act Rules 14d-1(c), 13e-3(g)(6), and 13e-4(h)(8).
- 4 Exchange Act Rule 14e-5(b)(10). In addition, Tier I rights offerings of equity securities by foreign private issuers meeting the conditions of Rule 801 and Tier I exchange offers meeting the conditions of Rule 802 are both exempt from the registration requirements of the Securities Act.
- 5 1999 Cross-Border Release, Section I.A.
- 6 Exchange Act Rule 14d-1(e).
- 7 Exchange Act Rule 14d-1(c).
- 8 Exchange Act Rule 14d-1(c)(1); Exchange Act Rule 13e-4(h)(8)(i).
- 9 Exchange Act Rule 14d-1, Instructions to paragraphs (c) and (d), Instruction 2; Exchange Act Rule 13e-4(h)(8), Instructions to paragraph (h)(8) and (i), Instruction 2.
- 10 Exchange Act Rule 14d-1, Instructions to paragraphs (c) and (d), Instruction 2(iii); Exchange Act Rule 13e-4(h)(8), Instructions to paragraph (h)(8) and (i), Instruction 2(iii); see also Exchange Act Rules 12g3-2(a) and 12g5-1.
- 11 Exchange Act Rule 14d-1, Instructions to paragraphs (c) and (d), Instruction 2(i); Exchange Act Rule 13e-4(h)(8), Instructions to paragraph (h)(8) and (i), Instruction 2(i). In the limited circumstances where the issuer or bidder is unable to complete the look-through analysis as of a date within the 90-day range, it may use a date within 120 days before the announcement.
- 12 Exchange Act Rule 14d-1, Instructions to paragraphs (c) and (d), Instruction 2(ii); Exchange Act Rule 13e-4(h)(8), Instructions to paragraph (h)(8) and (i), Instruction 2(ii).
- 13 Exchange Act Rule 14d-1, Instructions to paragraphs (c) and (d), Instruction 3; Exchange Act Rule 13e-4(h)(8), Instructions to paragraph (h)(8) and (i), Instruction 3; see also 2008 Cross-Border Release, pp. 31-34. The Release states that merely needing to dedicate substantial time and resources to the look-through analysis or having concerns about the completeness and accuracy of the US ownership levels obtained by completing a look-through analysis will not necessarily justify use of the alternate test. Furthermore, it makes clear that acquirors must make a good faith effort to conduct a reasonable inquiry into determining the level of US beneficial ownership. The Release provides indicative situations where an issuer or acquiror could employ the alternative test, including: (1) non-US jurisdictions where security holder lists are generated only at fixed intervals during the year, are not otherwise available to the acquiror, and where the published information is as of a date outside the required range; (2) subject securities are issued in bearer form; (3) nominees are prohibited by law from disclosing information about the country of residence of the target securities’ beneficial owners; or (4) where a business combination is a non-negotiated transaction. *Id.* at 32-33.
- 14 Exchange Act Rule 14d-1, Instructions to paragraphs (c) and (d), Instruction 3; Exchange Act Rule 13e-4(h)(8), Instructions to paragraph (h)(8) and (i), Instruction 3.
- 15 Exchange Act Rule 14d-1(c)(2); Exchange Act Rule 13e-4(h)(8)(ii).
- 16 Exchange Act Rule 14d-1(c)(2)(i); Exchange Act Rule 13e-4(h)(8)(ii)(A).
- 17 Exchange Act Rule 14d-1(c)(2)(ii); Exchange Act Rule 13e-4(h)(8)(ii)(B).
- 18 Exchange Act Rule 14d-1(c)(2)(iii); Exchange Act Rule 13e-4(h)(8)(ii)(C).
- 19 Exchange Act Rule 14d-1(c)(2)(iv); Exchange Act Rule 13e-4(h)(8)(ii)(D).
- 20 Exchange Act Rule 14d-1(c)(3)(i); Exchange Act Rule 13e-4(h)(8)(iii)(B).
- 21 Exchange Act Rule 14d-1(c)(3)(ii); Exchange Act Rule 13e-4(h)(8)(iii)(C).
- 22 Exchange Act Rule 14d-1(c)(3)(iii); Exchange Act Rule 13e-4(h)(8)(iii)(A). These materials are “furnished” and not “filed” within the meaning of Section 18 of the Exchange Act.
- 23 Exchange Act Rule 14d-1(c)(4); Exchange Act Rule 13e-4(h)(8)(iv).

24 Exchange Act Rule 14d-1(d)(2)(i); Exchange Act Rule 13e-4(i)(2)(i).

25 Exchange Act Rule 14d-1(d)(2)(ii); Exchange Act Rule 13e-4(i)(2)(ii). For example, a bidder making a Tier II offer for a target organized in one non-US jurisdiction, listed in another non-US jurisdiction, and with US beneficial ownership of its equity securities would be allowed to make separate offers in each of the three jurisdictions, if necessary, to accommodate regulatory conflict between the applicable regulatory regimes. *See 2008 Cross-Border Release*, p. 50.

26 Exchange Act Rule 14d-1(d)(2)(ii); Exchange Act Rule 13e-4(i)(2)(ii).

27 *Id.*

28 Exchange Act Rule 14d-1(d)(2)(iii); Exchange Act Rule 13e-4(i)(2)(iii).

29 Exchange Act Rule 14d-1(d)(2)(iv); Exchange Act Rule 13e-4(i)(2)(iv).

30 Exchange Act Rule 13e-4(i); Exchange Act Rule 14d-1(d).

31 Exchange Act Rule 14d-1(d)(1)(ii); Exchange Act Rule 13e-4(i)(1)(ii).

32 Exchange Act Rule 14d-1, Instructions to paragraphs (c) and (d), Instruction 3; Exchange Act Rule 13e-4(h)(8), Instructions to paragraph (h)(8) and (i), Instruction 3.

33 Rule 14d-1(d)(1)(i); Rule 13e-4(i)(1)(i).

34 *See, e.g.*, Rule 14d-1(d) (any person meeting Tier II conditions is entitled to Tier II relief).

35 Exchange Act Rule 14e-5(b)(10).

36 Exchange Act Rule 14e-5(b)(9).

37 *See* Securities Act Rules 800(a) and (c).

38 *See 1999 Cross-Border Release*, text at n.61.

39 General Notes to Securities Act Rules 800, 801, and 802, Note 6.

40 Securities Act Rule 144(a)(3)(vii).

41 *See July 2001 Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations*, Question 1.

42 Securities Act Rule 800(h).

43 Securities Act Rule 800(h)(3).

44 Securities Act Rule 800(h)(4).

45 Securities Act Rule 800(h)(1).

46 *Id.*

47 Securities Act Rule 802(h)(2).

48 *See* Securities Act Rule 802(h)(7). *See also 2008 Cross-Border Release*, pp. 31-34. The Release states that merely needing to dedicate substantial time and resources to the look-through analysis or having concerns about the completeness and accuracy of the US ownership levels obtained by completing a look-through analysis will not necessarily justify use of the alternate test. Furthermore, it makes clear that acquirors must make a good faith effort to conduct a reasonable inquiry into determining the level of US beneficial ownership. The Release provides indicative situations where an issuer or acquiror could employ the alternative test, including: (1) non-US jurisdictions where security holder lists are generated only at fixed intervals during the year, are not otherwise available to the acquiror, and where the published information is as of a date outside the required range; (2) subject securities are issued in bearer form; (3) nominees are prohibited by law from disclosing information about the country of residence of the target securities' beneficial owners; or (4) where a business combination is a non-negotiated transaction. *Id.* at 32-33.

49 *See* Securities Act Rule 800(h)(7).

50 *See* Securities Act Rule 802(a)(2).

51 *See* Securities Act Rule 802(a)(3).

52 *See* Securities Act Rule 802(b).

53 General Notes to Securities Act Rules 800, 801, and 802, Note 8.

54 *Id.* Note 9.





# CHAPTER 10

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## Rights Offerings Under Rule 801 and Employee Equity Compensation Plans Under Rule 701

### Securities Act Rule 801 Rights Offerings

Rule 801 provides an exemption from registration for certain rights offerings by foreign private issuers. A “rights offering” is defined for these purposes as the sale for cash of equity securities in which existing securities holders of a particular class (including holders of ADRs) are granted the right to purchase additional securities of that class, and the number of additional securities the holders may purchase is in proportion to the amount of securities they hold on the record date of the offering.<sup>1</sup>

Like Rule 802, Rule 801 does not impose a dollar limitation on the value of securities sold to US investors in an exempt transaction, but unlike Rule 802, only foreign private issuers may rely on Rule 801.<sup>2</sup> Rule 801 provides an exemption only for the issuer of securities and not for affiliates of the issuer or any person who seeks to resell the securities.<sup>3</sup> Securities issued pursuant to the Rule 801 exemption will take on the restricted or unrestricted status (for purposes of Rule 144) to the same extent and proportion of the securities held by the security holder of the class with respect to which the rights offering was made, as of the record date for the rights offering. Accordingly, resales of securities acquired pursuant to Rule 801 may be restricted depending on their restricted or unrestricted status.

### Rule 801 Requirements

The requirements of Rule 801 are as follows:

- *Limitation on US ownership:* US securities holders must hold 10% or less of the class of securities that is the subject of the rights offering. The calculation is done in the same manner as the calculation under the Rule 802 exemption, except that the calculation keys off the record date of the rights offering.<sup>4</sup> As with the Rule 802 exemption, the SEC Staff has taken the position that Rule 801 is not available if the target has no US shareholders.<sup>5</sup>
- *Equal treatment of US security holders:* The bidder must permit US security holders to participate in the rights offering on terms at least as favorable as those offered to other holders, but is not required to extend the offering into any US state that would require registration or qualification of the transaction.
- *Informational documents in the United States:* If the issuer publishes or otherwise disseminates an informational document to security holders in connection with the rights offering, it must furnish an English-language translation of that document to the SEC under cover of Form CB by the first business day after publication or dissemination, and must also file a consent to service of process on Form F-X.<sup>6</sup> It must disseminate any informational document to US security holders, in English, on a comparable basis to that provided to security holders in the home jurisdiction. In addition, if the issuer disseminates by publication in its home jurisdiction, it must publish the information in a manner reasonably calculated to inform US security holders of the offer.
- *Eligibility of securities:* The securities offered in the rights offering must be equity securities of the same class as the securities held by offerees in the United States (directly or through ADRs).
- *Limitations on transfer:* The terms of the rights must prohibit transfers by US security holders except in accordance with Regulation S.

- *Legends:* Any US offering documentation must contain a legend regarding the non-US nature of the transaction and the issuer's disclosure practices, and must state that investors may have difficulty in enforcing rights against the issuer and its officers and directors.

## Compensatory Benefit Plans – Securities Act Rule 701

Rule 701 provides an exemption from registration for offers and sales of securities pursuant to certain compensatory benefit plans.

### Eligible Issuers

Rule 701 is available to any issuer that is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, and that is not an investment company registered or required to be registered under the Investment Company Act. This includes foreign private issuers that have never listed their securities in the US or offered them to the public in the United States, or that benefit from the exemption from Exchange Act registration provided by Rule 12g3-2(b). If an issuer becomes subject to Exchange Act reporting after it has made offers in compliance with Rule 701 (for example, by conducting a public offering), it may nevertheless rely on Rule 701 to sell securities previously offered to the persons to whom the offers were made. In addition, a reporting issuer may rely on Rule 701 to the extent it guarantees the payment of a subsidiary's securities that are sold under Rule 701.

Rule 701 is only available to the issuer of securities and not to any of its affiliates. It also may not be used for capital-raising transactions.

### Eligible Transactions

Rule 701 exempts offers and sales of securities issued under a written compensatory benefit plan (or written compensation contract) established by the issuer, parent of the issuer, majority-owned subsidiary of the issuer, or majority-owned subsidiary of the issuer's parent. A "compensatory benefit plan" for these purposes means any purchase, savings, option, bonus, stock appreciation, profit sharing, thrift, incentive, deferred compensation, pension, or similar plan.

### Eligible Plans and Participants

The plan must be limited to employees, directors, general partners, trustees (where the issuer is a business trust), officers, consultants and advisors, and family members<sup>7</sup> of those persons who acquire the securities by gift or a domestic relations order. Offers and sales may be made to former employees, directors, general partners, trustees, officers, consultants and advisors only if those persons were employed by or provided services to the issuer at the time the securities were offered.

Certain additional requirements apply to consultants and advisors. In particular, Rule 701 is only available to consultants and advisors if:

- they are natural persons;
- they provide *bona fide* services to the issuer, its parents, its majority-owned subsidiaries, or majority-owned subsidiaries of the issuer's parent; and
- the services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the issuer's securities.

## Amounts That May Be Offered and Sold

Any amount of securities may be offered under Rule 701. Sales, however, are limited. In particular, under Rule 701, the aggregate sales price or amount of securities sold in reliance on Rule 701 during any consecutive 12-month period must not exceed the greatest of the following:

- \$1 million;
- 15% of the total assets of the issuer, measured at the issuer's most recent balance sheet date (or of the issuer's parent if the issuer is a wholly owned subsidiary and the securities represent obligations that the parent fully and unconditionally guarantees); or
- 15% of the outstanding amount of the class of securities being offered and sold in reliance on Rule 701, measured at the issuer's most recent balance sheet date.

The term "aggregate sales price" means the sum of all cash, property, notes, cancellation of debt, or any other consideration (including the value of the employee's services) received by the issuer for the sale of its securities. The aggregate sales price is calculated on the date of sale.

## Disclosure Requirements

An issuer must deliver a copy of the plan to purchasers. In addition, if the aggregate sales price or amount of securities issued under Rule 701 exceeds \$10 million<sup>8</sup> within any 12-month period, Rule 701 requires the issuer to provide each purchaser with certain information within a reasonable period of time *before* the date of sale, including:

- if the plan is subject to the US Employee Retirement Income Security Act of 1974, a copy of the ERISA summary plan description;
- if the plan is not subject to ERISA, a summary of the plan's material terms;
- risk factors related to the securities being offered and the issuer; and
- financial statements required to be furnished by Part F/S of Form 1-A under Regulation A (as of a date no more than 180 days before the sale of securities), which must either be prepared in accordance with US GAAP or IASB IFRS, or if prepared in local GAAP/non-IASB IFRS must be reconciled to US GAAP.

Because the financial statements must be no more than 180 days old, foreign private issuers that report financial results on a semi-annual basis are subject to a "blackout" period each year from the last day of the first half of the financial year (June 30 for calendar-year reporting companies) until the half-year results are released and provided to plan participants, during which time Rule 701 is not available.

Issuances under Rule 701 are subject to the antifraud provisions of the US federal securities laws. An issuer should consider whether disclosure in addition to that specified above is appropriate (such as MD&A or a developed business description).

## No Integration

Securities offerings under Rule 701 are not subject to integration with any other offers or sales by the issuer (including other unregistered offerings).

## Resale Limitations

Securities issued under Rule 701 are deemed to be restricted securities within the meaning of Rule 144. The Rule 701 exemption is only available to the issuer and does not cover the resale of the securities by any other person.

Resales must accordingly either be registered under the Securities Act or be structured to take advantage of an exemption from registration. However, if the issuer becomes subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, securities issued under Rule 701 may be resold 90 days thereafter:

- by non-affiliates without any restrictions other than the requirement imposed by Rule 144 for sale in brokers' transactions; and
- by affiliates pursuant to Rule 144 without observing the normal holding-period requirement for restricted securities.

Any certificated securities issued under Rule 701 should contain a legend stating that the securities have not been registered under the Securities Act, and may not be sold or transferred in the absence of registration or an exemption from registration.

## **State Blue Sky Issues in Rule 701 and Rule 801 Transactions**

Section 18 of the Securities Act preempts securities sold in Rule 701 offerings, but only where the issuer is an SEC reporting company. Many foreign private issuers choose to avoid registration with the SEC. In such a case, the blue sky laws would apply to any Rule 701 transactions.

In addition, rights offerings under Rule 801 (like cross-border exchange offers under Rule 802) do not qualify for federal preemption. Accordingly, it is necessary to review the securities laws of each of the states where existing security holders are resident to determine if there is any applicable state exemption.

## ENDNOTES

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- <sup>1</sup> Securities Act Rule 800(g).
- <sup>2</sup> See *1999 Cross-Border Release*, text at n.61.
- <sup>3</sup> General Notes to Securities Act Rules 800, 801, and 802, Note 6.
- <sup>4</sup> Securities Act Rule 800(h).
- <sup>5</sup> See *July 2001 Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations*, Question 1.
- <sup>6</sup> Securities Act Rule 801(a)(4)(i).
- <sup>7</sup> Securities Act Rule 701(c)(3) defines the term “family member.”
- <sup>8</sup> The threshold was raised from \$5 million to \$10 million effective July 23, 2018. See *Final Rule: Exempt Offerings Pursuant to Compensatory Arrangements*, Release No. 33-10520 (July 18, 2018).



# CHAPTER 11

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## Exchange Act Registration, Reporting, and Deregistration for Foreign Private Issuers

A foreign private issuer must register a class of equity securities under the Exchange Act if:

- that class will be listed on a US national securities exchange such as the NYSE or Nasdaq);<sup>1</sup> or
- unless the exemption from registration provided by Exchange Act Rule 12g3-2(b) is available, if the foreign private issuer has assets in excess of \$10 million and the class is held of record by either (i) 2,000 persons or (ii) 500 persons who are not AIs (in both cases, of whom at least 300 are residents in the United States).<sup>2</sup> However, any employee who received securities under an employee compensation plan in a transaction exempt from registration under the Securities Act will not be counted for purposes of the 2,000/500/300 shareholder trigger.<sup>3</sup>

### Rule 12g3-2(b) Exemption

Under the amendments to Rule 12g3-2(b) that took effect in 2008, foreign private issuers are no longer required to submit initial written applications to the SEC in order to qualify for the Rule 12g3-2(b) exemption and instead are now automatically eligible to claim the exemption if they satisfy the following conditions:<sup>4</sup>

- *No existing SEC reporting.* The foreign private issuer must not be required to file or furnish reports under Section 13(a) or 15(d) of the Exchange Act (this generally means that the foreign private issuer has not publicly offered any of its securities in the United States or registered its securities under the Exchange Act).
- *Foreign listing.* The foreign private issuer must maintain a listing on one or more markets constituting the primary trading market outside of the United States of the subject class of securities. For these purposes, primary trading market means:
  - a foreign market that, either alone or together with another foreign market, accounted for at least 55% of the trading in the relevant securities on a worldwide basis in the foreign private issuer's last fiscal year; and
  - if trading in the relevant securities in two foreign markets is combined to meet the 55% threshold, the trading on at least one of them was greater than the trading in the United States.
- *Electronic publication of non-US disclosure documents.* The foreign private issuer must publish in English, either via its website or through an electronic information delivery system, information material to an investment decision that it has released since the first day of its most recently completed fiscal year that it:
  - has made public or been required to make public;
  - has filed or has been required to file with the stock exchange on which its securities are listed (and has been made public by the exchange); or
  - has distributed or been required to distribute to its security holders.

The rule includes a list of the types of material information that should be disclosed, such as results of operations or financial condition; changes in business; acquisitions or dispositions of assets; the issuance, redemption, or acquisition of securities; changes in management or control; the granting of options or the payment of other remuneration to director or officers; and transactions with directors, officers, or principal security holders.

Once established, in order to maintain the Rule 12g3-2(b) exemption, a foreign private issuer must continue to publish electronically its disclosure documents in English promptly after the information has been made public in the foreign private issuer's primary trading market.

If a foreign private issuer no longer complies with the provisions of Rule 12g3-2(b), the foreign private issuer will have to either register the subject class of securities under the Exchange Act within 120 days after the foreign private issuer's fiscal year-end, qualify for the exemption under Rule 12g3-2(a) by concluding that it has fewer than 300 shareholders resident in the United States or, if possible, re-establish compliance with the rule's conditions within a "reasonably prompt manner."<sup>5</sup>

## Exchange Act Reporting

Once a foreign private issuer has registered a transaction with the SEC under the Securities Act or a class of securities under the Exchange Act (a reporting foreign private issuer), it must make certain ongoing filings with the SEC under the Exchange Act.<sup>6</sup> Reporting foreign private issuers also become subject to various other provisions of the US federal securities laws.

### Annual Report on Form 20-F

A reporting foreign private issuer must file an annual report on Form 20-F with the SEC four months after the foreign private issuer's fiscal year-end.<sup>7</sup>

Form 20-F contains detailed financial and non-financial disclosure requirements. We include a checklist for non-financial disclosure items in Annex A, below.

#### PRACTICE POINT

Annual reports on Form 20-F must be certified by a foreign private issuer's chief executive officer and chief financial officer under Sections 302 and 906 of Sarbanes-Oxley.

### Current Reports on Form 6-K

A reporting foreign private issuer must submit current reports to the SEC on Form 6-K.<sup>8</sup>

Form 6-K reports must contain all material information that the issuer:<sup>9</sup>

- makes or is required to make public pursuant to the laws of its country of incorporation or organization;
- files or is required to file with a stock exchange on which its securities are traded and that was made public by that exchange; or
- distributes or is required to distribute to its security holders.

#### PRACTICE POINT

Form 6-K submissions do not need to be certified by a foreign private issuer's chief executive officer and chief financial officer under Sections 302 and 906 of Sarbanes-Oxley.<sup>10</sup>

### Other Consequences of Exchange Act Reporting

A reporting foreign private issuer becomes subject to a variety of other provisions of the US federal securities laws, including:

- *Books and records; internal accounting controls:*<sup>11</sup> A reporting foreign private issuer must maintain and keep books, records, and accounts that "accurately and fairly reflect" the transactions and dispositions of assets of the foreign private issuer, and design and maintain a system of adequate "internal accounting controls."



- *Limitations on payments to foreign officials:*<sup>12</sup> A reporting foreign private issuer may not make corrupt payments to foreign officials, foreign political parties, or their intermediaries.
- *Audit requirements:*<sup>13</sup> A reporting foreign private issuer's audit must include procedures for the detection of illegal acts, and the issuer's auditors are required to take certain steps if illegal acts are found. Those steps include informing the issuer's management and audit committee, and potentially include a requirement to resign from the engagement or notify the SEC (if the issuer's board fails to take appropriate remedial action).
- *Sarbanes-Oxley:*<sup>14</sup> A reporting foreign private issuer is subject to the provisions of Sarbanes Oxley.

## Deregistration Under the Exchange Act and Termination of Reporting

In 2007, the SEC adopted Rule 12h-6 (and related Form 15F), thereby making it considerably easier for foreign private issuers to deregister their securities and terminate Exchange Act reporting obligations than was previously the case.<sup>15</sup> Foreign private issuers are now able to terminate their reporting obligations under Section 15(d) of the Exchange Act permanently. (Under the previous rules, these reporting obligations were suspended but could be reinstated, depending on the number of US holders of the issuer's securities over time.)

Rule 12h-6 sets out two alternative ways for foreign private issuers to deregister their equity securities and terminate Exchange Act reporting obligations and imposes three additional conditions which must be met (regardless of which alternative is chosen).

### Alternative 1: 5% Average Daily Trading Volume Test

Equity securities of foreign private issuers are eligible for deregistration and termination of the related Exchange Act reporting requirements if the average daily trading volume (ADTV)<sup>16</sup> of that class of securities during a recent 12-month period in the US has been 5% or less of the ADTV of the same class of securities on a worldwide basis.

An issuer will not be eligible to deregister a class of equity securities and terminate its Exchange Act reporting obligations under the ADTV standard if, within the previous 12 months, the issuer:

- terminated an ADR facility in the same class of securities and the US ADTV of that class of securities exceeded 5% of the issuer's worldwide ADTV at the time of such termination; or
- delisted the same class of equity securities from a US securities exchange and the US ADTV of that class of securities exceeded 5% of the issuer's worldwide ADTV at the time of such delisting.

### Alternative 2: 300 Holder Test

As an alternative to the ADTV benchmark provision, Rule 12h-6 permits a foreign private issuer to terminate its reporting obligations under the Exchange Act regarding a class of equity securities if, on any date within 120 days before filing for deregistration, the foreign private issuer has less than 300 record holders on a worldwide basis or who are US residents. The rule employs a "look-through" counting method under which an issuer has to analyze the accounts of brokers, banks, and other nominees located in the United States, the jurisdiction in which the issuer is organized, and, if different, the jurisdiction of its primary trading market to make this calculation.

### Additional Conditions

Regardless of whether it utilizes the ADTV alternative or the 300-holder alternative, a foreign private issuer wishing to deregister a class of equity securities must meet three additional conditions outlined below to deregister the class of equity securities and to terminate its Exchange Act reporting obligations.

- The foreign private issuer must have at least a 12-month Exchange Act reporting history, including having filed at least one Exchange Act annual report, and be current in its reports; note, however, that it need not have timely filed the required reports.<sup>17</sup>
- The equity securities of the foreign private issuer must not have been sold, subject to limited exceptions, through a registered public offering under the Securities Act in the 12 months leading up to the attempted deregistration. Securities sold via an exemption to the Securities Act are not subject to this limitation.
- Finally, the foreign private issuer must have had that class of securities listed on an exchange in the issuer's primary trading market<sup>18</sup> for at least 12 months preceding the deregistration filing in the United States.

### **Terminating Exchange Act Reporting for Debt Securities**

A foreign private issuer may terminate its reporting requirements under the Exchange Act with regard to a class of debt securities if two principal criteria are satisfied. First, the issuer is required to have submitted all required Exchange Act filings, including at least one Exchange Act annual report, since the debt securities were registered and came under the Exchange Act reporting system. Second, as with "Alternative 2" discussed above, the foreign private issuer must have less than 300 record holders on a worldwide basis or who are residents of the US, in either case, on a date within 120 days before filing for deregistration. The method for counting these record holders is the same as for equity securities as described above.

### **Implications for M&A Transactions**

The deregistration rules provide that a foreign private issuer that succeeds to the reporting obligations of another company following a merger, consolidation, exchange of securities, acquisition of assets, or similar transaction (a successor registrant) may terminate its inherited reporting obligations if it meets the prior reporting, foreign listing, and quantitative benchmark conditions described above.

### **Interaction With Rule 12g3-2(b) Exemption**

Foreign private issuers that deregister are immediately eligible to take advantage of the exemption from registration under Rule 12g3-2(b).<sup>19</sup>

### **Interaction With Rule 13e-3**

Deregistration may trigger the requirements of Rule 13e-3 of the Exchange Act, including the requirements to file a Schedule 13E-3 with the SEC,<sup>20</sup> although a foreign private issuer may be able to take advantage of the exemption provided by the cross-border tender offer rules (discussed above).

## **Reporting by Shareholders – Obligations of Major Shareholders to File Schedule 13D or 13G Reports**

Shareholders who acquire beneficial ownership of more than 5% of a class of equity securities registered under the Exchange Act (a registered equity class) become subject to certain filing obligations with the SEC.<sup>21</sup> In particular, the shareholder must file with the SEC (and send to the issuer of the securities by registered or certified mail) a statement on Schedule 13D or (if they are eligible) a short-form statement on Schedule 13G.<sup>22</sup>

A person is generally deemed to be the beneficial owner of shares if he or she, directly or indirectly, has:<sup>23</sup>

- voting power including the power to vote (or direct the voting of) the shares; or
- investment power including the power to dispose (or direct the disposition of) those shares.

In addition, when two or more persons agree to act together for the purposes of acquiring, holding, voting, or disposing of the equity securities of an issue, they are generally considered a "group," and their holdings of the registered equity class are aggregated for purposes of determining their filing obligations.<sup>24</sup>

We discuss the requirements of Schedules 13D and 13G below.

### Schedule 13D

A Schedule 13D must be filed within 10 days of the acquisition of more than 5% of a registered equity class.<sup>25</sup> Schedule 13D must be filed by all shareholders who are not otherwise eligible to use Schedule 13G. Schedule 13D requires disclosure of a variety of information, including:

- the identity, residence, citizenship, and nature of the beneficial ownership of the person making the report, and of all persons on whose behalf the purchases have been made;
- the source and amount of funds used in making the purchases;
- the purpose of the purchases; and
- a description of any contracts, arrangements, understandings, or relationships with respect to the securities.

### Schedule 13G

Certain persons who would otherwise be required to file a Schedule 13D may instead file the short-form Schedule 13G.<sup>26</sup>

These include:

- *13G institutional investors:*<sup>27</sup> certain institutional investors that have acquired the securities in the ordinary course of business and not with the purpose or effect of changing or influencing control of the issuer. Such institutional investors include, among others: (1) US-registered broker-dealers, (2) US-regulated banks, (3) US-regulated insurance companies, (4) US-registered investment companies, and (5) foreign institutions that are the functional equivalent of any of the US-regulated institutions that qualify to report on a Schedule 13G, provided that the foreign institution certifies that it is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent US institution and will undertake to furnish to the SEC, upon request, information that it otherwise would be required to provide on a Schedule 13D;
- *13G passive investors:*<sup>28</sup> other investors who have not acquired the securities with the purpose or effect of changing or influencing control of the issuer, are not 13G institutional investors, and do not beneficially own (directly or indirectly) more than 20% of the registered equity class; and
- *Other 13G investors:*<sup>29</sup> certain other investors who own more than 5% of a registered equity class as of the end of any calendar year, including investors who owned their positions before the issuer registered its equity securities under the Exchange Act, and following registration have not acquired more than 2% of the outstanding shares in any 12-month period.

Notwithstanding this, a 13G institutional investor and 13G passive investor must file a Schedule 13D within 10 days if it changes its intention to hold the securities for passive purposes only.<sup>30</sup> In addition, a 13G passive investor must file a Schedule 13D within 10 days of acquiring more than 20% of a registered equity class.<sup>31</sup>

The filing deadline for Schedule 13G varies depending on the type of investor. In particular:

- 13G institutional investors must file within 45 days of the end of the calendar year (to the extent they still own more than 5% of the registered equity class as of the end of the calendar year), or within 10 days after the end of the first month in which they own more than 10% of the registered equity class;<sup>32</sup>

- 13G passive investors must file within 10 days of the acquisition of more than 5% of a registered equity class;<sup>33</sup> and
- other 13G investors must file within 45 days of the end of the calendar year in which they acquired the securities or the issuer registered its equity securities under Section 12 of the Exchange Act.<sup>34</sup>

### Amendments to Schedule 13D or 13G Reports

If any material change occurs in the facts reported in a Schedule 13D, including any material increase or decrease in the percentage of the registered equity class beneficially owned, then an amendment disclosing that change must be filed promptly with the SEC.<sup>35</sup> An acquisition or disposition of 1% or more of a registered equity class is deemed to be "material" for these purposes.<sup>36</sup>

Any person who has filed a Schedule 13G (and remains eligible to use that Schedule) must amend the Schedule 13G within 45 days after the end of any calendar year in which there are any changes to the information reported in its Schedule 13G, other than a change in percentage ownership resulting from a change in the aggregate number of outstanding securities of the registered equity class.<sup>37</sup> In addition:

- a 13G institutional investor who has reported owning more than 10% of a registered equity class must file an amendment reporting any increase or decrease in its holdings of more than 5% of the registered equity class within 10 days of the end of the calendar month in which the change occurs;<sup>38</sup> and
- any other 13G passive investor must promptly file an amendment reporting an acquisition of greater than 10% of a registered equity class, and must thereafter report promptly any increase or decrease in its holdings of more than 5% of the registered equity class.<sup>39</sup>

### Filing Electronically

Under Rule 101 of Regulation S-T, documents such as registration statements for offerings of securities, annual reports on Form 20-F, and most current reports on Form 6-K must be filed electronically on the SEC's EDGAR system. In addition, all exhibits and attachments to SEC filings (such as material contracts) must be filed electronically, except for exhibits and attachments previously filed in paper form, which may generally be incorporated in an EDGAR filing by reference.

There are only limited exceptions to the requirement to file electronically. These include:

- a foreign private issuer's annual report to the holders of its securities submitted on Form 6-K; and
- a report or other document submitted on Form 6-K that the issuer is required to furnish and make public under the laws of its home country or the issuer's home-country exchange, that is (1) not a press release, (2) is not required to be and has not been distributed to the holders of the foreign private issuer's securities, and (3) if discussing a material event, has already been the subject of a Form 6-K filing or other SEC filing via EDGAR.

As a general matter under Rule 306 of Regulation S-T, all filings in EDGAR must be made in the English language. Non-English documents must be fairly and accurately translated into English for filing in accordance with the SEC's rules on foreign-language documents, including most documents submitted to the SEC under cover of Form 6-K.<sup>40</sup> Alternatively, a summary of certain documents filed with the SEC as exhibits may be provided, although the SEC's rules require specified significant documents (for example, articles of incorporation, articles of association, instruments defining the rights of security holders, and contracts on which an issuer's business is substantially dependent) to be provided in full translation.<sup>41</sup> Similarly, certain documents provided to the SEC on Form 6-K may be provided in English summary, including a report required to be furnished and made public under the laws of the issuer's home country or the rules of the issuer's home-country stock exchange, as long as it is not a press release and is not required to be, and has not been distributed to the issuer's security holders.<sup>42</sup> Any permitted summary must fairly and accurately summarize the terms of each material provision of the original text and fairly and accurately describe the terms that have been omitted or abridged.<sup>43</sup>

## ENDNOTES

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- 1 Exchange Act Section 12(a) prohibits transactions on US national securities exchanges with respect to unregistered securities, while Section 12(b) sets out the requirement for that registration.
- 2 Exchange Act Section 12(g)(1); Exchange Act Rules 12g-1, 12g3-2(a).
- 3 Exchange Act Section 12(g)(5).
- 4 *Final Rule: Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers*, Release No. 34-58465, Section II.D, pp. 34-35 (September 5, 2008).
- 5 *Id.* at 36-37.
- 6 Exchange Act Sections 13(a), 15(d).
- 7 Form 20-F, General Instructions A(b); *see also* Exchange Act Rule 13a-1 (each issuer with Section 12 registered securities must file an annual report within the time period specified in the relevant form).
- 8 Exchange Act Rules 13a-16(a), 15d-16(a); Form 6-K, General Instruction A.
- 9 Form 6-K, General Instruction B.
- 10 *Final Rule: Certification of Disclosure in Companies' Quarterly and Annual Reports*, Release No. 33-8124, text at n.49 (August 28, 2002) (Section 302 certification not required) [*Certification Adopting Release*]; *Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date*, Release No. 33-8400, text at n.146 (March 16, 2004) (Section 906 certification not required) [*Additional Form 8-K Disclosure Adopting Release*].
- 11 Exchange Act Sections 13(b)(2)-(7); Exchange Act Regulation 13B-2; *see also* Exchange Act Rules 13a-15(a), 15d-15(a) (reporting issuer must maintain "internal control over financial reporting").
- 12 Exchange Act Section 30A. In addition, any "domestic concern" whether or not registered with the SEC is subject to substantially identical anti-bribery provisions. 15 U.S.C. Section 78dd-2(a). A *domestic concern* for these purposes means any US citizen, national, or resident, or any entity (such as a corporation or a partnership) that has its principal place of business in the United States or that is organized under the laws of a US state or territory. 15 U.S.C. Section 78dd-2(h)(1).
- 13 Exchange Act Section 10A.
- 14 Sarbanes-Oxley Act, Section 2(a)(7) (definition of *issuer* subject to Sarbanes-Oxley).
- 15 *See Final Rule: Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934*, Release No. 34-55540, p. 1 (March 27, 2007) [*Foreign Issuer Deregistration Release*].
- 16 While Rule 12h-6 does not specify how ADTV is measured (which is consistent with other provisions in the Exchange Act, such as Regulation M, where the concept of ADTV is used), the rules do provide welcome guidance in two central areas. First, the rules specify that the number of shares underlying an issuer's ADRs shall be included in calculating ADTV. *See* Exchange Act Rule 12h-6 (Note to paragraph (a)(4)). Second, the SEC has clarified that an issuer may include off-market transactions, including ones completed through an alternative trading system, in its calculation of worldwide ADTV. *See Foreign Issuer Deregistration Release*, p. 22. In addition, the rules provide that trading volume related to equity-linked securities, such as convertible debt securities, options, and warrants, should be excluded when calculating ADTV. *See Foreign Issuer Deregistration Release*, p. 28.
- 17 *See Foreign Issuer Deregistration Release*, p. 37 ("In the event that an issuer determines that it should have filed a Form 6-K during this period, it can do so before it files its Form 15F.").
- 18 *Primary trading market* under Rule 12h-6 is defined as the market where at least 55% of the trading in the class of securities to be deregistered must have taken place through the facilities of a securities market during a recent 12-month period. Although two foreign jurisdictions can be aggregated to calculate this percentage, if this is done, the trading market for the class of securities in at least one of these jurisdictions must be larger than the US trading market for the same class of securities.
- 19 *See* Form 15F, General Instruction E.
- 20 Exchange Act Rule 13e-3(a)(3)(ii)(A).
- 21 Exchange Act Section 13(d)(1).
- 22 Exchange Act Rule 13d-1. The obligation to provide the issuer (and each exchange on which the issuer's securities are traded) with copies of the Schedule 13D or 13G is set out in Exchange Act Section 13(d)(1).
- 23 Exchange Act Rule 13d-3(a).
- 24 Exchange Act Rule 13d-5(b).
- 25 Exchange Act Rule 13d-1(a).
- 26 Exchange Act Rules 13d-1(b), (c), and (d).

- 27 Exchange Act Rule 13d-1(b)(1).
- 28 Exchange Act Rule 13d-1(c).
- 29 Exchange Act Rule 13d-1(d).
- 30 Exchange Act Rule 13d-1(e)(1).
- 31 Exchange Act Rule 13d-1(f)(1).
- 32 Exchange Act Rule 13d-1(b)(2).
- 33 Exchange Act Rule 13d-1(c).
- 34 Exchange Act Rule 13d-1(d).
- 35 Exchange Act Rule 13d-2(a).
- 36 *Id.*
- 37 Exchange Act Rule 13d-2(b).
- 38 Exchange Act Rule 13d-2(c).
- 39 Exchange Act Rule 13d-2(d).
- 40 Form 6-K, General Instruction D(1).
- 41 Securities Act Rule 403(c)(2); Exchange Act Rule 12b-12(d)(2).
- 42 Form 6-K, General Instruction D(2).
- 43 Securities Act Rule 403(c)(3)(ii); Exchange Act Rule 12b-12(d)(3)(ii); Form 6-K, General Instruction D(4).

# CHAPTER 12

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## The US Sarbanes-Oxley Act of 2002

The US Congress enacted Sarbanes-Oxley in 2002 in response to several high-profile, accounting-related scandals at US companies. Sarbanes-Oxley instituted a number of significant changes for public companies in the United States that were designed to enhance the reliability of financial information published by public companies and promote investor confidence in US markets.

### Who Is Subject to Sarbanes-Oxley?

Sarbanes-Oxley applies to all issuers (including foreign private issuers) that:

- have registered securities under the Exchange Act;
- are required to file reports under Section 15(d) of the Exchange Act; or
- have filed a registration statement under the Securities Act that has not yet become effective.<sup>1</sup>

This means, for example, that any foreign private issuer that has listed its securities in the US, or issued securities to the public in the US whether or not listed (such as in a registered exchange offer for high-yield bonds) is subject to Sarbanes-Oxley. A foreign private issuer, however, that has not sold securities to the public in the US, or that is exempt from Exchange Act registration by virtue of Exchange Act Rule 12g3-2(b), is not subject to the requirements of Sarbanes-Oxley.

We highlight below some key aspects of Sarbanes-Oxley.

### Internal Control Over Financial Reporting – Section 404

Section 404 of Sarbanes-Oxley contains two related requirements. Section 404(a) requires an assessment by management of the effectiveness of the issuer's ICFR, while Section 404(b) requires an attestation report of the issuer's independent auditors on management's assessment. Compliance with Section 404 can be a major undertaking for a newly public company. Fortunately, the SEC has adopted rules to allow an IPO issuer to wait until its second annual report to provide management's Section 404(a) assessment and its auditor's Section 404(b) attestation.<sup>2</sup>

Foreign private issuers that are "large accelerated filers" or "accelerated filers" must comply with both Sections 404(a) and 404(b), starting with the second annual report on Form 20-F following the IPO.<sup>3</sup> By contrast, foreign private issuers that are neither large accelerated filers nor accelerated filers, and those that are EGCs, are required only to provide management's assessment of internal control under Section 404(a).<sup>4</sup>

Management may not determine that an issuer's internal control over financial reporting is effective if it identifies one or more material weaknesses in the issuer's internal control.<sup>5</sup> The SEC has adopted a definition of the term material weakness in Exchange Act Rule 12b-2 and S-X Rule 1-02. A "material weakness" is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.

## Disclosure Controls and Procedures

In addition to internal control, an issuer must maintain and evaluate the effectiveness of its “disclosure controls and procedures.”<sup>6</sup> There is, however, no required auditor’s attestation with respect to disclosure controls and procedures.

Disclosure controls and procedures mean controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the Exchange Act is (i) timely recorded, processed, summarized, and reported; and (ii) accumulated and communicated to the issuer’s management to allow for timely decisions about disclosure.<sup>7</sup> There is substantial overlap between the concepts of disclosure controls and procedures and internal control over financial reporting, although there are some elements of each term that are not subsumed within the other. In particular, “disclosure controls and procedures will include those components of internal control over financial reporting that provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles.”<sup>8</sup> By contrast, disclosure controls and procedures would not necessarily include accurate recording of transactions and disposition or safeguarding of assets, which would remain components of internal control.<sup>9</sup> The existence of a material weakness in internal control may not prevent management from concluding that an issuer’s disclosure controls and procedures are effective, but, in practice, this can be a challenging determination.

## Certification Requirements – Sections 302 and 906

Sarbanes-Oxley contains two overlapping certifications that must be provided by an issuer’s CEO and CFO (or persons performing similar functions): the Section 302 certification and the Section 906 certification. Section 302 amends the Exchange Act, whereas Section 906 amends the US federal criminal code. Under the rules adopted by the SEC, both certifications must be included with a foreign private issuer’s annual report on Form 20-F.<sup>10</sup> Neither certification is required, however, for current reports on Form 6-K.<sup>11</sup>

## Listed Company Audit Committees – Rule 10A-3

Exchange Act Rule 10A-3 (which implements Section 301 of Sarbanes-Oxley) requires that each audit committee member has to be a member of the board of directors and meet certain independence requirements. To be “independent,” an audit committee member is barred from accepting any compensatory fees from the issuer or any subsidiary, other than in his or her capacity as a member of the board, and may not be an “affiliated person” of the issuer. The definition of affiliated person includes a person who, directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the specified person. There is, however, a safe harbor for certain non-executive officers and other persons that are 10% or less shareholders of the issuer.

Rule 10A-3 also requires that:

- the audit committee must be “directly responsible” for the appointment, compensation, oversight, and retention of the external auditors, who must report directly to the audit committee;
- the audit committee must establish procedures for the receipt, retention, and treatment of complaints regarding accounting, internal controls, or auditing matters, and for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters;
- the audit committee must have the authority to engage independent counsel and other advisers as it deems necessary to carry out its duties; and



- the issuer must provide the audit committee with appropriate funding for payment of external auditors, advisers employed by the audit committee, and ordinary administrative expenses of the audit committee.

Foreign private issuers are entitled to certain exemptions from the independence requirement of Rule 10A-3. For example, the inclusion of a non-management employee representative, a non-management affiliated person with only observer status, or a non-management governmental representative on the audit committee will not violate the affiliated person prong of the independence test. In addition, issuers involved in an IPO are entitled to certain exemptions during a transitional period following their public offering.

These requirements are not intended to conflict with local legal or listing provisions (or requirements under the foreign private issuer's organizational documents), and instead relate to the allocation of responsibility between the audit committee and the issuer's management.<sup>12</sup> Accordingly, the audit committee may recommend or nominate the appointment or compensation of the external auditor to shareholders if these matters are within shareholder competence under local law, and it must be granted those responsibilities that the board of directors can legally delegate.<sup>13</sup>

Rule 10A-3 contains a general exemption for foreign private issuers that have a statutory board of auditors or statutory auditors established pursuant to home-country law or listing requirements, which in turn meet various requirements. A foreign private issuer relying on Rule 10A-3's exemption from independence, or the general exemption noted above, will need to disclose in its annual report its reliance on the exemptions and an assessment of whether this reliance will materially adversely affect the audit committee's ability to act independently and to satisfy any of the other requirements of Rule 10A-3.<sup>14</sup>

## Audit Committee Financial Expert

Item 16A of Form 20-F (implementing Section 407(a) of Sarbanes-Oxley) requires a foreign private issuer to disclose that the issuer's board of directors has determined whether or not it has one audit committee financial expert serving on its audit committee, or, if not, to state why not. If the issuer has a two-tier board of directors, the supervisory or non-management board would make this determination. The issuer must also disclose the name of the audit committee financial expert (if any) and whether that person is "independent" from management.<sup>15</sup>

The SEC defines an audit committee financial expert as someone who has: (i) education and experience as a public accountant, auditor, principal financial officer, principal accounting officer, or controller, or experience in one or more positions that involve performance of similar functions; (ii) experience actively supervising persons in the positions above; (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, and who has:<sup>16</sup>

- an understanding of GAAP and financial statements;
- the ability to assess the general application of GAAP in connection with the accounting for estimates, accruals, and reserves;
- experience preparing, auditing, or analyzing financial statements similar to those of the issuer, or actively supervising others engaged in these activities;
- an understanding of internal controls over financial reporting; and
- an understanding of audit committee functions.

The term "GAAP" as used in Item 16A refers to the body of GAAP used by the issuer in its primary financial statements filed with the SEC.

Item 16A also contains a liability safe harbor for the audit committee financial expert, under which:

- a person who is determined to be an audit committee financial expert is not deemed to be an expert for any purpose, such as Section 11 of the Securities Act; and
- the designation of a person as an audit committee financial expert does not impose greater duties, obligations, or liabilities on the person than on other audit committee and board members, and does not affect the duties, obligations, or liabilities of other audit committee and board members.

## Loans to Executives – Section 402

Under Section 402 of Sarbanes-Oxley (which added Section 13(k) to the Exchange Act), it is illegal for an issuer to "extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof)" of that issuer. Section 402 covers both direct extensions and indirect extensions of credit, including through subsidiaries.

Section 402 contains certain exemptions, including:

- any loan existing on July 30, 2002, unless its terms are materially modified or the loan is renewed;
- consumer credit and extensions of credit under a charge card; and
- certain bank loans.

The broad sweep of Section 402, coupled with the absence of SEC guidance, has raised a number of thorny questions for issuers. In response, Latham & Watkins (together with 24 other law firms) issued a paper concluding that the following should generally be regarded as permissible under Section 402:<sup>17</sup>

- cash advances to reimburse travel and similar expenses while performing executive duties;
- personal usage of a company credit card and company car, and relocation expenses required to be reimbursed;
- "stay" and "retention" bonuses subject to repayment if an employee terminates employment before a designated date;
- indemnification advances for litigation;
- tax indemnity payments to overseas-based executive officers;
- loans by a parent or shareholder that is a foreign private issuer but not subject to Sarbanes-Oxley, to the executive officer of a wholly owned subsidiary that is subject to Sarbanes-Oxley, if the subsidiary has not "arranged" the loan and the loan is made by reason of service to the parent, not the subsidiary; and
- most "cashless" option exercises.

## Forfeiture of Bonuses – Section 304

Section 304 of Sarbanes-Oxley provides that if an issuer is required to "prepare an accounting restatement due to the material non-compliance of the issuer, as a result of misconduct" with any financial reporting requirements under the securities laws, the CEO and CFO must reimburse the issuer for:

- all bonuses or other incentive-based or equity-based compensation received from the issuer during the 12-month period following the first public issuance or filing with the SEC (whichever is first) of the financial document embodying the financial reporting requirement; and
- any profits received from the sale of the issuer's securities during that 12-month period.

## Proposed Incentive-Based Compensation Clawbacks Under Dodd-Frank

Under Dodd-Frank (adding new Section 10D of the Exchange Act), the SEC must adopt incentive-based compensation clawback rules for listed companies applicable to all current and former executives without regard to misconduct. As of September 1, 2019, the SEC has proposed, but not adopted, final rules to implement this mandate.

### Attorney Conduct – Part 205

The SEC's Part 205 standards (implementing Section 307 of Sarbanes-Oxley) impose various requirements on attorneys who are appearing and practicing before the SEC in the representation of an issuer. The term "appearing and practicing" before the SEC is broader than it might first appear. It potentially covers any lawyer who transacts business with the SEC, represents an issuer in SEC proceedings, provides advice on the US securities laws regarding any document the attorney "has notice" will be submitted to the SEC (including in the context of preparing documents to be filed), or advises an issuer whether information must be included in or filed with any SEC document.

If a covered attorney becomes aware of evidence of a "material violation" – which is defined to include a material violation of US securities law or a breach of fiduciary duty or a similar material violation of any US federal or state law – Part 205 creates a duty to report the matter to the issuer's chief legal officer (CLO) or to both the CLO and the CEO. The CLO must then open an inquiry into the matter and take all reasonable steps to cause the issuer to adopt an appropriate response. Unless the attorney reasonably believes that the CLO's response was adequate, he or she must report the matter "up the ladder" to the audit committee, to another independent board committee (if the issuer does not have an audit committee), or the board of directors as a whole (if there is no independent board committee).

As an alternative to reporting to the CLO or CEO, the attorney may refer the matter to the issuer's qualified legal compliance committee (QLCC), if one has been set up. A QLCC – which may also be the audit committee – is any committee of the issuer that includes at least one member of the audit committee and two or more non-employee members of the board of directors and that has been duly established by the board of directors with certain requirements. If the attorney reports the matter to the QLCC, he or she has no further obligations under Part 205. In addition, the CLO may refer a reported matter to the QLCC in lieu of conducting the required investigation, in which case the QLCC will be responsible for responding.

Part 205 contains an exemption for "non-appearing foreign attorneys," which is defined as an attorney who (1) is himself or herself admitted to practice law in a jurisdiction outside of the United States and does not hold himself or herself out as practicing US federal or state securities or other laws, and (2) either:

- conducts activities that would constitute appearing and practicing before the SEC only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or
- is appearing and practicing before the SEC only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

## NYSE and Nasdaq Corporate Governance and Board Composition Requirements

Nasdaq and NYSE impose corporate governance and board composition requirements as part of their respective listing standards. Foreign private issuers and controlled companies are exempt from some of these standards. (A “controlled company” is one in which more than 50% of the voting power for the election of directors is held by an individual, a group, or another company.)

We summarize these in detail in Annexes B and C, and highlight the NYSE and Nasdaq board composition requirements in the following table:

Nasdaq/NYSE Requirement	Foreign Private Issuers	All Others (e.g., EGCs, non-EGCs)
• Majority of independent directors	May follow home-country practice	Yes, within 12 months of listing
• Nominating/corporate governance committee	Same	Yes <sup>†</sup>
• Compensation committee	Same	Yes <sup>†</sup>
• Audit committee		
• Must meet requirements of Rule 10A-3 <sup>‡</sup>	Yes	Yes
• Must have at least three members	May follow home-country practice	Yes

<sup>†</sup> The requirements for these committees are:

- one independent director on each committee at the time of listing (under Nasdaq rules) or by the earlier of the date the IPO closes or five business days from the listing date (under NYSE rules);
- a majority of independent directors within 90 days thereafter (under both Nasdaq and NYSE rules); and
- fully independent committees within one year (under both Nasdaq and NYSE rules).

<sup>‡</sup> The following transition periods apply to all IPO companies:

- *for the first 90 days* after an IPO, all but one of the members of the audit committee are exempt from Rules 10A-3's independence requirement; and
- *for the first year* after an IPO, a minority of the members of the audit committee are exempt from Rule 10A-3's independence requirements (since most audit committees have three members, this means that only two need to be independent for the days 91 through 365 following the IPO).

## Regulation BTR

Regulation Blackout Trading Restrictions (Regulation BTR) implements Section 306 of Sarbanes Oxley. It prohibits, subject to certain exceptions, any director or executive officer of an issuer from purchasing, selling, or otherwise transferring the issuer's equity securities during any blackout period applicable to the securities if the officer acquires or previously acquired the securities in connection with his or her service or employment as a director or officer.

For a foreign private issuer, a blackout period generally means any period of more than three consecutive business days during which the ability to purchase or sell an interest in the issuer's equity securities held in an "individual account plan" (such as a qualifying retirement plan under Section 401(k) of the US Internal Revenue Code)<sup>18</sup> is temporarily suspended by the issuer or by a fiduciary of the plan with respect to not less than 50% of participants or beneficiaries located in the United States and either:

- the number of participants and beneficiaries located in the United States subject to the temporary suspension exceeds 15% of the total number of employees of the issuer and its consolidated subsidiaries; or
- more than 50,000 participants or beneficiaries located in the United States are subject to the temporary suspension.

## ENDNOTES

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- <sup>1</sup> See Sarbanes-Oxley Section 2(a)(7).
- <sup>2</sup> See Form 20-F, Instruction 1 to Item 15 (providing a “transition period” for “newly public companies” pursuant to which the management’s assessment and the auditor’s attestation is not required until the company “either had been required to file an annual report pursuant to section 13(a) or 15(d) of the Exchange Act for the prior fiscal year or had filed an annual report with the Commission for the prior fiscal year”).
- <sup>3</sup> See Form 20-F, Item 15. Under Exchange Act Rule 12b-2, a “large accelerated filer” is an issuer that, as of the end of its fiscal year:
- has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates (market capitalization) of \$700 million or more (measured as of the last business day of the issuer’s most recently completed second fiscal quarter);
  - has been subject to SEC reporting under the Exchange Act for a period of at least 12 calendar months; and
  - has filed at least one annual report under the Exchange Act with the SEC.
- In addition, under Exchange Act Rule 12b-2, an “accelerated filer” is an issuer meeting the same conditions, except that it has a market capitalization of \$75 million or more but less than \$700 million (measured as of the last business day of its most recently completed second fiscal quarter).
- <sup>4</sup> See *Final Rule: Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers*, Release No. 33-9142 (September 21, 2010). This rule implemented Section 989G of the Dodd-Frank Act, which added Section 404(c) to Sarbanes-Oxley. Under Section 404(c), the requirements of Section 404(b) do not apply to any audit report prepared for an issuer that is neither an accelerated filer nor a large accelerated filer. See also Section 103 of the JOBS Act, which modified Section 404(b) to exempt EGCs from the auditor attestation requirement.
- <sup>5</sup> See Form 20-F, Item 15(b)(3).
- <sup>6</sup> See Exchange Act Rules 13a-15 and 15d-15.
- <sup>7</sup> See Exchange Act Rules 13a-15(e) and 15d-15(e).
- <sup>8</sup> See *Final Rule: Management’s Reports on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Release No. 33-8238, at II.D (June 5, 2003).
- <sup>9</sup> See *id.*
- <sup>10</sup> See Exchange Act Rules 13a-14 and 15d-14.
- <sup>11</sup> See *Certification Adopting Release*, text at n.49 (Section 302); see *Additional Form 8-K Disclosure Adopting Release*, n.146 (Section 906).
- <sup>12</sup> See Instruction 1 to Exchange Act Rule 10A-3.
- <sup>13</sup> See Instruction 2 to Exchange Act Rule 10A-3.
- <sup>14</sup> See also Form 20-F, Item 16.D.
- <sup>15</sup> For listed issuers, the audit committee financial expert will need to satisfy the definition of “independence” as set out under Exchange Act Rule 10A-3.
- <sup>16</sup> S-K Item 407(d)(5).
- <sup>17</sup> See *Sarbanes-Oxley Act: Interpretive Issues under Section 402 – Prohibition of Certain Insider Loans* (October 15, 2002).
- <sup>18</sup> The term “individual account plan” is defined in Regulation BTR, Rule 100(j).

# CHAPTER 13

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## Selected Issues Under the Dodd-Frank Act

In July 2010, the Dodd-Frank Act was signed into law. In addition to sweeping revisions to US regulation of the financial markets, Dodd-Frank changes disclosure and corporate governance requirements for US public companies in several key areas. A number of these provisions apply to foreign private issuers that are public in the United States (many do not, since they modify portions of the securities laws from which foreign private issuers have traditionally been exempted).

### Conflict Minerals

Section 1502 of Dodd-Frank added Section 13(p) to the Exchange Act, and broadly mandates SEC reporting companies to make disclosures and undertake due diligence if they are involved in manufacturing products containing “conflict minerals.” In 2012, the SEC adopted new Exchange Act Rule 13p-1 and Form SD to implement Section 1502.<sup>1</sup>

Rule 13p-1 is deceptively simple – it provides that all SEC registrants “having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that registrant to be manufactured” must file Form SD, which, depending on the circumstances, can entail short-form reporting or long-form audited disclosure. Rule 13p-1 applies to all SEC reporting companies, including foreign private issuers.<sup>2</sup>

#### What Are “Conflict Minerals” and Where Are They Found?

Form SD defines conflict minerals as gold, tantalum, tin, and tungsten, unless the US Secretary of State determines that additional derivatives of the ores from which tantalum, tin, and tungsten are derived (*i.e.*, columbite-tantalite (coltan), cassiterite, or wolframite), are being used to finance conflict in the Democratic Republic of the Congo (the DRC) or an adjoining country. An adjoining country for these purposes means a country that shares an internationally recognized border with the DRC. This currently includes Angola, Burundi, Central African Republic, the Republic of Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.

#### What Does “Manufacture or Contract to Manufacture” Mean?

Rule 13p-1 and Form SD do not define manufacture or contract to manufacture. However, the SEC has stated that it would not consider an issuer that only “services, maintains, or repairs a product containing conflict minerals” to be engaged in manufacturing.<sup>3</sup>

The question whether an issuer contracts to manufacture depends on the “degree of influence exercised by the issuer on the manufacturing of the product based on the individual facts and circumstances surrounding an issuer’s business and industry.”<sup>4</sup> A company would not be viewed as contracting to manufacture a product if its actions involve no more than:

- specifying or negotiating contractual terms with a manufacturer that do not directly relate to the manufacturing of the product, such as training or technical support, price, insurance, indemnity, intellectual property rights, dispute resolution, or other like terms or conditions concerning the product, “unless the issuer specifies or negotiates taking these actions so as to exercise a degree of influence over the manufacturing of the product that is practically equivalent to contracting on terms that directly relate to the manufacturing of the product;”

- affixing its brand, marks, logo, or label to a generic product manufactured by a third party; or
- servicing, maintaining, or repairing a product manufactured by a third party.<sup>5</sup>

### **What Is the Meaning of “Necessary to the Functionality or Production of a Product”?**

Rule 13p-1 and Form SD do not define “necessary to the functionality or production of a product.” The SEC has stated that a company determining whether conflict minerals are necessary to the functionality of a product should consider:<sup>6</sup>

- whether a conflict mineral is contained in and intentionally added to the product or any component of the product and is not a naturally occurring by-product;
- whether a conflict mineral is necessary to the product’s generally expected function, use, or purpose; and
- if a conflict mineral is incorporated for purposes of ornamentation, decoration, or embellishment, whether the primary purpose of the product is ornamentation or decoration.

To determine whether conflict minerals are necessary to the production of a product, a company should consider:<sup>7</sup>

- whether a conflict mineral is contained in the product and intentionally added in the product’s production process, including the production process of any component of the product; and
- whether the conflict mineral is necessary to produce the product.

The SEC did not adopt a *de minimis* exception.

### **Form SD – Due Date**

Form SD is due on May 31 after the end of a company’s most recent fiscal year.<sup>8</sup>

### **Form SD – Conflict Minerals Disclosure and Conflict Minerals Report**

Companies must file either a short-form “Conflict Minerals Disclosure” or a lengthier “Conflict Minerals Report.” Under Item 1.01 of Form SD, to determine which obligation an issuer must follow, it must conduct a “reasonable country of origin inquiry” designed to determine “whether any of the conflict minerals originated in” the DRC or an adjoining country or whether they are from a recycled or scrap source. The possible outcomes are:

- If the company determines that its conflict minerals are DRC conflict free – meaning that they did not originate in the DRC or an adjoining country or that they came from recycled or scrap sources – and has no reason to believe otherwise, it must disclose its determination and “briefly describe the reasonable country of origin inquiry it undertook” on Form SD in a Conflict Minerals Disclosure and provide a link to its website where the disclosure is publicly available. The Conflict Minerals Disclosure does not require an independent private sector audit. The determination need not be certain, but the process undertaken should be reasonably designed and in good faith.
- If the company determines that its necessary conflict minerals did originate in the DRC or an adjoining country or the company has reason to believe, based on its reasonable country of origin inquiry, that conflict minerals in its supply chain originated in the DRC or an adjoining country, it must exercise due diligence on the source and chain of custody of its conflict minerals and make additional disclosures about its diligence efforts and the results of that diligence in the form of a Conflicts Mineral Report included as an exhibit to Form SD.



If a Conflicts Mineral Report is required, it must include “an independent private sector audit,” or IPSA, of the company’s due diligence measures. The purposes of the audit are to “express an opinion or conclusion as to whether the design” and description of the company’s due diligence measures are in conformity with the due diligence framework the company used.

## Impact of Court of Appeals Rulings

In various court decisions, the United States Court of Appeals for the District of Columbia Circuit concluded, in litigation challenging Rule 13p-1 and Form SD, that Rule 13p-1 violates the First Amendment of the US Constitution to the extent it requires issuers subject to the Rule to make certain disclosures addressing whether the conflict minerals necessary to their products were found to be “conflict free” (meaning they did not contain necessary conflict minerals that directly or indirectly finance or benefit armed groups in the Covered Countries). In light of these decisions, the SEC Staff has given broad no-action relief to issuers relating to their compliance with the rule. Under this relief, issuers are not required to provide the disclosure described under the second bullet point above. The SEC may propose new rules under Section 1502 but has not done so as of September 1, 2019.

## Compensation Committee Listing Standards

Section 952 of Dodd-Frank added Section 10C to the Exchange Act, and requires adoption by US exchanges, such as the NYSE and Nasdaq, of standards relating to compensation committees. Exchange Act Rule 10C-1 implements Section 10C, as do specific rules of the NYSE and Nasdaq.

### Exemptions for Foreign Private Issuers

A foreign private issuer that follows home-country practice is exempt from compliance with Rule 10C-1’s compensation committee independence requirements and the related NYSE and Nasdaq rules governing compensation committees if:

- *NYSE-listed company*: it discloses in its Annual Report on Form 20-F the “significant ways” in which its corporate governance practices differ from those followed by NYSE-listed US domestic companies;<sup>9</sup> and
- *Nasdaq-listed company*: it discloses in its Annual Report on Form 20-F the reasons that it does not have an independent compensation committee, each Nasdaq corporate governance requirement that it does not follow, and a brief statement of the home-country practice it follows in lieu of these corporate governance requirements.<sup>10</sup>

### Compensation Committee Independence

Rule 10C-1(b)(1)(i) requires that “each member of the compensation committee must be a member of the board of directors of the listed issuer, and must otherwise be independent.” (Rule 10C-1(c)(1) clarifies that, for foreign private issuers with a two-tier board system, “board of directors” means the supervisory or non-management board.) Section 303A.02(a)(ii) of the NYSE Listed Company Manual and Nasdaq Rule 5605(d)(2) set forth heightened compensation committee independence requirements under Rule 10C-1(b)(1)(i).

## **Authority to Retain and Compensate Compensation Consultants, Independent Legal Counsel, and Other Compensation Advisers**

Under Rule 10C-1(b)(2), compensation committees may retain or obtain the advice of a compensation consultant, independent legal counsel, or other adviser and are responsible to oversee the work of any such adviser appointed, while Rule 10C-1(b)(3) requires an issuer to provide appropriate funding for these advisers. Section 303A.05(c)(i)-(iii) of the NYSE Listed Company Manual and Nasdaq Rule 5605(d)(3) implement this.

## **Independence of Compensation Consultants and Other Advisers**

Rule 10C-1(b)(4) requires the compensation committee of a listed issuer to consider a list of independence factors (in addition to any other independence factors that a national exchange might set forth) prior to retaining a compensation consultant, legal counsel, or other adviser. It is important to note that Rule 10C-1(b)(4) governs the adviser selection *process*. As long as a compensation committee considers the independence factors, there is no *substantive* requirement the compensation committee only hire an independent adviser. Section 303A.05(c)(iv) of the NYSE Listed Company Manual and Nasdaq Rule 5605(d)(3) implement this.

## ENDNOTES

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- <sup>1</sup> See *Conflict Minerals*, Release No. 34-67716 (August 22, 2012).
- <sup>2</sup> *Id.* at 113.
- <sup>3</sup> *Id.* at 153.
- <sup>4</sup> *Id.* at 156.
- <sup>5</sup> *Id.* at 159.
- <sup>6</sup> *Id.* at 224.
- <sup>7</sup> *Id.*
- <sup>8</sup> Form SD, General Instruction B.
- <sup>9</sup> See New York Stock Exchange Listed Company Manual § 303A.11. Note that the NYSE did not implement the requirement of Exchange Act Rule 10C-1(b)(1)(iii)(A)(4) that a foreign private issuer must disclose the reasons why it does not have an independent compensation committee in order to claim the benefit of the exemption.
- <sup>10</sup> See Nasdaq Rule 5615(a)(3)(B)(i).



## CHAPTER 14

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### Liability Under the US Federal Securities Laws for Foreign Private Issuers

A foreign private issuer becomes exposed to liability under the US federal securities laws in a variety of ways as a result of offering or listing its securities in the United States. This liability can be civil or, in certain circumstances, criminal. Although litigation by private plaintiffs is more common, the SEC frequently initiates civil enforcement actions against foreign private issuers and persons associated with them. In cases involving serious securities fraud, the US Department of Justice, or DOJ, sometimes brings criminal proceedings, often in parallel with an SEC civil action. We summarize below the key areas of US federal securities law liability for foreign private issuers.

#### Registration Under Section 5 of the Securities Act

Section 5 of the Securities Act effectively requires every US offer and sale of securities to be either registered with the SEC or made pursuant to an available exemption from registration. The terms “offer” and “sale” in the Securities Act are broadly construed. For example, an offer includes any attempt to dispose of a security for value.<sup>1</sup> As a result, publicity in the United States about an impending offering, website disclosure of the offering, or even an email communication to “friends and family” announcing an offering can constitute an unregistered offer in violation of Section 5.

Violations of Section 5 can give rise to liability in SEC enforcement actions and also in actions brought by investors under Section 12(a)(1) of the Securities Act, as discussed below. They can also lead to the delay (or even abandonment) of a securities offering if the SEC imposes a cooling-off period. As a result of these onerous remedies, it is critical to control publicity and comply carefully with the requirements for any applicable exemptions from Section 5 registration.

Under Section 12(a)(1), an investor who buys securities issued in transactions violating Section 5 can rescind the sale and recover his or her purchase price (plus interest, less any amount received on the securities). If the investor no longer owns the securities, he or she can recover damages equal to the difference between the purchase and the sale price of the securities (again, plus interest, less any amount received on the securities).<sup>2</sup>

Section 12(a)(1) imposes strict liability, and an investor is not required to demonstrate any causal link between his or her damages and the violation of Section 5.<sup>3</sup> However, in order to be liable, a defendant must be a seller – that is, a person who successfully solicits the purchase, motivated at least in part by financial interest – and the plaintiff must actually have bought the securities from that defendant.<sup>4</sup>

#### Antifraud

As a general matter, there is no duty under the US federal securities laws to disclose material information unless an applicable rule or regulation specifically requires disclosure.<sup>5</sup> A foreign private issuer's duty to disclose may arise in situations such as:

- purchasing or selling securities;
- filing a registration statement;
- filing an annual report on Form 20-F;

- submitting information on Form 6-K;
- issuing a press release; and
- NYSE or Nasdaq requirements.

Once an issuer chooses to disclose information to investors or the public, it must do so completely and accurately.<sup>6</sup> If a statement is believed by the issuer to be true when made, but the issuer subsequently learns that it was not true, the issuer generally has a duty to correct that statement.<sup>7</sup> If, on the other hand, a statement by an issuer was reasonable when made, but it becomes misleading in light of subsequent events, the issuer might or might not have a “duty to update” the statement, depending on a number of factors.<sup>8</sup> This is one reason why projections of future results require careful thought.

### What Is “Material”?

The various antifraud provisions of the Securities Act and the Exchange Act impose liability for material misstatements or omissions in the offer or sale, or in connection with the purchase or sale, of securities. The fundamental test for “materiality” is whether there is a substantial likelihood that a reasonable investor would consider the misstatement or omission important in deciding whether or not to purchase or sell a security.<sup>9</sup> As the US Supreme Court has explained, “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”<sup>10</sup>

The determination of materiality is a mixed question of law and fact,<sup>11</sup> and there is no bright-line quantitative test for materiality.<sup>12</sup> In adopting Regulation FD, for example, the SEC indicated that the following subjects should be carefully reviewed to determine whether they are material:<sup>13</sup>

- earnings information;
- mergers, acquisitions, tender offers, joint ventures, or changes in assets;
- new products or discoveries, or developments regarding customers or suppliers (for example, the acquisition or loss of a contract);
- changes in control or in management;
- change in auditors or auditor notification that the issuer may no longer rely on an auditor’s audit report;
- events regarding the issuer’s securities – for example, defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits, or changes in dividends, changes to the rights of security holders, public or private sales of additional securities; and
- bankruptcies or receiverships.

In addition, in Staff Accounting Bulletin No. 99, the SEC Staff pointed to several qualitative factors that may need to be considered in assessing materiality, and that could render a quantitatively minor misstatement material, including whether the misstatement:

- arises from an item capable of precise measurement or from an estimate and, if so, the degree of imprecision inherent in the estimate;
- masks a change in earnings or other trends;
- hides a failure to meet analysts’ consensus expectations;
- changes a loss into income or vice versa;
- concerns a segment or other portion of the issuer’s business that has been identified as playing a significant role in the issuer’s operations or profitability;

- affects the issuer's compliance with regulatory requirements;
- affects the issuer's compliance with loan covenants or other contractual requirements;
- has the effect of increasing management's compensation – for example, by satisfying requirements for the award of bonuses or other forms of incentive compensation; and
- involves concealment of an unlawful transaction.

## Fraud in Connection With the Purchase or Sale of Securities – Rule 10b-5

Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 provide a broad (and heavily litigated) basis for both civil and criminal liability in securities transactions. Such claims can be brought by parties to the transaction as well as by the SEC, the DOJ, and investors who were effecting transactions in the subject securities during the period of improper disclosure. Rule 10b-5 prohibits, in connection with the purchase or sale of securities:

- employing “any device, scheme, or artifice to defraud;”
- making “any untrue statement of material fact” or omitting “to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;” or
- engaging in any “act, practice, or course of business which operates or would operate as a fraud or deceit.”

### Elements of a Claim Under Rule 10b-5

The elements of a claim under Rule 10b-5 by a private plaintiff are:

- a misrepresentation or omission of a material fact;<sup>14</sup>
- made with *scienter* – that is, either intent to deceive, manipulate, or defraud,<sup>15</sup> or recklessness (beyond mere negligence);<sup>16</sup>
- in connection with the purchase or sale of a security;
- upon which the plaintiff relied; and
- which caused the injury.

In government enforcement actions under Rule 10b-5, only the first three elements apply.

The requirement that the alleged fraud must have been “in connection with” the purchase or sale of securities is flexibly construed to effectuate the remedial purposes of the Exchange Act, particularly when the SEC is the plaintiff.<sup>17</sup> A private plaintiff, by contrast, must show that he or she actually purchased or sold stock,<sup>18</sup> and cannot succeed on a claim that he or she would have sold had the truth been known; but Rule 10b-5 does not require privity between the defendant and the plaintiff,<sup>19</sup> and accordingly a plaintiff need not show that he or she actually bought securities from the person who made the misleading statements.

### Scope of Rule 10b-5

Rule 10b-5 is not limited to public offerings of securities, and applies to unregistered transactions and secondary market trading. In addition, Rule 10b-5 covers oral and written statements, whether or not relating to a registration statement or prospectus.<sup>20</sup> These would potentially include statements made:

- in an offering memorandum for a Rule 144A offering or other private placement;
- during a press conference or an interview, or in a press release;
- in an annual report on Form 20-F; and
- in a document submitted on Form 6-K.

In addition, while an issuer is generally not liable for the statements of others, there may be exceptions. For example, the issuer could be liable for misstatements in an analyst's report if a corporate insider participates sufficiently in the preparation of the report or circulates the report to prospective investors.<sup>21</sup>

### Insider Trading

Insider trading is also prosecuted under Rule 10b-5, civilly by the SEC and criminally by the DOJ. As interpreted by the SEC and the US federal courts, Rule 10b-5 prohibits a person from buying or selling securities on the basis of material nonpublic information, or providing such information to another person who trades, in violation of a fiduciary duty or similar duty of trust and confidence.<sup>22</sup> Rule 10b-5 imposes an obligation to either disclose material nonpublic information or abstain from trading on:

- corporate insiders, such as directors, officers, and controlling shareholders, who owe a fiduciary duty to the issuer's shareholders;<sup>23</sup>
- temporary insiders, such as lawyers, accountants, or investment bankers;<sup>24</sup> and
- outsiders who "misappropriate" material nonpublic information for trading purposes in breach of a duty owed to the source of the information.<sup>25</sup>

#### PRACTICE POINT

Bear in mind that a person can be liable under Rule 10b-5 even if he or she did not actually trade on the material nonpublic information, but instead passed it directly or indirectly to a third party – a practice known as "tipping" – to get some "personal benefit."<sup>26</sup> The personal benefit could be pecuniary gain (such as a kickback or a "reputational benefit that will translate into future earnings") or even the benefit one gets from making "a gift of confidential information to a trading relative or friend."<sup>27</sup> In addition to the tipper, the "tippee" (the person to whom the information is disclosed) may also be liable under Rule 10b-5 if he or she trades on the basis of the tipped information and had reason to know the information came from a person who violated a duty of trust and confidence.<sup>28</sup>

### Damages Under Rule 10b-5

In private actions, violations of Rule 10b-5 can lead to rescission or damages.<sup>29</sup> Damages comprise a purchaser's out-of-pocket loss, essentially limited to the difference between the purchase or sale price the plaintiff paid or received and the mean trading price of the security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market.<sup>30</sup> Punitive damages are, however, not available in private actions under Rule 10b-5.<sup>31</sup>

In civil or administrative actions, the SEC can obtain money penalties, disgorgement, and injunctions or cease-and-desist orders. In criminal prosecutions, the DOJ can obtain penalties that include imprisonment, fines, and disgorgement.

### Extraterritorial Application of Section 10(b) and Rule 10b-5

Section 10(b) is entirely silent about how it applies extraterritorially. Nevertheless, for decades US courts generally allowed plaintiffs to bring suit under Section 10(b) and Rule 10b-5 in extraterritorial situations if there was sufficient "conduct" and/or "effects" in the US. Under the "conduct-and-effects" test, such provisions applied extraterritorially when wrongful conduct occurred in the US or when conduct outside the US had a "substantial effect" in the US or upon US citizens. In 2010, however, the US Supreme Court swept away this test in *Morrison v. National Australia Bank Ltd.* and applied a new "transactional" test, holding that Section 10(b) and Rule 10b-5 apply only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities[.]"<sup>32</sup>



*Morrison* was a “foreign-cubed” case – that is, one in which the alleged victims were (1) foreign investors who traded in the securities of a (2) foreign issuer on a (3) foreign exchange, but where some significant conduct in furtherance of the violation or some foreseeable substantial effect allegedly occurred within the US. Clearly the majority of justices that decided *Morrison* meant to limit the number of securities class action lawsuits brought in the US against non-US issuers by non-US investors, in light of their fear that the US had “become a Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.”<sup>33</sup>

*Morrison* involved solely Exchange Act claims, and subsequently plaintiffs in foreign-cubed (otherwise known as “f-cubed”) class actions have hoped to evade *Morrison*’s effects by alleging violations of Securities Act provisions that are similar to Section 10(b) and Rule 10b-5. However, *Morrison* expressly stated that the Securities Act and the Exchange Act share “[t]he same focus on domestic transactions,”<sup>34</sup> and thus far, not surprisingly, the lower courts have extended the logic of *Morrison* to Securities Act claims and dismissed them on that basis.<sup>35</sup>

One of the questions that courts have wrestled with in the wake of *Morrison* is whether its transactional test applies to American Depositary Receipts (“ADRs”), which are securities issued by US-based financial institutions that represent shares of foreign stock. Currently before the Supreme Court is the question of whether the transactional test applies extraterritorially to US over-the-counter (OTC) transactions in unsponsored ADRs.<sup>36</sup> In *Stoyas v. Toshiba Corporation*, the district court granted the company’s motion to dismiss on the grounds that the Exchange Act did not apply to OTC transactions in unsponsored ADRs. Specifically, the court found that *Morrison*’s first prong does not apply because the ADRs are not listed on any US stock exchange. As to *Morrison*’s second prong, the court found that plaintiffs failed to allege that Toshiba engaged in any affirmative act in connection with securities sales in the US, and as such the company’s ADRs are not domestic transactions.<sup>37</sup>

On appeal, the Ninth Circuit agreed that the OTC market is not an “exchange” under the Exchange Act, and therefore *Morrison*’s first prong does not apply to Toshiba’s ADRs. As to the second prong, however, the Court held that OTC transactions in unsponsored ADRs could qualify as domestic transactions if properly pled in an amended complaint.<sup>38</sup> Applying the “irrevocable liability” test (under which the place of the transaction is determined by the place in which the parties to the transaction incur “irrevocable liability”), the Ninth Circuit stated that “an amended complaint could almost certainly allege sufficient facts to establish that [the plaintiffs] purchased [their] Toshiba ADRs in a domestic transaction.” The Court pointed to numerous US connections, stating that the ADRs were purchased in the US, the plaintiffs are US entities located in the US, the OTC platform on which the ADRs were traded is located in the US, and the depositary banks that maintain the ADR trading are located in the US. Accordingly, the Ninth Circuit reversed and remanded the case to allow plaintiffs to amend their complaint. In October 2018, Toshiba appealed the decision to the Supreme Court, where it remains pending.<sup>39</sup>

As to governmental actions, shortly after *Morrison* was decided, the US Congress, in Section 929P(b) of the Dodd-Frank Act, acted to undo the effect of *Morrison* by reinstating the conduct-and-effects test on securities actions brought under both the Securities Act and the Exchange Act by the US government (that is, by the SEC or the Department of Justice).<sup>40</sup> In the first circuit court decision to directly address the extraterritorial application of this authority after *Morrison*, the Tenth Circuit affirmed the SEC’s ability to bring enforcement actions under the conduct-and-effects test in *SEC v. Scoville*.<sup>41</sup> While acknowledging that the Dodd-Frank provision amended only the jurisdictional sections of the Securities Act and the Exchange Act, the Tenth Circuit concluded based on the specific context for those amendments that “Congress has ‘affirmatively and unmistakably’ indicated that the antifraud provisions of the federal securities acts apply extraterritorially when the statutory conduct-and-effects test is met.”<sup>42</sup> The Court then determined that because the US defendants engaged in conduct within

the US, the antifraud provisions apply to their sale of Adpacks (which the Court found to be an investment contract that qualifies as a security) outside the US.<sup>43</sup> The defendants have not yet indicated whether they intend to appeal the decision to the Supreme Court.

Thus, at least in cases currently brought in the Tenth Circuit, US regulatory authorities, unlike private litigants, may seek to enforce federal securities laws abroad where the conduct-and-effects test is satisfied. Given that the defendants in *Scoville* are US-based entities, however, there remains some question as to whether the SEC and the DOJ can satisfy the conduct-and-effects test for “f-cubed” enforcement actions and prosecutions.

## Section 11 of the Securities Act – Registered Offerings

Section 11(a) of the Securities Act imposes liability if any part of a registration statement, at the time it became effective, “contained an 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.” Section 11 liability only covers statements made in a registration statement, and does not reach other documents that are not considered part of a registration statement (such as road show materials, FWPs, or research reports).<sup>44</sup> In addition, Section 11 does not extend to unregistered transactions, since these do not involve a “registration statement.”<sup>45</sup>

A Section 11 claim can be brought by a purchaser (and not by the government) against:

- each person who signed the registration statement, including the issuer and members of management;<sup>46</sup>
- each member of the issuer’s board of directors, or similar governing body, regardless of whether he or she signed the registration statement;<sup>47</sup>
- any expert named as responsible for a portion of the registration statement, such as an issuer’s auditors; and
- each underwriter participating in the offering.

Issuers are strictly liable under Section 11. Potential defendants other than the issuer<sup>48</sup> have statutory defenses to Section 11 liability by virtue of Section 11(b)(3):

- *Due diligence defense*: in the case of a non-expert with respect to the non-expertized portions of the registration statement, or in the case of an expert with respect to the expertized portions (for example, the financial statements that include the auditors’ opinion), a defendant must show that he or she had, after reasonable investigation, reasonable grounds to believe – and did believe – that the included information was true and that no material facts were omitted;<sup>49</sup> and
- *Reliance defense*: in the case of a non-expert with respect to expertized portions of the registration statement, a defendant must show he or she had no reasonable ground to believe, and did not believe, that the registration statement contained a material misstatement or omission.<sup>50</sup>

Damages for violation of Section 11 are generally limited to:<sup>51</sup>

- the difference between the price paid for a security and its value at the time a plaintiff brings a lawsuit;
- if the security has already been sold at the time a lawsuit is brought, the amount paid for the security, less the price at which the security was sold in the market; or
- if the security was sold after the lawsuit was brought but before judgment, the lesser of (1) the amount the plaintiff paid for the security, less the price at which the security was sold in the market, or (2) the amount the plaintiff paid for the security, less the value of the security as of the time the suit was brought. Punitive damages are not available under Section 11.<sup>52</sup>

The *Morrison* case may prevent a Section 11 claim against a non-US issuer in a case brought by non-US plaintiffs who traded on non-US exchanges (an “f-cubed” case). For a discussion of the *Morrison* case, see “Extraterritorial application of Section 10(b) and Rule 10b-5” above.

## Section 12(a)(2) of the Securities Act – Registered Offerings

Section 12(a)(2) of the Securities Act imposes liability on any person who offers or sells a security by means of a prospectus, or any oral communication, which contains “an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading.”

Section 12(a)(2) overlaps with Section 11, but covers oral statements, FWPs, and statements in a prospectus, rather than the registration statement alone (of which the prospectus is a part). Actions under Sections 11 and 12(a)(2) are brought by purchasers in private litigation. As for enforcement by the US government, civil and criminal actions involving material misstatement or omissions in sales of securities may be brought, respectively, by the SEC and the DOJ under Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5.

The US Supreme Court has construed the term “prospectus” in Section 12(a)(2) to mean a prospectus in connection with a public offering under the Securities Act. As a result, it ruled that Section 12(a)(2) does not apply to unregistered offerings or secondary market trading.<sup>53</sup>

Section 12(a)(2) provides a statutory due diligence defense if the seller can show he or she “did not know, and in the exercise of reasonable care could not have known,” of the material misstatements or omissions.

Under Section 12(a)(2), a person who buys securities on the basis of a prospectus that contains a material misstatement or omission – such as a person who buys securities issued in violation of Section 5 of the Securities Act – can rescind the sale and recover his or her purchase price (plus interest, less any amount received on the securities). If the investor no longer owns the securities, he or she can recover damages equal to the difference between the purchase and the sale price of the securities (again plus interest, less any amount received on the securities).

The *Morrison* case discussed above under “Extraterritorial application of Section 10(b) and Rule 10b-5” may prevent a Section 12(a)(2) claim against a non-US issuer in a case brought by non-US plaintiffs who traded on non-US exchanges (an “f-cubed” case).

### Timing of the Investment Decision Under Section 12(a)(2) – Rule 159

Rule 159 provides that, for purposes of determining whether a prospectus or oral statement included a material misstatement or omission at the time of the contract of sale under Section 12(a)(2), “any information conveyed to the purchaser only after such time of sale” will not be taken into account.

The key implication of Rule 159 is that Section 12(a)(2) liability is determined by reference to the total package of information conveyed to the purchaser at or before the time of sale. Accordingly, a preliminary prospectus, an FWP, or an oral communication at a road show may give rise to liability under Section 12(a)(2) (in suits by private plaintiffs), even if later corrected or supplemented in a final prospectus that is filed or delivered after pricing.

## Liability Considerations in Connection With Pending M&A Transactions

Merger negotiations or major corporate acquisitions can pose particularly difficult disclosure questions. A foreign private issuer that is holding merger negotiations need not disclose the existence of those negotiations, absent some other duty to disclose, or may respond to press inquiries by stating “no comment.” Once an issuer’s duty to disclose is triggered, however, it must disclose information about pending merger and acquisition transactions that are material and probable. Materiality is judged on the basic materiality standard under the US federal securities laws – that is, whether a reasonable investor would consider disclosure about the transaction important in deciding whether or not to purchase or sell a security. There is no bright-line test for when a transaction becomes probable. This may occur prior to the date a definitive agreement is signed and, therefore, prior to the date on which the parties would otherwise be prepared to announce the transaction.<sup>54</sup>

There is also an interaction between materiality and probability, so that high probability can compensate for a lower level of significance and vice versa.<sup>55</sup> The US Supreme Court has explained that “materiality ‘will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.’”<sup>56</sup> In short, the more substantial an acquisition or disposal is likely to be, the less probable it needs to be before it becomes material and must be disclosed.<sup>57</sup>

## Controlling Person Liability

Liability under the US federal securities laws potentially extends beyond issuers, underwriters, and other direct participants in securities offerings to the persons who control those participants. In particular, Section 15 of the Securities Act and Section 20 of the Exchange Act provide that controlling persons may be jointly and severally liable with the persons they control. As a result, an issuer’s significant shareholders, its board of directors (or similar governing body), and members of its management may be liable along with the issuer for violations of Section 11, Section 12, or Rule 10b-5.

The term “control” generally means the possession, directly or indirectly, 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.<sup>58</sup> This is not a bright-line test, and instead depends on the facts and circumstances of any particular case. A defendant generally will be found to have controlled an issuer if he or she actually participated in (that is, exercised control over) the operations of the issuer and possessed the power to control the specific transaction or activity from which the issuer’s primary liability derives.<sup>59</sup> Some courts have held that the defendant must be a “culpable participant” in the issuer’s wrongful conduct in order to trigger liability.<sup>60</sup>

The controlling person has a defense to liability under Section 15 if he or she “had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist,” and a defense under Section 20 if he or she “acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.” This analysis is obviously quite fact specific,<sup>61</sup> and may depend on such factors as whether the defendant is an inside or outside director.

The *Morrison* case discussed above under “Extraterritorial application of Section 10(b) and Rule 10b-5” may prevent Section 15 and Section 20 claims against controlling persons of a non-US issuer in a case brought by non-US plaintiffs who traded on non-US exchanges (an “f-cubed” case).

## PRACTICE POINT

Potential controlling persons, such as controlling shareholders and members of an issuer's board of directors, should familiarize themselves generally with the disclosure used in connection with an offering, and should pay particular attention to any high-level statements about an issuer's strategy, business, or financial performance. They should also review carefully any statements about themselves (for example, disclosure about a controlling shareholder).

## PSLRA Safe Harbor<sup>62</sup>

The Private Securities Litigation Reform Act of 1995 (PSLRA) provides a safe harbor for SEC reporting issuers, including SEC reporting foreign private issuers, for certain types of written or oral forward-looking statements,<sup>63</sup> including:<sup>64</sup>

- projections of revenues, income, losses, earnings, and other financial items;
- statements of the plans and objectives of management for future operations; and
- statements of future economic performance.

The PSLRA does not, however, protect forward-looking statements made in connection with initial public offerings or tender offers, or those statements that are included in financial statements prepared in accordance with GAAP.<sup>65</sup>

In order to take advantage of the PSLRA safe harbor, among other things, the forward-looking statement must be identified as such, and must be accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.<sup>66</sup> As a practical matter, issuers try to bring themselves within the safe harbor with respect to written forward-looking statements by inserting cautionary language noting that the relevant document contains forward-looking statements and by keeping current, in a widely available public document such as a periodic SEC filing, the key market variables and risk factors affecting the issuer's business. (This is the reason many earnings announcements and other press releases routinely include long disclaimers.) As for forward-looking oral statements, a spokesperson will often make a formal statement to the following (rather stilted) effect:

"The statements I am about to make include statements about our plans and future prospects for the company and our industry that are forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. Our actual performance may differ materially from performance suggested by those statements. I encourage you to review the 'Cautionary Statement' section of [our annual report on Form 20-F] filed with the SEC for additional information concerning factors that could cause those differences."

We suggest that this statement be made at the beginning of each conference call with investors or analysts. Some issuers have the statement made by the moderator of the call, rather than by an officer.

## Enforcement

### Background

The SEC prosecutes civil violations of the US federal securities laws.<sup>67</sup> It has wide-ranging powers to investigate any conduct that could constitute a violation of those laws.<sup>68</sup> SEC investigations are conducted by the Division of Enforcement, which reports to the five members appointed by the President of the United States who constitute the Commission itself. If, after investigating, the Division

of Enforcement believes it has found a violation, it typically recommends to the Commission that enforcement action be taken. The Commission then decides by majority vote whether to take action or not and what action to take. Charges may be brought administratively within the SEC or in a US federal district court. In either venue, the preponderance-of-the-evidence standard of proof applies, meaning that the finder of fact needs only to find that it is more likely than not that the Division of Enforcement has proved the elements of the offense. The proof need not be "clear and convincing" or "beyond a reasonable doubt" (the latter being the standard of proof in criminal cases).<sup>69</sup> An adverse decision in an SEC administrative or civil trial can be appealed to a US federal appellate court, and some appeals are eventually heard by the US Supreme Court.

While the SEC has civil enforcement authority only, Section 24 of the Securities Act and Section 32(a) of the Exchange Act make it a federal crime for any person to willfully violate any provision of those acts or a rule promulgated under the acts. "Willfully" is not defined uniformly by all US federal courts, but in most courts it means that the defendant knew his conduct was wrongful, but did not necessarily know it was unlawful (whereas in the SEC civil context "willfully" simply means that the actor was conscious of taking the action and not sleepwalking or the like). Consequently, the SEC works closely with criminal law enforcement agencies throughout the US to develop and bring criminal cases when the misconduct warrants more severe action and can be proved beyond a reasonable doubt.

Criminal penalties under the federal securities laws can be severe. Under Securities Act Section 24, conviction for each violation can result in a fine of up to \$10,000 and/or imprisonment for up to five years. Under Exchange Act Section 32, for individuals, conviction can result in a fine of up to \$5 million and/or imprisonment for up to 20 years, per violation; however, no one can be imprisoned for violating an Exchange Act rule or regulation if he or she proves that he or she had no knowledge of the rule or regulation. Fines against entities can reach \$25 million per violation.

### **Enforcement Against Foreign Private Issuers and Non-US Nationals**

The SEC actively enforces the US federal securities laws against foreign private issuers and non-US nationals, subject to the extraterritorial reach issues discussed above with respect to the *Morrison* case and Section 929P(b) of the Dodd-Frank Act. In addition, the Commission and the SEC Staff will often defer to some degree to foreign regulators and prosecutors when the other nation has a more substantial interest in the matter.

The SEC's ability to take enforcement action against foreign private issuers and non-US nationals is also limited by its ability to obtain evidence from outside the United States. The SEC is a signatory to the Multilateral Memorandum of Understanding (MMOU) of the International Organization of Securities Commissions (IOSCO), which is the first global multilateral information-sharing arrangement among securities regulators. As of November 2015, 109 securities and derivatives regulators had become signatories to the MMOU. Another more formal, negotiated mechanism used to obtain information is a Mutual Legal Assistance Treaty (MLAT) between the US and another country. The SEC must make an MLAT request through the US Department of Justice.<sup>70</sup> In addition, IOSCO is in the process of implementing among its membership an Enhanced Multilateral Memorandum of Understanding (EMMOU) that is intended to foster great cross-border enforcement cooperation and assistance through an expanded enumeration of powers which securities regulators will exercise on behalf of another requesting regulator.

Particular difficulties may arise for foreign private issuers and non-US nationals who have legal obligations in both the US and in their home countries. While every jurisdiction prohibits fraud, there is no universally accepted definition of fraud, and thus activities that comply with local laws may violate the US federal securities laws under certain circumstances. For example, in *E.On AG*,<sup>71</sup> the SEC brought and settled an enforcement action against a German company whose shares were listed on the NYSE. The SEC charged that the company had denied falsely that it was involved in merger negotiations and that the denials (issued in both English and German) violated Rule 10b-5. While acknowledging that disclosure practices regarding the existence of negotiations may differ in other jurisdictions, the SEC nevertheless asserted that it would not apply a different standard to foreign private issuers for commenting on pending merger negotiations than to domestic US issuers.<sup>72</sup>

## ENDNOTES

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- 1 Securities Act Section 2(a)(3).
- 2 David M Brodsky & Daniel J Kramer, *Federal Securities Litigation*, 4-16 to 4-17 (1st ed. 1997) [*Federal Securities Litigation*].
- 3 *Id.* at 4-2 to 4-3.
- 4 *Id.* at 5-20 (citing *Pinter v. Dahl*, 486 US 622, 641-54 (1988)).
- 5 Federal Securities Litigation at 6-4.
- 6 *Id.* at 6-4 to 6-5.
- 7 See, e.g., *Stansky v. Cummins Engine Co., Inc.*, 51 F.3d 1329 (7th Cir. 1995) (distinguishing duty to correct from duty to update).
- 8 See, e.g., *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997).
- 9 See *TSC Indus., Inc. v. Northway, Inc.*, 426 US 438, 449 (1976); see also Securities Act Rule 405 (“material” information is “matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered”). TSC involved the interpretation of Section 14(a) of the Exchange Act and Rule 14a-9. The Supreme Court has, however, explicitly extended TSC’s definition of materiality to Rule 10b-5, *Basic, Inc. v. Levinson*, 485 US 224, 231-32 (1988), and the lower US federal courts have generally used the TSC standard in all contexts involving the antifraud provisions of the US federal securities laws. See Louis Loss & Joel Seligman, *Securities Regulation*, 2074-75 (3rd ed. 1992) [*Loss & Seligman*].
- 10 *TSC Indus., Inc.*, 426 US at 449.
- 11 *Id.* at 450.
- 12 SAB 103, Topic 1.M.1 (SAB 103 recodifies Staff Accounting Bulletin 99).
- 13 *Final Rule: Selective Disclosure and Insider Trading*, Release No. 33-7881, text at n.47 (August 15, 2000) [*Regulation FD Release*].
- 14 In the case of an omission, a plaintiff must show that there was a duty to disclose the material facts; merely being in possession of material nonpublic information does not, of itself, create a duty to disclose. *Federal Securities Litigation* at 6-4.
- 15 *Ernst & Ernst v. Hochfelder*, 425 US 185, 193 (1976).
- 16 *Federal Securities Litigation* at 6-13 to 6-14.
- 17 Cf., e.g., *SEC v. Zandford*, 535 U.S. 813, 822 (2002).
- 18 *Blue Chip Stamps v. Manor Drug Stores*, 421 US 723, 754-55 (1975).
- 19 *Loss & Seligman* at 3679 n.553.
- 20 See *id.* at 3688 (explaining that “[t]he Rule may be violated by feeding misinformation into the marketplace, or even withholding information too long,” regardless of whether the defendants themselves bought or sold securities) (citation omitted).
- 21 *Federal Securities Litigation* at 6-30 to 6-31. The SEC has stated that an issuer may be “fully liable” if it disseminates and adopts false third-party reports “even if it had no role whatsoever in the preparation of the report.” *Use of Electronic Media Release*, n.54 (citing *In the Matter of Presstek, Inc.*, Release 34-39472 (December 22, 1997)).
- 22 *Federal Securities Litigation* at 6-32; see also *Regulation FD Release*, text at footnote 28 (referring to a temporary insider as “a person who owes a duty of trust or confidence to the issuer,” such as an attorney, investment banker, or accountant).
- 23 *Federal Securities Litigation* at 6-32 to 6-33.
- 24 *Id.* at 6-34; see also *Regulation FD Release*, n.28 (referring to a temporary insider as “a person who owes a duty of trust or confidence to the issuer,” such as an attorney, investment banker, or accountant).
- 25 *Id.* at 6-34 to 6-35 (citing *United States v. O’Hagan*, 521 US 642 (1997)). The SEC has added two rules to clarify issues that have arisen in insider trading cases. First, Rule 10b5-1 provides that trading “on the basis of” material nonpublic information includes all trading while in possession of that information, except certain trades previously contracted for in good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b5-1. Second, Rule 10b5-2 fleshes out the meaning of a “duty of trust or confidence” for purposes of the misappropriation theory.
- 26 *SEC v. Dirks*, 463 U.S. 646 (1983).
- 27 *Id.*; see also *SEC v. Yun*, 327 F.3d 1263 (11th Cir. 2003) (applying the *Dirks* personal benefit rule to misappropriation case).
- 28 *Federal Securities Litigation*, at 6-34.
- 29 *Id.* at 6-42.



30 Exchange Act Section 21D(e)(1); *see also* Exchange Act Sections 21(d)(3) (providing for money penalties in SEC civil actions) and 32(a) (providing for criminal penalties for willful violations of the Exchange Act); *Federal Securities Litigation* at 6-43 to 6-45 (discussing damages under Exchange Act Section 10(b)).

31 *Federal Securities Litigation* at 6-42; *see also* Exchange Act Section 28(a) (limiting recovery for damages in actions under the Exchange Act to *actual damages*).

32 130 S.Ct 2869, 2884 (2010).

33 *See id.* at 2286.

34 *Id.* at 2885.

35 *See, e.g., In re Satyam Computer Services Ltd. Securities Litigation*, 2013 WL 28053, at n.14 and \*15-17 (S.D.N.Y. Jan. 2, 2013) (Sections 11, 12(a)(2), and 15); *In re Vivendi Universal, S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 529 (S.D.N.Y. 2012) (Sections 11 and 12(a)(2)); *In re Royal Bank of Scot. Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327, 338 & n.11 (S.D.N.Y. 2011) (Sections 11 and 12(a)(2)).

36 There are three types of sponsored ADRs. Level I sponsored ADRs represent securities of a foreign issuer that is exempted from registration under the Exchange Act, and are only traded in the US OTC market. Level II and III sponsored ADRs are listed on the US stock exchange, and therefore are subject to the SEC's disclosure and other requirements applicable to foreign registrants. Paul Dudek, *Securities Litigation: Applying Morrison to American Depositary Receipts*, at 11 (February 2017), *available at* <https://www.lw.com/thoughtLeadership/applying-morrison-to-american-depository-receipts>.

37 *Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080, 1091-95 (C.D. Cal. 2016), *rev'd*, 896 F.3d 933 (9th Cir. 2018)

38 *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 952 (9th Cir. 2018) (finding that the complaint failed to "sufficiently allege a domestic violation of the Exchange Act, but that allowing leave to amend would not be futile").

39 *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486.

40 Section 929P(b) of the Dodd-Frank Act.

41 *SEC v. Scoville*, 913 F.3d 1204, 1218 (10th Cir. 2019).

42 *Id.* at 1215-18.

43 *Id.* at 1224.

44 *Federal Securities Litigation* at 3-1.

45 *See Loss & Seligman* at 4217-18.

46 *Federal Securities Litigation* at 3-11 (citing Securities Act Section 6(a)).

47 *Id.* at 3-12.

48 *Id.* at 3-14.

49 Securities Act Sections 11(b)(3)(A) and (B).

50 Securities Act Section 11(b)(3)(C).

51 Securities Act Section 11(e). Note that, under Section 11(e), an underwriter is not liable for Section 11 damages "in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public" unless that underwriter "shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting."

52 *Federal Securities Litigation* at 3-19 to 3-20.

53 *Gustafson v. Alloyd Co.*, 513 US 561, 564, 584 (1995). There is some question whether Section 12(a)(2) liability extends to offshore public offerings under Regulation S. One lower US federal court has held that, despite *Gustafson*, "an offering issued pursuant to Regulation S is subject to" Section 12(a)(2) liability "if it is a public offering." *Sloane Overseas Fund Ltd. v. Sapiens Int'l Corp.*, 941 F. Supp. 1369, 1376 (S.D.N.Y. 1996).

54 *Basic*, 485 US at 236 (quoting *TSC Indus., Inc.*, 426 US at 450).

55 *Id.* at 238-41.

56 *Id.* at 238 (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)).

57 *See, e.g., SEC v. Geon Industries, Inc.*, 531 F.2d 39, 47-48 (2d Cir. 1976). ("Since a merger in which it is bought out is the most important event that can occur in a small corporation's life, to wit, its death, we think that inside information, as regards a merger of this sort, can become material at an earlier stage than would be the case as regards lesser transactions – and this even though the mortality rate of mergers in such formative stages is doubtless high.")

58 Securities Act Rule 405; *see also* Exchange Act Rule 12b-2.

59 *Federal Securities Litigation* at 11-5.

60 *Id.* at 11-5 to 11-7.

- 61 *See generally id.* at 11-7 to 11-10 (discussing the defense).
- 62 *See generally Federal Securities Litigation* at 2-1 to 2-31 (discussing the PSLRA).
- 63 Securities Act Section 27A(c)(1).
- 64 Securities Act Section 27A(i)(1).
- 65 Securities Act Section 27A(b)(2).
- 66 Securities Act Section 27A(c)(1)(A)(i).
- 67 For a comprehensive discussion of SEC Enforcement practice, *see, e.g., The Securities Enforcement Manual: Tactics and Strategies* (Richard M. Phillips, ed. 1997); William R. McLucas, J. Lynn Taylor & Susan A. Mathews, *A Practitioner's Guide to the SEC's Investigative and Enforcement Process*, 70 Temp. L. Rev. 53 (1997).
- 68 *See SEC v. Murphy*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,688 (C.D. Cal. 1983).
- 69 *Steadman v. SEC*, 450 U.S. 91 (1981).
- 70 For a discussion of MLATs, *See* Symposium, Mann, Mari & Lavdas, *International Agreements and Understandings for the Production of Information and Other Mutual Assistance*, 29 Int'l Law 780, 781 n.248 and accompanying text (1995).
- 71 *In the Matter of E.On AG*, Release No. 34-43372 (September 28, 2000).
- 72 *Id.*

# CHAPTER 15

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## Activities of Non-US Broker-Dealers in the United States

### Background

It would seem perfectly logical for a foreign private issuer to engage the services of a broker-dealer in its own jurisdiction to help it structure and effect its securities offerings, including those involving US markets and US investors. However, Section 15(a) of the Exchange Act generally requires the registration with the SEC of any broker-dealer that uses US jurisdictional means to effect transactions in, or to induce, or attempt to induce the purchase or sale of, any security.<sup>1</sup> Accordingly, a broker-dealer operating outside the United States that, for example, telephones or sends documents into the United States to contact US persons with respect to securities transactions (whether in the primary or secondary markets or in connection with an M&A transaction), must register with the SEC unless an applicable exemption from registration is available.<sup>2</sup> An issuer that uses an entity that is not appropriately registered (or exempt from registration) to help it sell its securities in the United States or to US persons, or to effect a tender offer or other transaction involving the sale of securities in the United States, may itself be subject to liability (including possible rescission by investors) and, if engaged in a public offering, may be required to disclose possible rescission risk relating to prior securities activities by unregistered persons in its prospectus for the current offering.

It is also important to bear in mind that, although Exchange Act Rule 3a4-1 provides an exemption for certain employees of an issuer that wishes to sell its own securities through such employees, the exemption is very limited. For example, such persons may not be paid transaction-based compensation (such as a bonus based on the success of the transaction), and they generally must have substantial duties other than marketing the securities. Accordingly, securities offerings in the United States by both US and non-US issuers are generally conducted through SEC-registered broker-dealers. When such broker-dealers are acting in a “principal” capacity with respect to the offering, they are generally termed underwriters;<sup>3</sup> when they act in a purely “agency” capacity, they are generally termed “placement agents.”

### What Is a “Broker-Dealer”?

The term “broker-dealer” is not itself defined in the Exchange Act, but is commonly used to refer to entities that act as either or both a “broker” and/or a “dealer.”

Section 3(a)(4) of the Exchange Act defines a “broker,” in general, as “any person engaged in the business of effecting transactions in securities for the account of others.” Based on no-action guidance from the SEC Staff, activities that may be deemed (alone or in combination) to confer “broker” status include:

- soliciting clients to enter into securities transactions;
- assisting issuers in structuring prospective securities transactions or helping issuers to identify potential purchasers of securities;
- participating in the order-taking or order-routing process or otherwise bringing buyers and sellers of securities together; and
- receipt of compensation that is contingent on the success of a securities transaction or that is based on the amount or value of a securities transaction.<sup>4</sup>

Section 3(a)(5) of the Exchange Act defines a “dealer,” in general, as “any person engaged in the business of buying and selling securities for such person’s own account through a broker or otherwise.” Activities that have been identified (alone or in combination) by the SEC Staff as indicators of “dealer” (rather than “investor” or “trader” status) include:

- participating in a selling group, underwriting securities, or purchasing or selling securities as principal from or to customers rather than from or to only brokers or dealers;
- carrying a dealer inventory or holding oneself out as a dealer or market-maker or as otherwise willing to buy or sell particular securities on a continuous basis;
- quoting a market in securities or publishing any quotations on or through any quotation system used by dealers, brokers, or institutional investors or otherwise quoting prices, other than on a limited basis through a retail screen broker;
- handling money or securities, or executing or clearing securities transactions, for third parties;
- issuing or originating securities;
- extending or arranging for the extension of credit to others in connection with securities; and
- engaging in trading transactions for the benefit of others, rather than consistently with one’s own judgment and investment and liquidity objectives.<sup>5</sup>

## The Rule 15a-6 Safe Harbor

Exchange Act Rule 15a-6 (Rule 15a-6) is a “safe harbor” that permits non-US broker-dealers (Non-US BDs) to conduct certain activities in the United States and with US persons without SEC registration or affiliation with an SEC-registered broker-dealer.<sup>6</sup> Pursuant to Rule 15a-6, Non-US BDs may:

- effect “unsolicited” securities transactions with US persons;
- solicit and effect securities transactions for certain types of counterparties; and
- subject to certain conditions, provide research to certain large institutional investors.

In addition, pursuant to a no-action letter issued by the SEC Staff in January 1996 (the 1996 Staff Letter), Non-US BDs may, subject to the conditions detailed in the 1996 Staff Letter, effect certain transactions in non-US securities with US fiduciaries acting for the account of offshore clients.

Although Non-US BDs are permitted to make certain US contacts under Rule 15a-6 without the assistance or intermediation of an SEC-registered broker-dealer, the range of activities in which Non-US BDs are permitted to engage under the Rule is broader for those Non-US BDs that have established an arrangement with an SEC-registered broker-dealer in accordance with paragraph (a)(3) of Rule 15a-6 (such arrangement, a Chaperoning Arrangement; the SEC-registered broker-dealer involved in such arrangement is the Chaperoning Broker-Dealer). The requirements for establishing a Chaperoning Arrangement are summarized below.

On March 21, 2013, the Staff of the SEC’s Division of Trading and Markets published guidance in the form of Frequently Asked Questions on Rule 15a-6 (the Rule 15a-6 FAQs).<sup>7</sup> The Rule 15a-6 FAQs resulted from the efforts of a Task Force assembled by the Trading and Markets Subcommittee of the American Bar Association to discuss and seek clarification from the Staff with respect to certain recurring issues regarding Rule 15a-6.<sup>8</sup> In the Rule 15a-6 FAQs, the Staff affirmed the general applicability of certain previously issued interpretive guidance and addressed certain aspects of the operation of Rule 15a-6, primarily with respect to issues concerning solicitation, the dissemination of research reports, recordkeeping requirements, and chaperoning arrangements between foreign broker-dealers and SEC-registered broker-dealers.

While this additional Staff guidance is helpful, it is important to note that the SEC has also increased its enforcement efforts in this area in recent years.<sup>9</sup> Further, the SEC continues to caution the industry that broker-dealer registration violations are serious and will be pursued, even where there has been no allegation of fraud or willful misconduct.<sup>10</sup>

## Permitted Activities Under Rule 15a-6 – Without a Chaperoning Arrangement

In accordance with Rule 15a-6 and applicable SEC Staff interpretive guidance, a Non-US BD may engage in the following activities without registration as a broker-dealer with the SEC and without entering into a Chaperoning Arrangement:

### Unsolicited Transactions<sup>11</sup>

A Non-US BD may effect an “unsolicited” transaction with any US person. Solicitation, however, has traditionally been viewed quite broadly by the SEC and would generally include any action intended to induce securities transactions, develop goodwill, or make the Non-US BD known in the United States.<sup>12</sup> For example, “solicitation” would include, among other things, the following activities:

- telephone calls to US investors encouraging the use of the Non-US BD to effect securities transactions;
- provision of research by the Non-US BD to US investors; and
- attempts by the Non-US BD to make its business known in the United States, including, for example, through (a) seminars or conferences held in the United States or targeted to US investors, (b) individual introductory meetings with US investors, or (c) advertisement of its services, or interviews with senior management regarding particular securities or markets, on a television or radio broadcast into the United States or in a publication of general circulation in the United States.

However, the Staff clarified in the Rule 15a-6 FAQs that, absent any other indicia of solicitation, a Non-US BD may rely on Rule 15a-6(a)(1) to effect more than one unsolicited securities transaction on behalf of a single US investor. The Staff emphasized in this regard that the inquiry is to the nature of the activities of the broker-dealer, as opposed to the number of transactions effected. Nonetheless, the Staff cautioned that a “series of frequent transactions or a significant number of transactions between a Non-US BD and a US investor [may be] indicative of solicitation through the establishment of an ‘ongoing securities business relationship.’”<sup>13</sup>

### Activities With Certain Specified Counterparties<sup>14</sup>

A Non-US BD may solicit and engage in securities transactions with the categories of persons listed below (Permissible Direct Counterparties):

- *Broker-Dealers and Banks.* An SEC-registered broker-dealer, whether acting as principal for its own account or as agent for others, or a US bank acting in accordance with certain exceptions or exemptions from the definition of “broker” or “dealer” under the Exchange Act.
- *Supranational Organizations.* The African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the International Bank for Reconstruction and Development, the International Monetary Fund, and the United Nations (as well as their agencies, affiliates, and pension funds).
- *Non-US Persons Temporarily Present in the United States.* A non-US person temporarily present in the United States with whom the Non-US BD had a *bona fide* pre-existing relationship before the non-US person entered the United States.<sup>15</sup>

- *Non-US Branches of US Companies.* An agency or branch of a US-organized entity permanently located outside the United States, provided that any resulting securities transactions occur outside the United States.
- *Non-Resident US Citizens.* A US citizen resident outside the United States, provided that the resulting securities transactions occur outside the United States and the Non-US BD does not direct its selling efforts to “identifiable groups” of US citizens residing outside the United States (such as military or embassy personnel).
- *US Fiduciaries Acting for Offshore Clients.* A US resident fiduciary acting for an “offshore client,”<sup>16</sup> provided that the transactions involve only “foreign securities,”<sup>17</sup> written assurances are obtained from the fiduciary and certain other requirements as set forth in the 1996 Staff Letter are met.<sup>18</sup>

### **Provision of Research Reports to Major US Institutional Investors<sup>19</sup>**

A Non-US BD may provide research reports to “major US institutional investors,” and effect securities transactions resulting from doing so,<sup>20</sup> provided that (except in the case of research reports sent to Permissible Direct Counterparties) the Non-US BD does *not*:

- recommend that the Non-US BD be used to effect transactions in any security;
- initiate any contact with the recipients to follow up on the research or otherwise attempt to induce securities transactions by such recipients; or
- provide such research pursuant to any express or implied understanding that the recipients will direct commission income (or soft dollars) to the Non-US BD.<sup>21</sup>

Rule 15a-6 defines the term “major US institutional investor” as an entity (i) that either is a “US institutional investor” or an SEC-registered investment adviser, and (ii) that owns or has under management at least \$100 million. The term US institutional investor (as defined in Rule 15a-6) includes US-registered investment companies, banks, savings and loan associations, insurance companies, and certain employee benefit plans, charitable organizations, and trusts.

In April 1997, however, the SEC Staff issued a Rule 15a-6 related no-action letter (the 1997 Staff Letter) that, among other things, significantly expanded the definition of major US institutional investor. Pursuant to the 1997 Staff Letter, the term “major US institutional investor” is now deemed to include, in addition to the above categories, any entity (including a corporation, partnership, unregistered investment adviser, or hedge fund) that owns or has under management at least \$100 million in aggregate financial assets.<sup>22</sup>

### **Permitted Activities Under Rule 15a-6 – With a Chaperoning Arrangement<sup>23</sup>**

If a Non-US BD enters into a Chaperoning Arrangement with an SEC-registered broker-dealer, the Non-US BD would, pursuant to Rule 15a-6(a)(3) applicable SEC Staff interpretive guidance issued in connection therewith, be permitted to engage in the following activities (in addition to the activities discussed above):

#### **Contacts With Major US Institutional Investors From Outside the United States**

Qualified employees of the Non-US BD may contact from outside the United States (*e.g.*, by telephone) major US institutional investors *at any time* without an appropriately licensed representative of the Chaperoning Broker-Dealer being present.

## Contacts With US Institutional Investors (Non-Majors) From Outside the United States

Qualified employees of the Non-US BD may contact from outside the United States (e.g., by telephone) US institutional investors that are not major US institutional investors:

- *at any time*, if an appropriately licensed representative of the Chaperoning Broker-Dealer participates in such contact, or
- without the participation of a representative of the Chaperoning Broker-Dealer, if such contact takes place outside of the trading hours of the NYSE (currently, 9:30 a.m. to 4:00 p.m. New York time) and no orders to effect transactions *other than those involving foreign securities* are accepted by the Non-US BD employees during such contact.<sup>24</sup>

### In-Person US visits

Qualified employees of the Non-US BD may:

- *at any time*, visit major US institutional investors and US institutional investors in the United States if the qualified employee is accompanied on such visits by an appropriately licensed representative of the Chaperoning Broker-Dealer.
- without being accompanied by a representative of the Chaperoning Broker-Dealer, visit major US institutional investors if the number of days on which such unchaperoned visits occur does not exceed 30 per year and the qualified Non-US BD employee does not accept orders to effect any securities transactions (whether involving US securities or non-US securities) while in the United States.<sup>25</sup>

### Access to Screen-Based Quotations

Non-US BDs may provide US investors with access to screen-based quotation systems that supply quotations, prices, and other trade reporting information input directly by the Non-US BD, so long as any resulting transactions are effected in accordance with the requirements of Rule 15a-6.<sup>26</sup>

## Key Requirements With Respect to the Establishment of a Chaperoning Arrangement

### Certain Requirements Applicable to the Non-US BD and Its Personnel

- *Consents to service of process.* A consent to service of process for any civil action brought by, or proceeding before, the SEC or any US self-regulatory organization must be executed by the Non-US BD and each of its personnel engaged in the solicitation of US investors, and such consents must be submitted to and maintained by the Chaperoning Broker-Dealer.
- *Provision of background information to chaperoning broker-dealer.* Each employee of the Non-US BD who engages or proposes to engage in contacts with major US institutional investors and US institutional investors must provide to the Chaperoning Broker-Dealer certain employment and other background information.
- *Provision of information to the SEC.* The Non-US BD must provide to the SEC upon request any information or documents within its possession or control relating to transactions effected by the Chaperoning Broker-Dealer pursuant to the Chaperoning Arrangement and assist the SEC in obtaining testimony of its employees and other persons with respect to such transactions (unless it is prohibited from doing so pursuant to applicable law).

## Certain Responsibilities of the Chaperoning Broker-Dealer under the Chaperoning Arrangement

- *Effecting transactions.* The Chaperoning Broker-Dealer must “effect” all securities transactions entered into between the Non-US BD and US investors under the Chaperoning Arrangement.<sup>27</sup> In addition, the Chaperoning Broker-Dealer must take responsibility for, among other things, issuing confirmation statements to the US investor, complying with applicable net capital requirements, and safeguarding, delivering, and receiving funds and securities in connection with such transactions (subject to the ability of the Non-US BD to directly settle certain securities transactions under certain circumstances).<sup>28</sup>
- *Customer relationship.* US investors that are counterparties to transactions entered into with the Non-US BD pursuant to the Chaperoning Arrangement are, for purposes of US regulatory requirements and the Chaperoning Broker-Dealer’s policies and procedures, treated as “customers” of the Chaperoning Broker-Dealer. Accordingly, the Chaperoning Broker-Dealer must, among other things, open accounts for such US investors on its books and comply with any applicable suitability, “know your customer,” best execution, and other requirements with respect to transactions between the Non-US BD and such US investors.
- *Maintaining books and records.* The Chaperoning Broker-Dealer is responsible for the maintenance of appropriate books and records with respect to transactions between the Non-US BD and US investors entered into under the Chaperoning Arrangement. The Chaperoning Broker-Dealer must also maintain as part of its books and records copies of the consents to service of process and informational questions submitted to it by the Non-US BD and its personnel. Such books and records must be kept in an office of the Chaperoning Broker-Dealer located in the United States and be provided to the SEC upon request.



## ENDNOTES

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- <sup>1</sup> Note that this is not limited to capital markets transactions and, for example, could also apply to transactions involving the acquisition or sale of a business if the transaction is effected through the purchase or sale of securities.
- <sup>2</sup> This Chapter addresses only an available exemption from federal broker-dealer registration requirements; it does not address state broker-dealer registration requirements or applicable state law exemptions therefrom. Moreover, it should be noted that compliance with Rule 15a-6 does *not* necessarily mean that a non-US broker-dealer will not be subject to state broker-dealer registration requirements.
- <sup>3</sup> Because the term “underwriter” is typically associated with a public offering, a broker-dealer acting in a similar capacity in connection with a Rule 144A transaction (as described in Chapter 2) is sometimes referred to as an “initial purchaser.”
- <sup>4</sup> See, e.g., *MuniAuction Inc.*, SEC Staff No-Action Letter (Mar. 13, 2000).
- <sup>5</sup> See, e.g., *Continental Grain Company*, SEC Staff No-Action Letter (Nov. 6, 1987); *Fairfield Trading Corp.*, SEC Staff No-Action Letter (Jan 10, 1988).
- <sup>6</sup> To be eligible for the safe harbor provisions of Rule 15a-6, the Non-US BD must meet the definition of “foreign broker or dealer” set forth in the Rule. Among other things, that definition requires that the Non-US BD not be a branch or office of an SEC-registered broker-dealer.
- <sup>7</sup> See Frequently Asked Questions Regarding Rule 15a-6 and Foreign Broker-Dealers, available at <http://www.sec.gov/divisions/marketreg/faq-15a-6-foreign-bd.htm> [Rule 15a-6 FAQs]. The FAQs have been updated since their original issuance to clarify certain issues and add new guidance.
- <sup>8</sup> Latham & Watkins partner Dana Fleischman is the former Chair of the ABA Trading and Markets Subcommittee and, in that capacity, led the Task Force that sought and obtained the FAQs.
- <sup>9</sup> See, e.g., *In the Matter of HSBC Private Bank (Suisse), SA*, SEC Release No. 34-73681 (November 25, 2014); *In the Matter of Credit Suisse Group AG*, SEC Release No. 34-71593 (February 21, 2014); *In the Matter of CentreInvest, Inc. et al.*, SEC Release No. 34-68764 (January 30, 2013); *In the Matter of ABN AMRO Bank, N.V.*, SEC Release No. 33-9437 (July 31, 2013); *In the Matter of Banco Commercial Portugues, S.A.*, SEC Release No. 33-9393 (March 18, 2013); *In the Matter of Motilal Oswal Securities Limited*, SEC Release No. 34-68296 (November 27, 2012); *In the Matter of JM Financial Institutional Securities Private Limited*, SEC Release No. 34-68297 (November 27, 2012); *In the Matter of Edelweiss Financial Services Limited*, SEC Release No. 34-68298 (November 27, 2012); *In the Matter of Ambit Capital Private Limited*, SEC Release No. 34-68295 (November 27, 2012); *In the Matter of Banco Espirito Santo S.A.*, SEC Release No. 34-65608 (October 24, 2011); *Securities and Exchange Commission v. UBS AG, 1:09-CV-00316 (JR) (D.D.C. filed Feb. 18, 2009)*; *In the Matter of CentreInvest, Inc. et al.*, SEC Ad. Proc. 3-13304 (December 8, 2008).
- <sup>10</sup> See David W. Blass, Chief Counsel, SEC Division of Trading and Markets, A Few Observations in the Private Fund Space (April 5, 2013), available at <http://www.sec.gov/news/speech/2013/spch040513dwg.htm>. See also *In the Matter of William M. Stephens*, SEC Release No. 34-69090 (Mar. 8, 2013); *In the Matter of Ranieri Partners LLC and Donald W. Phillips*, SEC Release No. 34-69091 (Mar. 8, 2013) (each of the foregoing, involving violations of broker-dealer registration requirements by US-based persons).
- <sup>11</sup> See Exchange Act Rule 15a-6(a)(1).
- <sup>12</sup> As an indication of how broadly the concept of solicitation is viewed by the SEC, a non-US BD could be deemed to have solicited a US investor who on his own initiative opened an account with the Non-US BD and became a regular customer. See Release No. 34-27017 (July 11, 1989), at n.103 [Rule 15a-6 Adopting Release].
- <sup>13</sup> See Rule 15a-6 FAQs, Response to Question 9. Prior to the issuance of the Rule 15a-6 FAQs, it also was unclear whether a Non-US BD could directly contact US employees in connection with the administration of a foreign issuer’s employee stock option plan (an ESOP), or whether it needed to effect such communications and resulting transactions through an SEC-registered broker-dealer or US bank pursuant to Rule 15a-6(a)(4) or other available exemption (or, alternatively, whether US employees would need to be excluded from participation in the plans). The Staff states in the Rule 15a-6 FAQs that certain limited activities engaged in by a Non-US BD relating to its administration of a foreign issuer’s ESOP or other employee plan would not be viewed as “solicitation” for purposes of its reliance on the Rule 15a-6(a)(1) exemption. The Staff updated the Rule 15a-6 FAQs on March 28, 2013 to clarify that the foregoing position applies equally to situations in which the US plan participants receive, transfer, or hold the foreign issuer’s shares pursuant to a sponsored American Depositary Receipt program. See Rule 15a-6 FAQs, Responses to Questions 2 and 2.1.
- <sup>14</sup> See Rule 15a-6(a)(4).
- <sup>15</sup> The Staff states in the Rule 15a-6 FAQs that the determination of whether a person is temporarily present in the United States is ultimately dependent on the facts and circumstances of each particular situation, but notes that a foreign person should be deemed “temporarily present” in the United States if such person (1) is not a US citizen and (2) is not a lawful permanent resident of the United States (i.e., a “Green Card holder”). See Rule 15a-6 FAQs, Response to Question 1. The Staff has indicated that this FAQ is not meant to preclude other situations in which a non-US person may be shown to be “temporarily present” in the United States for purposes of this exception.

- <sup>16</sup> An “offshore client” is defined in the 1996 Staff Letter as (i) any entity not organized or incorporated under the laws of the United States and not engaged in a trade or business in the United States for US federal income tax purposes, (ii) any natural person who is not a “US resident,” or (iii) any entity not organized or incorporated under the laws of the United States substantially all of the outstanding voting securities of which are beneficially owned by the persons described in (i) and (ii) above. For the purposes of this definition, the term “US resident” includes a US citizen residing outside the United States unless such citizen (x) has \$500,000 or more under management with the relevant US resident fiduciary with whom the Non-US BD transacts business, or (y) has, together with his or her spouse, a net worth in excess of \$1 million.
- <sup>17</sup> “Foreign securities” are defined in the 1996 Staff Letter as (i) a security issued by an issuer not organized or incorporated under the laws of the United States when the transaction in such security is not effected on a US securities exchange or through the Nasdaq system (including a depositary receipt issued by a US bank, but only if it is initially offered and sold outside the United States in accordance with Regulation S), (ii) a debt security (including a convertible debt security) issued by an issuer organized or incorporated in the United States in connection with a distribution conducted outside the United States, and (iii) any over-the-counter derivative instrument on an instrument described in (i) or (ii) above; *provided, however*, that debt securities of an issuer organized or incorporated under the laws of the United States do not constitute “foreign securities” if they are offered and sold as part of a “global offering” involving both a distribution of the securities in the United States under a registration statement filed under the Securities Act and a contemporaneous distribution outside the United States.
- <sup>18</sup> See 1996 Staff Letter. Although the no-action position set forth in the 1996 Staff Letter was technically applicable only to those SEC-registered broker-dealers cited in the Letter and their non-US affiliates, the Rule 15a-6 FAQs make clear that other broker-dealers may also rely on the 1996 Staff Letter, so long as all the substantive requirements of the 1996 Staff Letter are met.
- <sup>19</sup> See Rule 15a-6(a)(2). Note that pursuant to SEC Regulation AC, a Non-US BD that is affiliated with an SEC-registered broker-dealer must comply with the certification requirements of Regulation AC with respect to any research reports sent or otherwise made available to US investors, including those reports sent to major US institutional investors in reliance on Rule 15a-6(a)(2). For further information regarding the requirements applicable to Non-US BDs with respect to SEC Regulation AC, see *Division of Market Regulation: Responses to Frequently Asked Questions Concerning Regulation Analyst Certification* (revised April 26, 2005).
- <sup>20</sup> If, however, a Non-US BD has established a Chaperoning Arrangement with an SEC-registered broker-dealer, any transactions in securities discussed in the reports sent to major US institutional investors *must* be effected by the SEC-registered broker-dealer. On the other hand, with a Chaperoning Arrangement in place, the Non-US BD would be permitted to engage in follow-up contacts with the recipients of the reports to the extent permitted by Rule 15a-6(a)(3).
- <sup>21</sup> In the *Rule 15a-6 Adopting Release*, the SEC noted that Non-US BDs could also continue to rely on a prior no-action position taken by the SEC pursuant to which a Non-US BD could provide research reports to *any* US person, so long as (i) an SEC-registered broker-dealer “accepts responsibility” for the content and US distribution of such research reports and this fact is prominently noted on the reports, (ii) the reports state that transactions in securities are to be effected through the SEC-registered broker-dealer (and not through the Non-US BD), and (iii) all resulting transactions are in fact effected through the SEC-registered broker-dealer. Although, in order for a Non-US BD to rely on this no-action position, an SEC-registered broker-dealer is required to “accept responsibility” for research distributed to US persons, this arrangement is not a true Chaperoning Arrangement of the kind discussed below (e.g., among other things, reliance on this position does not require the execution by the Non-US BD of a consent to service of process in the United States) and, accordingly, the Non-US BD would not be permitted to directly contact any US investor (including a major US institutional investor) in reliance on this type of arrangement. Research reports prepared by a Non-US BD that are distributed by an SEC-registered broker-dealer to clients of the SEC-registered broker-dealer must also comply with certain additional requirements imposed by self-regulatory organizations of which the SEC-registered broker-dealer is a member. See, e.g., FINRA Rules 2210 and 2241. Certain SEC-registered broker-dealers and their affiliates are also subject to further disclosure and other research-related requirements contained in the Global Research Analyst Settlement with the SEC, FINRA, and various other regulators, as discussed in more detail below, in the chapter titled “US Restrictions on Interactions Between Investment Banking Personnel and Research Analysts.”
- <sup>22</sup> See *Rule 15a-6 FAQs*, Response to Question 7 (confirming that the expanded definition of “major US institutional investor” set forth in the 1997 Staff Letter applies to every provision of Rule 15a-6 in which that term is used) and Response to Question 18 (clarifying that the definition of “major US institutional investor” includes any entity, all the equity owners of which are major US institutional investors).
- <sup>23</sup> Although not technically required in order to comply with Rule 15a-6(a)(3), the implementation of a Chaperoning Arrangement is typically documented in the form of a written services agreement between the Non-US BD and the SEC-registered broker-dealer that sets forth the respective roles and responsibilities of, and the limitations on, each of the parties to the arrangement.
- <sup>24</sup> See 1997 Staff Letter.
- <sup>25</sup> See 1997 Staff Letter. See also *Rule 15a-6 FAQs*, Responses to Questions 6, 8, and 8.1.
- <sup>26</sup> See 1997 Staff Letter.

<sup>27</sup> In accordance with the *Rule 15a-6 Adopting Release*, however, the Chaperoning Broker-Dealer may appoint the Non-US BD as its agent in connection with the physical execution of transactions in non-US securities listed on non-US securities exchanges or traded in non-US markets. The Non-US BD may also be appointed to mechanically process records related to the transactions, so long as the Chaperoning Broker-Dealer retains responsibility for, and maintains the originals or copies of, such records, and the records comply with applicable requirements under US law. See *Rule 15a-6 Adopting Release*, text accompanying note 150.

In addition, with respect to the transfer and holding of non-US securities, it should be possible for the Chaperoning Broker-Dealer (assuming that it is subject to the possession and control provisions of Rule 15c3-3 under the Exchange Act and is *not* claiming an exemption therefrom pursuant to paragraph (k)(2) thereunder) to establish an account at the Non-US BD *in the Chaperoning Broker-Dealer's name* for the benefit of the Chaperoning Broker-Dealer's customers, so long as the Chaperoning Broker-Dealer has submitted an application to the SEC (and the SEC has approved such application) for the designation of the account as a "satisfactory control location" in accordance with Rule 15c3-3(c) (a Control Location Application). See SEC Release No. 34-10429 (Oct. 12, 1973) [*Control Location Release*]. Pursuant to the Control Location Release, the Control Location Application will be considered accepted unless rejected by the SEC within 90 days of receipt. The Control Location Release also states that, so long as the criteria for designation as a "satisfactory control location" is met, the requested location will be deemed a "satisfactory control location" during the period that the application is being considered by the SEC.

<sup>28</sup> Notwithstanding the requirement in Rule 15a-6(a)(3) that the Chaperoning Broker-Dealer be responsible for "safeguarding, delivering, and receiving funds and securities," pursuant to the 1997 Staff Letter, there are certain circumstances in which clearance and settlement is permitted to occur through the *direct* transfer of funds and securities between a US institutional or major US institutional investor and the Non-US BD. Specifically, such direct settlement is permitted in transactions that involve "foreign securities" (as such term is defined in the 1996 Staff Letter) or US government securities where (i) the transactions have been intermediated by the Chaperoning Broker-Dealer in accordance with Rule 15a-6(a)(3) and (ii) the Non-US BD is *not* (a) acting as custodian of the funds or securities of the US institutional or major US institutional investor or (b) in default to any counterparty on any material financial market transaction. See 1997 Staff Letter.



# CHAPTER 16

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## US Restrictions on Interactions Between Investment Banking Personnel and Research Analysts

### Background

Following the “technology boom” in the late 1990s, which was sometimes alleged to have been fueled by glowing research reports prepared by analysts who were employed by broker-dealers with an interest in obtaining or retaining investment banking business of the issuers that were the subject of the reports, various regulators (both within and outside the United States) moved to adopt more stringent rules and regulations designed to prevent investment banking personnel and investment banking considerations from influencing such research analysts and the content of their research reports.

In the United States, the two most prominent self-regulatory organizations at the time, the NASD and the member regulation arm of the NYSE (now, FINRA) adopted a series of rules and rule amendments beginning in 2002 that focused on equity research reports and interactions between investment banking personnel and equity research analysts employed by their member firms.<sup>1</sup> In 2003, the SEC adopted Regulation Analyst Certification (or Regulation AC), which addresses debt as well as equity research and requires research analysts, among other things, to certify that the views expressed in their research reports are their own.

Also in 2003, the SEC and various other regulators entered into a settlement (generally referred to as the Global Research Analyst Settlement) with ten of the largest investment banking firms in the world (two additional firms joined the settlement in 2004), which provided for substantial monetary penalties as well as an agreement to put in place significant additional restrictions with respect to interactions between investment banking and equity research personnel. Although the Global Research Analyst Settlement was amended in March 2010, largely to eliminate certain restrictions that are now covered by FINRA rules (and thus applicable to all FINRA-member firms), several significant restrictions remain in force and are applicable only to the settling firms.<sup>2</sup>

In August 2015, FINRA issued two Regulatory Notices announcing the effective dates for new FINRA equity and debt research rules approved by the SEC.<sup>3</sup> FINRA Rule 2241 (the Equity Research Rule) modifies and consolidates legacy NASD Rule 2711 and Incorporated NYSE Rule 472 with respect to equity research activities (the Legacy Equity Research Rules), and FINRA Rule 2242 (the Debt Research Rule) imposes rules applicable to debt research analysts and debt research reports.

Because of these restrictions with respect to investment banking and research interactions, it is important for issuers and other market participants to understand that certain meetings that involve the participation of issuer personnel, investment bankers, and research analysts may not be possible at all, or may only be possible under certain strict conditions. For example, research analysts are not permitted to participate in investor road shows related to an offering and investment banking personnel are not permitted to direct research analysts to engage in marketing or selling efforts related to an offering. There are also limitations regarding joint due diligence activities in connection with an investment banking services transaction. FINRA requires member firms to have written policies and procedures to prohibit the performance of joint due diligence prior to the selection of underwriters for a transaction.<sup>4</sup> Moreover, research analysts (and research reports) must not be used for the purpose of soliciting investment banking business.<sup>5</sup>

Some of the pertinent rules and restrictions relating to research analyst and investment banking interactions are summarized below.

## Regulation AC

Regulation AC (which, as noted above, applies to both equity and debt research) requires that any broker or dealer, or certain persons associated with brokers or dealers, must include in any research reports that they publish or circulate to a US person in the US a “clear and prominent” certification from the research analyst:

- attesting that all of the views expressed in the research report accurately reflect the research analyst’s personal views about the securities or issuers covered in the report; and
- either that no part of the analyst’s compensation is related to specific recommendations expressed in the report, or if it is related, details of the source, amount, and purpose of the compensation and how the compensation could influence the recommendations expressed in the report.

Regulation AC contains an exclusion covering non-US research. In particular, “foreign persons” located outside the US who are not associated with a US registered broker-dealer are exempt from Regulation AC if they:

- prepare a research report concerning a foreign security; and
- provide the research report to a US person in the US in accordance with the exemption under Exchange Act Rule 15a-6(a)(2) for non-US broker-dealers providing research reports to major US institutional investors.

A “foreign person” for these purposes means any non-US person, and a “foreign security” means a security issued by a foreign person for which the US market is not the principal trading market.

## FINRA Research Rules

While there are certain material differences between the Equity Research Rule and the Debt Research Rule (collectively, the Research Conflict Rules), the two rules have similar underlying policy rationales and generally impose similar requirements. The Research Conflict Rules are also largely in line with the Legacy Equity Research Rules, but significantly expand FINRA members’ obligations in certain areas.

### Restrictions on Research Analyst Compensation

Under the Equity Research Rule, a FINRA member must limit the determination of its research department’s budget to senior management not engaged in investment banking services.<sup>6</sup> In addition, as under the Legacy Equity Research Rules, the Equity Research Rule requires that the FINRA member’s policies and procedures prohibit compensation based upon specific contributions to a member’s investment banking activities, and require a committee that reports to the board of directors (or a senior executive officer if the member has no board of directors) to review and approve at least annually the compensation of any research analyst with primary responsibility for the substance of a research report.<sup>7</sup> Such committee is not permitted to include any representative of the firm’s investment banking department.

The Debt Research Rule imposes substantially similar requirements for debt research activities, but extends the prohibition on personnel that may review budget and compensation decisions to persons engaged in principal trading in addition to investment banking, while sales and trading personnel are permitted to provide input into the evaluation of debt research analysts in order to convey customer feedback, subject to certain conditions regarding final compensation decisions.<sup>8</sup>

## Prohibition of *Quid Pro Quo* Research and Participation in Pitch Meetings or Road Shows

The Research Conflict Rules require that FINRA members restrict or limit research analysts from activities that can reasonably be expected to compromise the analysts' objectivity.<sup>9</sup> The Research Conflict Rules include the prohibitions under the Legacy Equity Research Rules on research analysts participating in pitches and other solicitations of investment banking services transactions as well as road shows and other marketing on behalf of issuers related to such transactions. Consistent with prior guidance, however, analysts may continue to listen to or view a live webcast (from a remote location or another room if at the same location) of a transaction-related road show or other widely attended presentation by investment banking to investors or the sales force.

The Research Conflict Rules also codify FINRA's prior interpretation that the solicitation provisions prohibit FINRA members from including in pitch materials any information about a FINRA member's research capacity in a manner that suggests, directly or indirectly, that the FINRA member might provide favorable research coverage.<sup>10</sup> The Research Conflict Rules further clarify that three-way meetings between research analysts and current or prospective customers in the presence of investment banking personnel or company management regarding an investment banking transaction are prohibited.<sup>11</sup>

Finally, FINRA interprets the Research Conflict Rules to require that any research analyst's written or oral communication with a current or prospective customer or internal personnel related to an investment banking services transaction be fair, balanced and not misleading, taking into consideration the overall context in which the communication is made.<sup>12</sup>

## Chaperone Provisions

Under the Equity Research Rule, FINRA members must maintain policies and procedures that prohibit pre-publication review, clearance, or approval of research reports by persons engaged in investment banking services,<sup>13</sup> and must also restrict pre-publication review by non-research personnel, other than legal and compliance employees.<sup>14</sup> Although this provision generally follows the legacy requirements on pre-publication review of research by investment banking personnel, it eliminates the exception under the Legacy Equity Research Rules allowing for pre-publication review of research reports by investment banking personnel to verify factual accuracy. As under the Legacy Equity Research Rules, however, the subject company and non-investment banking personnel may still review sections of a draft research report for factual accuracy provided certain conditions have been met.<sup>15</sup>

The Debt Research Rule imposes substantially similar requirements with respect to debt research activities, but is broader in that it extends the prohibition on pre-publication review to include sales and trading personnel<sup>16</sup> and principal trading personnel<sup>17</sup> in addition to investment banking personnel.<sup>18</sup>

## Restrictions on Publishing Research Reports and Making Public Appearances Following Certain Offerings

Under the Equity Research Rule, a FINRA member's policies and procedures must define research "quiet periods" of at least 10 days after an IPO in which the member has acted as an underwriter or dealer, and three days after a secondary offering in which the member has acted as a manager or co-manager. In the Equity Research Notice, FINRA clarified that, as provided in the Legacy Equity Research Rules, the "date of the offering" is interpreted to refer to the later of the effective date of the registration statement or the first date on which the securities were bona fide offered to the public.<sup>19</sup>

The Equity Research Rule maintains exceptions to these quiet periods for research reports concerning the effects of significant news or a significant event on the subject company and, for secondary

offerings, research reports issued in compliance with Rule 139 regarding a subject company with “actively-traded securities” (as such term is defined in SEC Regulation M).<sup>20</sup> In addition, FINRA reaffirmed that such quiet periods do not apply following the IPO or secondary offering of an EGC.<sup>21</sup>

Notably, the quiet periods under the Equity Research Rule represent a significant departure from the Legacy Equity Research Rules, which imposed a 40-day quiet period on a member acting as manager or co-manager of an IPO, a 25-day quiet period on a member participating as an underwriter or dealer (other than manager or co-manager) in an IPO, and a 10-day quiet period on a member acting as manager or co-manager of a secondary offering.<sup>22</sup> The Equity Research Rule also eliminates the requirement under the Legacy Equity Research Rules for a 15-day quiet period before and after expiration, waiver, or termination of a lock-up agreement entered into in connection with a public offering.<sup>23</sup>

The Debt Research Rule does not mandate offering-related quiet periods.

## Disclosure Requirements

The Research Conflict Rules impose several disclosure requirements on research reports and public appearances by research analysts. In research reports, FINRA members must disclose at the time of publication or distribution of the report:

- if the research analyst or a member of the research analyst's household has a financial interest in the debt or equity securities of the subject company (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), and the nature of such interest;
- if the research analyst has received compensation based upon (among other factors) the member's investment banking revenues; and
- any other material conflict of interest of the research analyst or member that the research analyst or an associated person of the member with the ability to influence the content of a research report knows or has reason to know at the time of the publication or distribution of a research report.<sup>24</sup>

With respect to public appearances, a research analyst must disclose:

- if the research analyst or a member of the research analyst's household has a financial interest in the debt or equity securities of the subject company (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), and the nature of such interest;
- if the member or its affiliates beneficially own one percent or more of any class of common equity securities of the subject company;
- if, to the extent the research analyst knows or has reason to know, the member or any affiliate received any compensation from the subject company in the previous 12 months;
- if the research analyst received any compensation from the subject company in the previous 12 months;
- if, to the extent the research analyst knows or has reason to know, the subject company currently is, or during the preceding 12-month period was, a client of the member. In such cases, the research analyst also must disclose the types of services provided to the subject company, if known by the research analyst; or
- any other material conflict of interest of the research analyst or member that the research analyst knows or has reason to know at the time of the public appearance.<sup>25</sup>



## Global Research Analyst Settlement

Pursuant to the Global Research Analyst Settlement (or Settlement), the settling firms agreed to make a number of structural reforms intended to insulate research personnel from improper investment banking influence.<sup>26</sup> (For purposes of the Settlement, the term “research” refers solely to equity research.) In addition, although not technically “parties” to the Settlement, affiliates of the settling firms (including non-US affiliates, but not including certain investment adviser affiliates) are also subject to the structural reform requirements of the Settlement to the extent their activities relate to research with respect to US issuers or non-US issuers with a US principal trading market if such research is distributed to US investors. As noted above, the original terms of the Settlement were substantially modified in March 2010 by court order. As so modified, the principal structural reforms required by the Settlement are summarized below.<sup>27</sup>

- The research and investment banking functions within the firm must be physically separated.
- Research budget and allocation of research expenses must be determined by the firm’s senior management without input from investment banking personnel and without regard to specific revenues or results derived from investment banking.
- Investment banking personnel may not have any input into company-specific research coverage decisions and investment banking revenues or potential revenues may not be taken into account in making company-specific coverage decisions.
- The firm must have an oversight committee comprised of research management and, if desired, others (but not investment banking personnel) to review changes in ratings and material changes in price targets, and to monitor the overall quality and accuracy of the firm’s research reports.
- After the firm receives an investment banking mandate relating to a public offering of securities, research personnel may communicate with investors orally regarding such offering, provided that such research personnel do not appear jointly with company management or investment banking personnel in those communications and certain other requirements are met.
- Firewalls must be put in place that are reasonably designed to prevent all communication between investment banking and research personnel other than those expressly permitted by the Settlement (including requirements that certain communications be chaperoned by legal or compliance personnel).

In addition to the disclosures required under applicable law (including pursuant to the FINRA requirements summarized above), each of the settling firms also agreed to include disclosures in its research reports designed to put recipients on notice of the potential conflicts of interest arising from the firm’s investment banking activities and cautioning such recipients that the report should be considered as only a single factor in making an investment decision.

### PRACTICE POINT

Although the JOBS Act prohibits the SEC and FINRA from adopting or maintaining certain restrictions on interactions between research analysts and investment banking personnel, the JOBS Act does not change any of the restrictions applicable to firms that are party to the Global Research Analyst Settlement.<sup>28</sup> Similarly, the Research Conflict Rules do not have any impact on the restrictions applicable under the Global Research Analyst Settlement.

## ENDNOTES

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- <sup>1</sup> See, e.g., former NASD Rule 2711 and NYSE Rule 472.
- <sup>2</sup> A number of states (including, among others, California and New York) have required that firms that were not involved in the Global Research Analyst Settlement agree to substantially comply with the Settlement's restrictions in order to do business with the state, including providing trading and investment services to state pension funds.
- <sup>3</sup> See FINRA Regulatory Notice 15-30 (August 2015), available at: [https://www.finra.org/sites/default/files/notice\\_doc\\_file\\_ref/Regulatory-Notice-15-30.pdf](https://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-15-30.pdf) [Equity Research Notice]; FINRA Regulatory Notice 15-31 (August 2015), available at: <https://www.finra.org/sites/default/files/Regulatory-Notice-15-31.pdf> [Debt Research Notice].
- <sup>4</sup> See FINRA Rule 2241, Supplementary Material .02; FINRA Rule 2242, Supplementary Material .09. FINRA clarified, however, that this prohibition would not be interpreted to apply if the joint due diligence activities involve a communication with the management of an EGC that is attended by both the research analyst and an investment banker as permitted by the JOBS Act.
- <sup>5</sup> See FINRA Rule 2241(b)(2)(L)(i) and Supplementary Material .01.
- <sup>6</sup> See FINRA Rule 2241(b)(2)(D).
- <sup>7</sup> See FINRA Rule 2241(b)(2)(E)-(F). The committee must consider the following factors when reviewing a research analyst's compensation, if applicable: (i) the research analyst's individual performance, including the analyst's productivity and the quality of the analyst's research; (ii) the correlation between the research analyst's recommendations and the performance of the recommended securities; and (iii) the overall ratings received from clients, sales force, and peers independent of the member's investment banking department, and other independent ratings services.
- <sup>8</sup> See FINRA Rule 2242(b)(2)(G).
- <sup>9</sup> See FINRA Rule 2241(b)(2)(L); FINRA Rule 2242(b)(2)(L). See also FINRA's FAQs regarding its research conflicts of interest rules (in particular, with respect to analyst communications with issuers during the solicitation period prior to the award of an underwriter mandate) at <http://www.finra.org/industry/faq-research-rules-frequently-asked-questions-faq>.
- <sup>10</sup> See FINRA Rule 2241, Supplementary Material .01; FINRA Rule 2242, Supplementary Material .01.
- <sup>11</sup> See FINRA Rule 2241, Supplementary Material .03; FINRA Rule 2242, Supplementary Material .02.
- <sup>12</sup> See FINRA Rule 2241, Supplementary Material .03; FINRA Rule 2242, Supplementary Material .02.
- <sup>13</sup> "Investment banking services" include, without limitation, acting as an underwriter, participating in a selling group in an offering for the issuer or otherwise acting in furtherance of a public offering of the issuer; acting as a financial adviser in a merger or acquisition; providing venture capital or equity lines of credit or serving as placement agent for the issuer or otherwise acting in furtherance of a private offering of the issuer. See FINRA Rule 2241(a)(5).
- <sup>14</sup> See FINRA Rule 2241(b)(2)(A).
- <sup>15</sup> See FINRA Rule 2241, Supplementary Material .05. Sections of a draft research report may be provided to non-investment banking personnel or the subject company for factual review, provided: (i) that the draft section does not contain the research summary, research rating, or price target; (ii) a complete draft of the report is provided to legal or compliance personnel before sections are submitted to non-investment banking personnel or the subject company; and (iii) any subsequent proposed changes to the rating or price target are accompanied by a written justification to legal or compliance and receive written authorization for the change. The FINRA member also must retain copies of any draft and the final version of the report for three years.
- <sup>16</sup> "Sales and trading personnel" include persons in any department or division, whether or not identified as such, who perform any sales or trading service on behalf of a FINRA member. See FINRA Rule 2241(a)(12); FINRA Rule 2242(a)(15).
- <sup>17</sup> The Debt Research Rule does not contain a definition of "principal trading personnel."
- <sup>18</sup> See FINRA Rule 2242(b)(2)(A).
- <sup>19</sup> See Equity Research Notice at p. 5.
- <sup>20</sup> See FINRA Rule 2241(l)(iii). The exceptions also apply to public appearances regarding such companies.
- <sup>21</sup> See FINRA Rule 2241(l).
- <sup>22</sup> FINRA has indicated that, although it had been in favor of completely eliminating the quiet period following a secondary offering, it was constrained by the terms of Sarbanes-Oxley which mandates quiet periods following "public offerings" of securities.
- <sup>23</sup> Notwithstanding the changes to the quiet periods in the Equity Research Rule, there is still typically a 25-day quiet period imposed for EGCs and non-EGCs due to considerations under applicable federal securities laws. See Chapter Five.
- <sup>24</sup> See FINRA Rule 2241(c)(4)(A)-(B); FINRA Rule 2242(c)(4)(A)-(B).
- <sup>25</sup> See FINRA Rule 2241(d)(1); FINRA Rule 2242(d)(1).

- <sup>26</sup> The firms were also required to (i) adopt and implement policies and procedures reasonably designed to ensure that its personnel do not seek to influence the contents of research reports or the activities of research personnel for the purpose of obtaining or retaining investment banking business, and (ii) retain an independent monitor to review the implementation and effectiveness of the policies and procedures adopted by them to achieve compliance with the structural reforms and other requirements of the Settlement.
- <sup>27</sup> Many of the original provisions that were modified or deleted by the March 2010 court order (including, e.g., those relating to analyst compensation, analyst evaluations, termination of research coverage, and solicitation of investment banking business) are now addressed by the Research Conflict Rules.
- <sup>28</sup> See *Research FAQs*, Responses to Questions 2, 3, and 4.



# CHAPTER 17

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## The Prospectus Regulation (Regulation (EU) 2017/1129)

The Prospectus Regulation (Regulation (EU) 2017/1129) (the PR) was published in the Official Journal of the European Union on June 30, 2017 and came into effect on July 20, 2017. It repealed the Prospectus Directive (Directive 2010/73/EU) (the PD) on July 21, 2019 (save for certain provisions concerning the admission of securities and offer size, which were already in force as described below), and is directly effective in all European Union (EU) member states. The PR comprises part of the European Commission's Action Plan on Building a Capital Markets Union, the aim of which is to (i) help businesses tap into more diverse sources of capital from anywhere within the EU, (ii) make markets work more efficiently and (iii) offer investors and savers additional opportunities to put their money to work, in order to enhance growth and create jobs.

The PR is skeletal and it expressly requires the European Commission to adopt implementing and delegated acts and regulatory technical standards for further guidance to supplement the PR. As such, the PR is supplemented by the delegated regulation on the format, content, scrutiny, and approval of the prospectus for consultation (the Delegated Regulation) which also came into effect on July 21, 2019. The Delegated Regulation sets out a number of amendments to the format and content of prospectuses.

A prospectus that is currently governed by the PD will continue to be governed by the PD until the end of its validity period without the need for any new or supplementing prospectus.

The new prospectus regime introduced by the PR and the Delegated Regulation has made a number of changes to the regime that existed under the PD. The key changes are as follows:

- *New exemption from the PR:* A member state can exempt domestic offers of securities to the public from the obligation to produce a prospectus if the offer is less than a monetary amount determined by each member state, and not exceeding €8,000,000.
- *Summary section requirements for securities with a denomination of less than €100,000 listed on a regulated market:* the PR provides prescriptive guidance on the required content and presentation of the summary section.
- *Risk factor categorization for all securities listed on a regulated market:* The issuer must only include specific and material risk factors, and must use categories and present risk factors in the order of materiality.
- *Publication restrictions:* The prospectus must be available on a website and must be accessible without any prior registration or acceptance of a disclaimer.

### When the PR Applies

Under Article 3 of the PR, an approved prospectus must be made available to the public if:

- securities are offered to the public within the EU; or
- securities are admitted to trading on a regulated market situated or operating within the EU.

The PR only applies to transferable securities, as defined in Directive 2014/65/EU, as amended (MiFID II) (which includes all transferable securities (whether equity or non-equity)), other than money-market instruments (as defined in MiFID II) which have a maturity of less than 12 months (e.g., commercial paper). Equity securities are defined as shares, other transferable securities

equivalent to shares, or securities that may be converted into shares. Non-equity securities are classified as all securities that are not equity securities.

Under Article 1 of the PR, the PR does not apply to:

- units issued by collective investment undertakings other than the closed-end type;
- non-equity securities issued by a member state or by one of a member state's regional or local authorities, by public international bodies of which one or more member states are members, by the European Central Bank, or by the central banks of the member states;
- shares in the capital of central banks of the member states;
- securities unconditionally and irrevocably guaranteed by a member state or by one of a member state's regional or local authorities;
- securities issued by associations with legal status or non-profit-making bodies, recognized by a member state, for the purposes of obtaining the funding necessary to achieve their non-profit-making objectives;
- non-fungible shares of capital whose main purpose is to provide the holder with a right to occupy an apartment, or other form of immovable property or a part thereof and where the shares cannot be sold on without that right being given up; or
- an offer of securities to the public with a total consideration in the EU of less than €1,000,000, which shall be calculated over a period of 12 months.

## Exemptions

Issuers making a public offer of securities in the EEA are exempt from the obligation to produce a PR-compliant prospectus in certain circumstances that include (but are not limited to) the following:

- the offer is made solely to qualified investors; and/or
- the offer is addressed to fewer than 150 natural or legal persons per member state other than qualified investors; and/or
- the denomination per unit amounts to at least €100,000; and/or
- the offer is addressed to investors who acquire the securities for a minimum total consideration of €100,000 per investor, for each separate offer; and/or
- dividends paid out to existing shareholders in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer; and/or
- non-equity securities issued in a continuous or repeated manner by a credit institution, where the total aggregated consideration in the EU for the securities offered is less than €75,000,000 per credit institution calculated over a period of 12 months, provided that those securities (i) are not subordinated, convertible, or exchangeable; and (ii) do not give a right to subscribe for or acquire other types of securities and are not linked to a derivative instrument; and/or
- securities fungible with securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 20% of the number of securities already admitted to trading on the same regulated market.

The PR provides that no additional prospectus will be required for a subsequent resale or a final placement of securities through financial intermediaries, provided that a valid prospectus remains available and the issuer gives written consent to its use.

## Basic Disclosure Regime

The contents of a PR-compliant prospectus are determined by the information stipulated in the annexes to the Delegated Regulation. These annexes are based on a “building block” approach, whereby issuers include in the prospectus the information stipulated in the relevant annexes. For example, if an issuer was offering guaranteed “wholesale” bonds (*i.e.*, bonds with a minimum denomination of €100,000), a PR-compliant prospectus would have to include the information stipulated in Annexes 7 (Registration document for wholesale non-equity securities), 15 (Securities note for wholesale non-equity securities), and 21 (Guarantees).

A prospectus must include a summary that provides “key information” that investors need in order to understand the nature and the risks of the issuer, the guarantor (if applicable), and the securities that are being offered or admitted to trading on a regulated market. The length of the summary should take into account the complexity of the issuer and the securities being offered, but should not exceed 7 pages (subject to certain exceptions). A summary is not required for non-equity securities with a minimum denomination of €100,000.

A summary is not required for non-equity securities to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in such securities, or that have a denomination per unit of €100,000.

The table below sets out some of the key disclosure requirements for a PR-compliant prospectus and identifies key differences between those requirements for shares, retail debt and wholesale debt.

Shares	Retail Debt	Wholesale Debt
<b>Issuer</b>		
Detailed business description and description of markets, including breakdown of revenues by operating segment and geographic markets	Less detailed business description than shares	Less detailed business description than retail debt
Description of issuer’s material investments and principal investments for the period covered by the historical financial information or to which issuer has committed (including method of financing)	N/A	N/A
Summary of material contracts entered into by the issuer or a group member in the previous two years outside the ordinary course of business or of any other contract containing provisions that are material to the group	Brief summary of material contracts that are not entered into in the ordinary course of the issuer’s business, which could be material to the issuer’s ability to meet its obligations in respect of the securities	Same as retail debt

Shares	Retail Debt	Wholesale Debt
Details of related-party transactions for the period covered by the historical financial information and up to the date of the prospectus	N/A	N/A
<b>Risk Factors</b>		
A description of the material risks that are specific to the issuer, in a limited number of categories, with the most material risks set out first	A description of the material risks that are specific to the issuer and that may affect the issuer's ability to fulfil its obligations under the securities, in a limited number of categories, with the most material risks set out first	Same as retail debt
<b>Financial Information</b>		
Three years' audited financial information. The last two years audited historical financial information must be presented and prepared in a form consistent with that which will be adopted in the issuer's next published annual financial statements	Two years' audited financial information. The last audited historical financial information must be presented and prepared in a form consistent with the accounting standards framework that will be adopted in the issuer's next published annual financial statements	Two years' audited financial information. The last year of financial information included may not be older than 18 months from the date of the prospectus
Unaudited half-year interim financial statements if prospectus is dated more than nine months after the end of the last audited financials	Same as shares	N/A
Operating and financial review, or "MD&A" section	N/A	N/A
Profit forecasts, if included, must contain a statement setting out the principal assumptions upon which the issuer has based its forecast, or estimate	Same as shares	The inclusion of a profit forecast is done on a voluntary basis. If included, they must contain a statement setting out the principal assumptions upon which the issuer has based its forecast, or estimate
Issuer's capital resources and cash flow, including a working capital statement (stating that working capital is sufficient or disclosing how any additional working capital will be provided)	N/A	N/A
Description of any significant change in the financial performance of the group since last financial statements or negative statement	Description of any significant change in the financial position of the group since last financial statements or negative statement	Description of any significant change in the financial performance of the group since last financial statements



Shares	Retail Debt	Wholesale Debt
Significant recent trends in production, sales and inventory, and costs and selling prices, since last financial year. Information on known trends, uncertainties, demands, commitments, or events that are reasonably likely to have a material effect on issuer's prospects for current financial year	Description of any material adverse change in the prospects of the issuer since the last audited accounts. Information on known trends, uncertainties, demands, commitments, events that are reasonably likely to have a material effect on issuer's prospectus for current financial year	Description of any material adverse change in the prospects of the issuer since the last audited accounts
Statement of capitalisation and indebtedness no older than 90 days prior to the date of the prospectus	N/A	N/A
Pro forma financial information in the case of a significant gross change, and a report on this prepared by an independent auditor	N/A	N/A
Shareholders and Management		
Extensive disclosure regarding members of administration, management, and supervisory bodies, including description of: <ul style="list-style-type: none"> <li>• Employment history</li> <li>• Relevant expertise and experience</li> <li>• Potential conflicts of interest</li> <li>• Remuneration</li> <li>• Share options</li> <li>• Shareholdings in issuer</li> </ul>	Names, business addresses, and functions of members of administrative, management, or supervisory bodies, and any potential conflicts of interest	Same as retail debt
Information on persons who directly or indirectly have a share interest which is notifiable under the issuer's national law. Description of any direct or indirect "control" of the issuer including measures in place to ensure control is not abused	Disclosure of whether the issuer is directly or indirectly owned or controlled and by whom. Description of the measures in place to ensure such control is not abused	Same as retail debt

Shares	Retail Debt	Wholesale Debt
If known, indicate whether major shareholders or members of management intend to subscribe in the offer or whether any person intends to subscribe for more than 5% of the offer	N/A	N/A
Other		
Description of any interest, including a conflict of interest, that is material to the offering, detailing the persons involved and the nature of the interest	Same as shares	Same as shares

Issuers may incorporate by reference into a prospectus information that has been previously or simultaneously published and is contained in a document that has (among others things) been approved by or filed with a competent authority. The summary included in the prospectus may not incorporate information by reference. Where only certain parts of a document are incorporated by reference, a statement shall be included in the prospectus that the non-incorporated parts are either not relevant for the investor or covered elsewhere in the prospectus.

The PR explicitly provides that home-country regulators may authorize the omission from a prospectus of certain information where disclosure of such information would be contrary to the public interest, seriously detrimental to the issuer, or of minor importance in relation to the offer and would not influence the assessment of the financial position and prospects of the issuer or guarantor, if any.

There is a simplified disclosure regime (*i.e.*, reduced prospectus content requirements in certain limited respects) for certain secondary issuers, including (among others) issuers whose securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue securities fungible with existing securities which have been previously issued. Certain issuers may choose to draw up an EU Growth prospectus under the proportionate disclosure regime, with lighter disclosure requirements and a standardized format. Such issuers include (among others) SMEs and issuers, other than SMEs, whose securities are traded or are to be traded on an SME growth market, provided that those issuers had an average market capitalization of less than €500,000,000 on the basis of end-year quotes for the previous three calendar years. The specific content required for reduced disclosure prospectuses will generally require a summary, a registration document, and a securities note.

## Divergence From US Requirements

There are a number of differences in the disclosure requirements imposed by the PR and US securities laws that need to be taken into account when doing cross-border transactions involving both the EEA and the United States. For example, the PR explicitly contemplates a decreasing level of disclosure from share offerings to retail debt to wholesale debt in such categories as the business description, operating and financial review (or MD&A), and trend information, whereas Form 20-F contemplates a uniform level of disclosure.

Form 20-F requires, among other things, more detailed disclosure of off-balance sheet arrangements and contractual obligations than the PR.

# CHAPTER 18

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## The US Investment Company Act of 1940

### Background

The Investment Company Act and the SEC's rules thereunder establish a comprehensive regulatory scheme for "investment companies." As we discuss below, the definition of investment company is broad, and potentially covers certain foreign private issuers that view themselves primarily as operating companies rather than investment companies (so-called "inadvertent investment companies").

The Investment Company Act prohibits unregistered non-US investment companies from issuing securities to the public in the United States. Foreign private issuers are generally unable to comply with the registration and reporting requirements of the Investment Company Act. This means that a foreign private issuer that intends to offer its securities in the US must:

- fall outside of the definition of investment company under the Investment Company Act;
- structure the offering to fit within an exception to or exemption from the Investment Company Act; or
- obtain special exemptive relief from the SEC.

### Can an Operating Company Be an Investment Company?

Investment company status is incompatible with an operating business because the Investment Company Act is designed to regulate funds holding portfolios of non-control, typically diversified securities. The Investment Company Act is not simply a disclosure statute – it is an inflexible, substantive federal law of corporations that imposes extensive operating restrictions on investment companies. As a result, an operating company that is also an "investment company" will find itself paralyzed by the array of substantive Investment Company Act requirements. Most notably, these include:

- *Limit on affiliate transactions.* Any transactions and dealings between an investment company and its affiliates are presumptively unlawful. The definition of "affiliate" under the Investment Company Act is very broad.<sup>1</sup>
- *Ethics, compliance, and recordkeeping burdens.* The Investment Company Act sets forth onerous and detailed requirements for investment companies to adopt (i) a code of ethics, (ii) written policies and procedures to ensure compliance with federal securities laws and (iii) a recordkeeping policy. These policies must be reviewed at least annually, and in some cases quarterly, and the entire compliance system is subject to sporadic, in-depth, on-site audit and inspection by the SEC.<sup>2</sup>
- *Limitations on capital structure.* Investment companies must maintain (i) 300% asset coverage over debt (and 200% asset coverage over any preferred stock), (ii) only one class of debt, and (iii) only one class of preferred stock.<sup>3</sup>
- *Strict investment policies.* Investment companies must adopt various policies governing investment objectives and concentrations, borrowing money, and issuing "senior securities." These companies must strictly adhere to these policies, which cannot be changed without a shareholder vote. Note that acquiring control of another company risks breaching the investment objectives and would likely require shareholder approval.<sup>4</sup>
- *Limits on directors, officers, underwriters, and others.* The directors, officers, underwriters, and other specified related parties of an investment company are subject to a wide range of "bad boy" disqualifications, with a 10-year look back.<sup>5</sup>

- *Requirements for independent directors.* In general, at least 40% of the board of directors (and in many cases, at least 75%) must not have a material business relationship with the investment company, its entities, or certain additional persons. These directors are also subject to heightened scrutiny, as the SEC has repeatedly emphasized that independent directors must act as “watchdogs” on behalf of investors.<sup>6</sup>
- *Required investment adviser.* The investment company would be required to appoint an investment adviser, which in turn may need to be registered under the Investment Advisers Act of 1940 and become subject to its own registration and compliance regime. This process requires shareholder approval and adoption of a written contract (also by shareholder approval), which cannot be assigned or changed without shareholder approval. The contract is subject to strict fee requirements and anti-assignment provisions.<sup>7</sup>
- *Public filings; financial reporting.* The investment company’s periodic filings, as well as its annual (audited) and quarterly (unaudited) financial statements are configured significantly differently from the forms used by traditional operating companies and may be subject to separate accounting requirements.<sup>8</sup>
- *Changes in status.* An investment company may not cease to be an investment company without shareholder approval.<sup>9</sup>
- *Effect on MLP taxation.* The Investment Company Act poses particular problems for publicly traded partnerships, also known as master limited partnerships (MLPs). It is critical for MLPs to avoid investment company status at all costs. Specifically, section 7704(a) of the Internal Revenue Code of 1986, as amended (the Code), provides the general rule that a publicly traded partnership will be treated as a corporation for federal income tax purposes. However, Section 7704(c) of the Code provides an exception to the general rule for any publicly traded partnership if 90% or more of such publicly traded partnership’s gross income for a taxable year consists of “qualifying income,” which is defined to include income from a number of activities, the most significant of which are related to certain natural resources. If this exception is met, MLPs are not subject to tax at the entity level. Instead, the MLP is treated as a partnership, and its taxable income is allocated to its partners and taxed only at the partner level. Importantly, this exception from the publicly traded partnership rules generally does not apply to a publicly traded partnership that would be treated as a regulated investment company as defined in section 851(a) of the Code, if such publicly traded partnership were a domestic corporation.<sup>10</sup> Thus, a publicly traded partnership that is registered under the Investment Company Act is generally taxed as a corporation under the Code. In other words, a registered investment company cannot be an MLP even if it otherwise generates the requisite amount of qualifying income.

The above is not a comprehensive list, but it is enough to highlight the main disadvantages of being inadvertently deemed an investment company. Thankfully, the Investment Company Act provides a wide array of exceptions and exemptions. Thoughtfully applied, these allow most operating companies to avoid becoming an investment company.

## Investment Company Definition; the 40% Test

Section 3(a)(1) of the Investment Company Act defines an “investment company” to include any issuer that (1) is “or holds itself out as being engaged primarily ... in the business of investing, reinvesting, or trading in securities” or (2) is “engaged ... in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to own investment securities having a value” exceeding 40% of the value of the issuer’s total assets on an unconsolidated basis, excluding US Government securities<sup>11</sup> and certain cash items. We refer to this numerical test of investment security ownership as the 40% Test.

## 40% Test – What Is an “Investment Security”?

The definition of investment securities is broad, and includes the following items:<sup>12</sup>

- any note, stock, treasury stock, security future, bond, or debenture;
- any evidence of indebtedness (including any loan);
- any certificate of interest or participation in any profit-sharing agreement;
- any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, or certificate of deposit for a security;
- any fractional undivided interest in oil, gas, or other mineral rights;
- any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group of index securities (including any interest therein or based on the value thereof);
- any put, call, straddle, option, or privilege entered into on a US national securities exchange relating to non-US currency;
- any interest or instrument commonly known as a “security;” and
- any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

However, the following are not investment securities:

- US Government securities;
- securities issued by “employees’ securities companies” (*i.e.*, entities that are held for the benefit of an issuer’s employees and meet certain additional statutory requirements);<sup>13</sup> and
- securities issued by a majority-owned subsidiary that is itself not an investment company (with certain exceptions).<sup>14</sup>

## 40% Test – Value

The Investment Company Act defines the “value” of an issuer’s total assets to be (1) market value at the end of the prior fiscal quarter, in the case of securities owned at that time for which market quotations are readily available, (2) fair value at the end of the prior fiscal quarter (as determined in good faith by the board of directors of the issuer), in the case of all other securities and assets owned at that time, and (3) cost, in the case of securities and assets acquired after the end of the prior fiscal quarter.<sup>15</sup>

In making the calculation of the percentage of investment securities to total assets, cash items are not counted – in other words, they are excluded from both the numerator and the denominator. Note that intangible assets such as goodwill count as “good” (*i.e.*, non-investment security) assets, as do physical assets such as property, plant, and equipment. Likewise, accounts receivable generated by operating companies are generally not considered to be investment securities.

## 40% Test – Cash Items

Although the Investment Company Act does not define the term, the SEC Staff has stated that the following can be considered “cash items.”<sup>16</sup>

- cash;
- coins;
- paper currency;
- demand deposits with banks;
- cashier checks;
- certified checks;

- bank drafts;
- money orders; and
- letters of credit.

In addition, the SEC Staff generally views as cash items shares held for cash management purposes by an operating company in a registered US money market fund with a stable net asset value of \$1.00 per share.<sup>17</sup> This is so, even though those shares are technically securities. It is not clear, however, whether the SEC Staff would consider comparable non-US instruments in the same way.

Certain other liquid instruments typically used by foreign private issuers for treasury management are more problematic. Certificates of deposit, for example, may be viewed as investment securities, depending on such factors as the reasons for which an issuer holds them and the length of time they are held.<sup>18</sup> Similarly, the SEC Staff may take the position that time deposits in a bank are not cash items.<sup>19</sup>

## Rule 3a-1 Safe Harbor; 45% Tests

Rule 3a-1 provides a safe harbor to issuers that fail the 40% Test, but are not investment companies in the sense that they are not primarily engaged in an investment business. The rule takes into consideration the nature of an issuer's assets and the sources of its income.

An issuer seeking to rely on Rule 3a-1 must satisfy two 45% tests. More specifically, (1) no more than 45% of the value of the issuer's total assets (excluding US Government securities and cash items) must consist of, and (2) no more than 45% of the issuer's net income after taxes (for the last four fiscal quarters combined) must be derived from, certain investment securities (Rule 3a-1 Investment Securities). Note that, unlike the 40% Test, an issuer is allowed to compute the 45% tests of Rule 3a-1 on a *consolidated* basis with its wholly owned subsidiaries. This can considerably simplify some of the calculation difficulties of the 40% Test, particularly in the case of companies with many subsidiaries.

Rule 3a-1 Investment Securities are for the most part identical to investment securities for purposes of the 40% Test. For example, US Government securities, cash items, investments in US money market funds,<sup>20</sup> securities issued by majority-owned subsidiaries that are not themselves investment companies,<sup>21</sup> and securities issued by employees' securities companies are excluded from the definition of Rule 3a-1 Investment Securities. But the definition of Rule 3a-1 Investment Securities also excludes securities issued by certain companies that are "controlled primarily" by the issuer, and that are not investment companies or companies through which the issuer engages in an investment business.<sup>22</sup>

The percentage of an issuer's investment income is determined by comparing, for the last four fiscal quarters combined, (1) its net income from investment securities (*i.e.*, after-tax investment income *minus* investment expenses) to (2) its total net income (*i.e.*, after-tax income *minus* all business expenses).<sup>23</sup> In the case of net losses, the SEC Staff has stated that Rule 3a-1 requires an issuer to match its investment expenses with investment income to "ensure that only income or loss generated by investment activities are compared to" the issuer's total net income or loss.<sup>24</sup> As a result, the relevant comparison for purposes of the income test would be (x) net investment loss (*i.e.*, investment expenses *minus* investment income) to (y) total net loss (*i.e.*, expenses *minus* income).<sup>25</sup>

## Additional Exceptions and Exemptions

A foreign private issuer that fails the 40% Test and cannot take advantage of Rule 3a-1 despite being an operating company is often referred to as an inadvertent investment company. The Investment Company Act provides a number of statutory exceptions and rule-based exemptions for inadvertent investment companies. Broadly speaking, these exceptions and exemptions are of two types. The

first depend on the specific characteristics of the issuer, while the second depend on transaction structure – that is, the specific manner in which a given security offering is conducted.

These exceptions and exemptions include the following.

## Exceptions and Exemptions Based on Characteristics of the Issuer

### Issuers Primarily Engaged in Non-Investment Activity – Sections 3(b)(1) and 3(b)(2)

Sections 3(b)(1) and 3(b)(2) provide that an issuer that fails the 40% Test is not an investment company if it is primarily engaged in non-investment activity either directly or through wholly owned subsidiaries (Section 3(b)(1)) or through majority-owned subsidiaries and controlled companies<sup>26</sup> (Section 3(b)(2)). An issuer seeking to rely on Section 3(b)(1) or 3(b)(2) “initially must establish that it is engaged in some non-investment business.”<sup>27</sup> If a non-investment business exists, the inquiry shifts to whether that non-investment business is the primary business of the issuer.<sup>28</sup> And if that business is found to be primary, the issuer may then be eligible to rely on Section 3(b)(1) or 3(b)(2).<sup>29</sup>

To test whether an issuer is primarily engaged in a non-investment company business for purposes of both Sections 3(b)(1) and 3(b)(2), the SEC has traditionally looked to a five-factor test (laid out in the SEC’s 1947 declaratory order in *Tonopah Mining Co.*).<sup>30</sup> The five factors are:

- an issuer’s historical development;
- its public representations of policy;
- the activities of its officers and directors;
- the nature of its present assets; and
- the sources of its present income.

The last two factors (nature of the issuer’s assets and sources of its income) have traditionally been the most important of the five *Tonopah* factors.<sup>31</sup> Although the SEC has declined to set guidelines, it has stated that an issuer that has no more than 45% of its assets invested in investment securities and derives no more than 45% of its income from investment securities<sup>32</sup> would generally not be considered primarily engaged in an investment business.<sup>33</sup> Bear in mind that this test is essentially identical to the two 45% tests established in Rule 3a-1. But an issuer that cannot rely on the Rule 3a-1 exemption because it exceeds either or both of the 45% tests may still seek to rely on Section 3(b)(1), given that Section 3(b)(1) incorporates three factors in addition to the 45% tests.

The SEC views Section 3(b)(1) as self-operating,<sup>34</sup> and the SEC Staff generally will not issue no-action relief with respect to Section 3(b)(1) because it believes the question whether an issuer is primarily engaged in a non-investment business as an inherently factual matter and because an issuer may apply for an exemptive order under Section 3(b)(2).<sup>35</sup> By contrast, Section 3(b)(2) requires that issuers submit an application to the SEC for an order granting relief, and the SEC has stated that it “ordinarily would be unwilling to issue an order” under Section 3(b)(2) when Section 3(b)(1) “provides an automatic exclusion.”<sup>36</sup>

In order to obtain a Section 3(b)(2) exemptive order, an issuer must submit an application to the SEC. Section 3(b)(2) provides that a good-faith filing of an application for exemptive relief by an issuer (other than a registered investment company) exempts the applicant from all provisions of the Investment Company Act for a 60-day period, and the SEC has also been willing to grant temporary orders extending the 60-day exemptive period.

### Broker-Dealers – Section 3(c)(2)

Section 3(c)(2) exempts any person “primarily engaged” in the business of underwriting and distributing securities issued by other persons, selling securities to customers, acting as a broker, and acting as a market intermediary (or any combination of these activities). The person's gross income must be “derived principally” from these businesses (and related activities). A “market intermediary” for these purposes is a person that regularly holds itself out as being willing contemporaneously to engage in, and that is regularly engaged in, the business of entering into transactions on both sides of the market for financial contracts.

#### PRACTICE POINT

Non-US broker-dealers are not specifically covered by Section 3(c)(2) and (unlike non-US banks and insurance companies discussed below) the SEC has not enacted a rule to extend Section 3(c)(2) to these entities. In practice, however, non-US broker-dealers may be able to take advantage of Section 3(c)(2) if they fit within its other substantive requirements.<sup>37</sup>

### Banks and Insurance Companies – Section 3(c)(3) and Rule 3a-6

Section 3(c)(3) exempts US-regulated banks and insurance companies regulated by US States from the definition of investment company. Under Rule 3a-6, the SEC has also exempted non-US banks and insurance companies meeting certain requirements. These include:

- the non-US bank must be regulated as such by the authorities of the country in which it is organized, and must be “engaged substantially in commercial banking activity;” and
- the non-US insurance company must be regulated as such by the authorities of the country in which it is organized, and must be “engaged primarily and predominately” in specified types of insurance business (including writing insurance policies and reinsurance of risks).

#### PRACTICE POINT

UK building societies generally qualify for the Rule 3a-6 exemption.<sup>38</sup>

### Transient Investment Companies – Rule 3a-2

Rule 3a-2 provides temporary relief from investment company status for “transient investment companies” – i.e., operating companies<sup>39</sup> that temporarily fall within the definition of investment company because of unusual corporate events (e.g., securities issuances or asset dispositions).<sup>40</sup> Under Rule 3a-2, an issuer will not be deemed to be an investment company under the Investment Company Act for a period of time not exceeding one year, provided that the issuer has a *bona fide* intent to be engaged primarily in a non-investment business “as soon as is reasonably possible” and in any event within the one-year period. This intent must be evidenced by (1) the issuer’s business activities and (2) an appropriate resolution of the issuer’s board of directors or by an appropriate action of the person or persons performing similar functions for any issuer not having a board of directors. A resolution or action of this sort must be recorded contemporaneously in the issuer’s minute books or comparable documents.

The one-year period of time begins on the earlier of two dates. The first is the date on which an issuer owns or proposes to own securities and/or cash having a value exceeding 50% of the value of the issuer’s total assets, on either a consolidated or unconsolidated basis. The second is the date on which the issuer owns or proposes to own investment securities in an amount that would lead it to fail the 40% Test.

Although Rule 3a-2 provides up to one year of exemptive relief, the rule does not provide a blanket one-year exemption. The SEC has stated that the determination of what constitutes an intent to engage primarily in a non-investment company activity “as soon as is reasonably possible” will “depend on all



the facts and circumstances of each particular case, including the nature of the business in which the issuer intends to become primarily engaged."<sup>41</sup>

#### PRACTICE POINT

Rule 3a-2 only provides a temporary exemption, and an issuer can rely on the rule only once in any three-year period. In addition, the SEC Staff generally refuses to grant no-action relief under this rule.<sup>42</sup>

#### Finance Subsidiaries – Rule 3a-5

Rule 3a-5 exempts certain finance subsidiaries from being considered investment companies under the Act and provides that the securities of those finance subsidiaries held by parent companies or parent-controlled companies are not investment securities for purposes of the 40% Test. In order to be considered a finance subsidiary under the rule, all outstanding securities of the subsidiary, other than parent-guaranteed debt securities and non-voting preferred stock, must be owned by the parent (or a parent-controlled company), and in turn the parent (or parent-controlled company) must itself not be an investment company. The finance subsidiary must also meet each of the following requirements:

- the primary purpose of the subsidiary must be to finance the business operations of its parent company (or parent-controlled companies);
- any publicly held debt securities and non-voting preferred stock of the subsidiary must be unconditionally guaranteed by the parent company, and that guaranty must give guaranteed security holders the right to institute legal proceedings directly against the parent company to enforce the guaranty without first proceeding against the subsidiary in the event of default in payment;<sup>43</sup>
- all convertible or exchangeable securities of the subsidiary must be convertible or exchangeable only for (1) securities issued by the parent company or (2) guaranteed debt securities or non-voting preferred stock of the subsidiary meeting the requirements set out in the bullet point above;
- the finance subsidiary must invest in or loan to its parent company (or parent-controlled company) 85% of any cash or cash equivalents raised by the subsidiary through an offering of debt securities, non-voting preferred stock, or other borrowings "as soon as practicable" and in any event not later than six months after the subsidiary receives those funds; and
- the subsidiary must not invest, reinvest, own, hold, or trade in securities other than (1) US Government securities,<sup>44</sup> (2) securities of its parent company (or a parent-controlled company) or (3) certain commercial paper exempt from registration under the Securities Act.

#### PRACTICE POINT

Rule 3a-5 covers only commercial paper that is exempt from registration under Section 3(a)(3) of the Securities Act. A finance subsidiary accordingly may not hold commercial paper issued under other exemptions from Securities Act registration, such as Section 4(a)(2).

#### Research and Development Companies – Rule 3a-8

Rule 3a-8 is a safe harbor from investment company status for *bona fide* R&D companies. In particular, under the rule, an issuer is not an investment company if:

- its "research and development expenses" (as defined in ASC 730) for the last four fiscal quarters combined, are a "substantial percentage"<sup>45</sup> of its total expenses for the same period;
- its net income derived from investments in securities, for the last four fiscal quarters combined, does not exceed twice the amount of its research and development expenses for the same period;
- its expenses for investment advisory and management activities, investment research and custody, for the last four fiscal quarters combined, do not exceed 5% of its total expenses for the same period;

- its investments in securities are “capital preservation investments” – *i.e.*, an investment made to conserve capital and liquidity until the funds are used in the issuer’s primary business – except that:
  - no more than 10% of its total assets may consist of other investments; or
  - no more than 25% of its total assets may consist of other investments, provided that at least 75% of those other investments are investments made pursuant to a collaborative research and development arrangement;
- it does not hold itself out as being primarily engaged in an investment business;
- it is primarily engaged, directly or through majority-owned subsidiaries or companies it primarily controls, in a non-investment business (based on certain indicia); and
- its board of directors has adopted a written investment policy with respect to its capital preservation investment.

## Exceptions and Exemptions Based on Transaction Structure

### 100 holders – Section 3(c)(1)

Section 3(c)(1) – often referred to as the “100-holder exception” – provides an exception from the definition of investment company for any issuer “whose outstanding securities (other than short-term paper) are beneficially owned by not more than 100 persons and which is not making and does not presently propose to make a public offering of its securities.”<sup>46</sup> Section 3(c)(1)’s prohibition on public offerings means that an issuer cannot register its securities with the SEC for sale in the United States.

The SEC Staff has taken the position that, as a general matter, a foreign private issuer relying on Section 3(c)(1) must limit only the initial US purchasers of securities (and their subsequent US transferees) to 100 beneficial owners, and is not required to limit the number of non-US offerees or to take steps to prevent US persons from acquiring securities in valid secondary market transactions offshore (provided certain requirements are met).<sup>47</sup> To take advantage of Section 3(c)(1), a foreign private issuer accordingly should issue securities only to US investors who provide certifications (in investor letters) as to the number of beneficial owners of their securities, and must require similar certifications to be made in connection with subsequent transfers by US investors.

### Qualified Purchasers – Section 3(c)(7)

Section 3(c)(7) of the Act (sometimes referred to as the QP exception) provides an exception from the definition of investment company for any issuer “the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are qualified purchasers, and which is not making and does not at that time propose to make a public offering of such securities.”

Section 3(c)(7) requires investors to be “qualified purchasers” at the time of acquisition of the issuer’s securities. Unlike the Section 3(c)(1) exception, Section 3(c)(7) does not limit the number of investors so long as all investors are qualified purchasers (including investors in the issuer’s short-term paper). But the requirement that the Section 3(c)(7) entity’s securities be held only by qualified purchasers lasts for the life of the issuer. This generally means that, as in Section 3(c)(1) transactions, investor letters must be obtained from the initial purchasers of securities and transfer restrictions must be put in place to limit secondary market sales to qualified purchasers.

The term "qualified purchaser" includes:

- any natural person who owns not less than \$5 million in investments;<sup>48</sup>
- any company that owns not less than \$5 million in investments and is owned by two or more natural persons related to each other as family members;
- any trust that was not formed for the specific purpose of acquiring the securities offered as to which the trustee and each settlor is a qualified purchaser; and
- any person acting for its own account or the accounts of other qualified purchasers, who own and invest on a discretionary basis at least \$25 million in investments.<sup>49</sup>

The SEC Staff has interpreted Section 3(c)(7) in a similar manner to Section 3(c)(1). Accordingly, foreign private issuers can generally conduct simultaneous offshore public offerings and private offerings in the United States so long as initial US purchasers of securities (and their subsequent US transferees) are qualified purchasers.<sup>50</sup>

## Exemptive Orders

The SEC has authority (for example, pursuant to Section 6(c)) to exempt companies and transactions from the Investment Company Act. Accordingly, a foreign private issuer that is unable to take advantage of one of the exceptions or exemptions under the Investment Company Act can consider applying to the SEC for an exemptive order.

An application for an exemptive order typically involves a detailed written submission to the Staff of the Division of Investment Management of the SEC. Depending on the complexity of the relief sought, the process will generally take anywhere from six months to one year.

## ENDNOTES

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- <sup>1</sup> See Investment Company Act Section 17.
- <sup>2</sup> See Investment Company Act Sections 17, 31, and 38 and related Investment Company Act rules.
- <sup>3</sup> See Investment Company Act Section 18.
- <sup>4</sup> See Investment Company Act Sections 8 and 13.
- <sup>5</sup> See Investment Company Act Section 9.
- <sup>6</sup> See Investment Company Act Section 10. Certain investment companies that elect to be regulated as business development companies are internally managed and do not have to hire a third-party investment manager.
- <sup>7</sup> See Investment Company Act Sections 10 and 15.
- <sup>8</sup> See Investment Company Act Section 30.
- <sup>9</sup> See Investment Company Act Section 13.
- <sup>10</sup> To the extent provided by US Treasury Department regulations, the exception from the publicly traded partnership rules will still apply to such a partnership if a principal activity of that partnership is the buying and selling of commodities (other than stock in trade or similar property described in section 1221(a)(1) of the Code), or options, futures, or forwards with respect to commodities.
- <sup>11</sup> “Government securities” are defined in Section 2(a)(16) to include “any security issued or guaranteed as to principal or interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by Congress” or a certificate of deposit for any of the foregoing.
- <sup>12</sup> See Section 2(a)(36) (defining “security”) and Section 3(a)(2) (defining “investment securities” as all “securities” with certain exceptions).
- <sup>13</sup> An “employees’ securities company” is an investment company or similar issuer all of the outstanding securities of which (other than short-term paper) are beneficially owned (a) by the employees or persons on retainer of a single employer or of two or more employers each of which is an affiliated company of the other; (b) by former employees of such employer or employers; (c) by members of the immediate family of such employees, persons on retainer, or former employees; (d) by any two or more of the foregoing classes of persons; or (e) by such employer or employers together with any one or more of the foregoing classes of persons. See Section 2(a)(13).
- <sup>14</sup> Securities issued by a majority-owned subsidiary that is not an investment company by virtue of the statutory exception provided by Section 3(c)(1) or Section 3(c)(7) would nevertheless be considered investment securities. See Section 3(a)(2)(C)(ii).
- <sup>15</sup> Section 2(a)(41). The definition of value contained in Section 2(a)(41), read literally, refers to “registered investment companies.” *But see SEC v. Fifth Avenue Coach Lines, Inc.*, 289 F. Supp. 3, 27 n.13 (S.D.N.Y. 1968), *aff’d*, 435 F.2d 510 (2d Cir. 1970), stating that value in Section 2(a)(41) also applies to companies which are not registered under the Act.
- <sup>16</sup> *Willkie Farr & Gallagher*, SEC Staff No-Action Letter (October 23, 2000) [*Willkie Farr*].
- <sup>17</sup> See *id.*
- <sup>18</sup> See *Proposed Rule: Certain Prima Facie Investment Companies*, Release No. IC-10937, n.4 (November 13, 1979) [*Rule 3a-1 Proposing Release*] (“Whether certificates of deposit are to be considered cash items or investment securities, for purposes of determining whether an issuer holding them is an investment company under [Section 3(a)(1)(c)], depends on the purpose for which such interests are held, the circumstances under which they were acquired, the length of the period for which they are held, the amount held in comparison with the company’s other assets, and any other ‘special circumstances.’ ... For example, certificates of deposit purchased as an integral part of an operating business – such as during a transition between lines of business or as a result of seasonal liquidity requirements – may be treated as cash items. When it cannot be shown conclusively that the operating business requires substantial liquid assets, however, such deposits may be considered investment securities for purposes of [Section 3(a)(1)(c)].”).
- <sup>19</sup> The SEC has stated that time deposits “typically would not be considered cash items absent convincing evidence of no investment intent.” *Rule 3a-1 Proposing Release*, n.29.
- <sup>20</sup> See *Willkie Farr*.
- <sup>21</sup> The exclusion for securities of majority-owned subsidiaries in the definition of Rule 3a-1 Investment Securities varies slightly from the comparable exclusion for purposes of the 40% Test. Rule 3a-1(b) provides that the definition of Rule 3a-1 Investment Securities includes securities of a majority-owned subsidiary if, among other things, that subsidiary is excluded from the definition of an investment company under Section 3(c)(1). By contrast, under the 40% Test, securities of a majority-owned subsidiary that is not an investment company by virtue of Section 3(c)(1) are counted as investment securities. Section 3(a)(2)(C)(ii).
- <sup>22</sup> Rule 3a-1(a)(4). The SEC Staff has stated that “a company is not ‘controlled primarily’ by an issuer within the meaning of the rule unless (1) the issuer has control over the company within the meaning of [Section 2(a)(9)] and (2) the degree of the issuer’s control is greater than that of any other person.” *Health Communications Services, Inc.*, SEC Staff No-Action Letter (Apr. 26, 1985). Section 2(a)(9), in turn, provides that “control” is assumed if 25% or more of the subsidiary’s outstanding voting securities are held by the issuer.
- <sup>23</sup> *Final Rule: Certain Prima Facie Investment Companies*, Release No. IC-11551 (Jan. 14, 1981).

24 *DRX, Inc.*, SEC Staff No-Action Letter (Jan. 28, 1988) [*DRX*].

25 *Id.* The SEC Staff recognized in *DRX* that not all expenses can be clearly earmarked as investment or operating, and that some “reasonable method of allocation” must be used.

26 Section 2(a)(9) defines “control” as the power “to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.” Section 2(a)(9) also provides that a person who owns more than 25% of a company’s outstanding voting securities is presumed to control that company. In order to qualify for a Section 3(b)(2)(B) exception, any controlled company must be involved in a similar type of business as the issuer. Section 3(b)(2)(B).

27 *Proposed Rule: Certain Research and Development Companies*, Release No. IC-19566 (Jul. 8, 1993).

28 *Id.*

29 *Id.*

30 26 S.E.C. 426 (1947) [*Tonopah*].

31 *Final Rule: Certain Research and Development Companies*, Release No. IC-26077, text at n.10 (June 16, 2003) [*Rule 3a-8 Adopting Release*].

32 See Section 2(a)(36) (defining “security”) and Section 3(a)(2) (defining “investment securities” as all “securities” with certain exceptions).

33 See Rule 3a-1 Proposing Release.

34 *Id.* n.17.

35 *Compact Video, Inc.*, SEC Staff No-Action Letter (Apr. 13, 1998).

36 *ICOS Corp.: Order Granting Exemption*, Investment Company Act Release No. 19,334 (Mar. 16, 1993), 58 Fed. Reg. 15,392, at 15,393 (Mar. 22, 1993).

37 *Cf. Charterhouse Tilney*, SEC Staff No-Action Letter (July 15, 1993) (although the SEC Staff has taken the position that the exclusion of broker-dealers from the definition of investment advisers in Section 202(a)(11)(C) of the US Investment Advisers Act of 1940 is meant to apply solely to SEC-registered broker-dealers, the Staff has extended the exclusion to non-US broker-dealers if resulting transactions with US investors are conducted in accordance with the exemption from broker-dealer registration provided by Exchange Act Rule 15a-6) [*Charterhouse Tilney*].

38 Rule 3a-6(b)(1)(ii)(B).

39 An issuer that holds itself out as being engaged primarily in the business of investing, reinvesting, or trading in securities may not take advantage of Rule 3a-2. *Final Rule: Transient Investment Companies*, Release No. IC-11552, at n.9 (Jan. 14, 1981).

40 *Id.*

41 *Id.* at n.7.

42 *Cooper Development Company*, SEC Staff No-Action Letter (Dec. 12, 1988).

43 Rule 3a-5(a)(1)-(3). The defaults to be covered in the parent guaranty include (1) in the case of debt securities, defaults arising from failure to pay principal, interest, or premium and (2) in the case of non-voting preferred stock, defaults arising from failure to pay dividends, liquidation preference, and payments to be made under a sinking fund. Rule 3a-5(a)(1)-(2). Although the parent guaranty must be unconditional, it may be subordinated in right of payment to other debt of the parent company. *Id.* Note that where the parent company is a non-US bank, it may issue an irrevocable letter of credit in lieu of a guaranty, subject to certain additional requirements. Rule 3a-5(a)(7).

44 “Government securities” are defined in Section 2(a)(16).

45 The SEC deliberately left the term “substantial” undefined. See *Rule 3a-8 Adopting Release*, text at n.20 (August 2003).

46 Beneficial ownership by a company is deemed to be beneficial ownership by one person except that, if the company owns more than 10% of the issuer’s outstanding voting securities and would be an investment company but for the exception of Section 3(c)(1) or 3(c)(7), beneficial ownership is deemed to be that of all of the holders of the company’s securities. Section 3(c)(1)(A).

47 *Investment Funds Institute of Canada*, SEC Staff No-Action Letter (Mar. 4, 1996) [IFIC], interpreting *Touche Remnant & Co.*, SEC Staff No-Action Letter (Aug. 27, 1984). The requirements of *IFIC* include that the non-US issuer has not made a public offering of securities in the United States; that the non-US issuer (or persons acting on its behalf ) has not engaged in “directed selling efforts” or other attempts to condition the market for the securities in the United States, and has not taken steps to facilitate secondary market trading in the United States (e.g., listing its securities in the United States, arranging for dealers to make a secondary market in the United States, or creating an ADR facility); the non-US issuer has not directly or indirectly sold securities offshore to US residents; and the non-US issuer’s activities with respect to its securities holders are limited. *IFIC*.

48 The term “investments” is defined in Rule 2a51-1.

49 Section 2(a)(51)(A).

50 *Goodwin, Procter & Hoar*, SEC Staff No-Action Letter (Feb. 28, 1997).



## CHAPTER 19

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### Some Additional Relevant Laws; Self-Regulatory Organizations

#### Foreign Corrupt Practices Act

The US Foreign Corrupt Practices Act (FCPA) potentially applies to foreign private issuers in several different ways. There is a key distinction in this context between reporting foreign private issuers on the one hand – *i.e.*, foreign private issuers that have registered a transaction with the SEC under the Securities Act or a class of securities under the Exchange Act and accordingly have an Exchange Act reporting obligation under Exchange Act Section 13(a) or 15(d) – and non-reporting foreign private issuers. A reporting foreign private issuer would include an NYSE- or Nasdaq-listed foreign private issuer, while a foreign private issuer that has only issued Rule 144A bonds in the United States or whose ADRs were traded only over the counter in the United States would typically be a non-reporting foreign private issuer.

- A reporting foreign private issuer is subject to:
  - the FCPA's books-and-records provisions, which require the issuer to maintain and keep books, records, and accounts that "accurately and fairly reflect" the transactions and dispositions of assets of the foreign private issuer, and design and maintain a system of adequate "internal accounting controls;"<sup>1</sup> and
  - the FCPA's limitations on corrupt payments to foreign officials, foreign political parties, or their intermediaries.<sup>2</sup>
- A *non-reporting foreign private issuer* is not subject to either the FCPA's books-and-records or its anti-bribery provision. However, the FCPA has a separate anti-bribery provision codified outside the securities laws applying to "domestic concerns."<sup>3</sup> That term covers any US citizen, national, or resident, or any entity (such as a corporation or a partnership) that has its principal place of business in the United States or which is organized under the laws of a US state or territory.<sup>4</sup> So, a foreign private issuer's subsidiaries that are domestic concerns, or its US officers or directors, would be subject to the anti-bribery aspects of the FCPA.

#### OFAC; US Sanctions

The US Treasury Department's Office of Foreign Assets Control, or OFAC, administers and enforces a range of comprehensive and targeted economic and trade sanctions programs. In addition to the country- or territory-wide sanctions programs against Cuba, Iran, North Korea, Syria, and the Crimea region of Ukraine (commonly referred to as "embargoes"), OFAC administers targeted sanctions against certain parties involved in illicit activities, such as weapons proliferation, international terrorism, narcotics trafficking, and other activities that undermine US national security or US foreign policy objectives. These parties are identified on the Treasury Department's list of Specially Designated Nationals and Blocked Persons, or "SDN List," which is available on the OFAC website. OFAC takes the position that any entity owned 50% or more by one or more SDNs is itself considered an SDN by operation of law, even if the entity is not identified on the SDN list.

In addition, OFAC has imposed so-called "sectoral" sanctions on certain entities that operate in the finance, energy, and defense sectors of the Russian economy. The United States imposed these measures in conjunction with comparable sanctions maintained by the European Union and other governments in response to events in Ukraine in early 2014. Such entities are identified on OFAC's Sectoral Sanctions Identifications ("SSI") list, which is also available on the OFAC website. US persons are prohibited from participating in or supporting specified types of financial transactions (relating to

debt and, in some cases, equity) or certain energy-related projects involving SSI-listed parties. These restrictions also extend to entities that are owned 50% or more by entities on the SSI list.

OFAC has intensified economic pressure on Venezuela by targeting certain sectors of the Venezuelan economy – including the gold, oil, financial, and defense and security sectors – and through the implementation of targeted finance-related sanctions against the Government of Venezuela. For instance, US persons are restricted from dealing in new debt (with a maturity greater than 30 days) or new equity of the Government of Venezuela, dealing in certain digital currencies issued by the Government of Venezuela, or from dealing in debt owed to the Government of Venezuela. Further, OFAC has added to the SDN List certain high-level officials of the Government of Venezuela, including Nicholas Maduro (the President of Venezuela), Tareck Zaidan El Aissami Maddah (the Executive Vice President of Venezuela), and certain members of Venezuela's Supreme Court of Justice. OFAC has also targeted Venezuela's state-owned oil and natural gas company, Petróleos de Venezuela, S.A. (PdVSA), and a series of Venezuelan banks, including the Central Bank of Venezuela.

All of the OFAC-administered sanctions programs apply to the conduct of US persons. For these purposes, the term "US person" includes:

- all US companies and their foreign branches (including their employees wherever located and regardless of nationality);
- all US citizens and US lawful permanent residents (*i.e.*, green card holders), wherever located (*i.e.*, even when employed or located outside the United States and working for non-US companies); and
- anyone (including non-US nationals) physically present in the United States (regardless of the duration of their time in the United States).

Note that the OFAC sanctions programs against Cuba and Iran are broader, in that they apply to the US persons identified above as well as to foreign-incorporated entities that are "owned or controlled" by a US person (*i.e.*, foreign subsidiaries of US corporations).

Violations of OFAC-administered economic sanctions programs are subject to stringent criminal and/or civil sanctions. For most sanctions programs, criminal violations, which must be premised on a showing of willfulness, may be punished by fines of up to \$1,000,000 per violation plus up to 20 years' imprisonment. Most civil violations of the OFAC sanctions program do not require any showing of intent or knowledge, and are punished by penalties of up to \$302,584 per violation or twice the value of the transaction, whichever is greater.

Finally, the US government continues to threaten "secondary" sanctions as a foreign policy tool. While the "primary" sanctions described above apply to the activities of US persons and other activities that have some jurisdictional nexus with the United States, secondary sanctions are designed to deter and penalize certain activities of non-US persons that may not be covered by primary sanctions. Under present law, secondary sanctions can be imposed on non-US persons who engage in certain categories of activities or transactions involving Iran, sanctioned Russian parties, or certain sectors of the Venezuelan economy (currently, the gold, oil, financial, and defense and security sectors). The US Department of State, as well as OFAC, typically play a role in administering secondary sanctions programs. In practice, thus far, secondary sanctions are imposed rarely, and the US government has indicated an interest in engaging in dialogue with potential targets, in the first instance. Penalties under secondary sanctions can take various forms, but they generally focus on denying certain privileges of conducting business in the United States, such as access to US financing, government procurement, and export licensing. Secondary sanctions can also include the designation of offending non-US persons on the OFAC SDN list.



Separate and apart from US primary and secondary sanctions, SEC-reporting companies are also subject to SEC reporting requirements relating to certain activities, including activities of affiliates, with certain Iranian (and other) entities under Exchange Act Section 13(r). Among other instances, disclosure is required when a US or non-US issuer, or its affiliate, during the period covered by an annual or quarterly report due to the SEC, has “without the specific authorization of a Federal department or agency” knowingly conducted a transaction or dealing with the Government of Iran.

## **Anti-Money Laundering; PATRIOT Act**

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, or PATRIOT Act,<sup>5</sup> was adopted by the United States Federal government in part to combat activities such as money laundering and terrorist financing that are conducted through banking channels and other parts of the financial system. The PATRIOT Act amended<sup>6</sup> another federal statute called the Bank Secrecy Act.<sup>7</sup> Generally, the PATRIOT Act amendments to the Bank Secrecy Act are applicable to financial institutions<sup>8</sup> that are located in or have operations within the United States. Among other things, the Bank Secrecy Act (as amended by the PATRIOT Act) requires US financial institutions and foreign financial institutions that conduct business in the US to have appropriate anti-money laundering, or AML, compliance programs in place. The PATRIOT Act also enhances the provisions of the Bank Secrecy Act by requiring financial institutions:

- to have appropriate risk-based customer identification programs;
- to not engage in business with foreign shell banks;
- to enhance their due diligence procedures concerning types of accounts, including foreign correspondent and private banking accounts; and
- to improve information sharing between banks and with the US government (for example, by reporting certain transactions over \$10,000).

In general, a non-US company that is not a financial institution with a presence in the US will not be subject to the requirements of the AML provisions of the PATRIOT Act. However, if such a non-US company establishes an account with or engages in transactions with any financial institution in the United States that is subject to the Bank Secrecy Act (as amended by the PATRIOT Act), then such company will be required to provide information to the financial institution that the financial institution determines is necessary for it to comply with its customer identification, due diligence, and other obligations under the Bank Secrecy Act.

## **Investment Advisers Act of 1940**

The US Investment Advisers Act of 1940, in general, requires the registration with the SEC of any person who, for compensation and using US jurisdictional means, provides advice to others as to the value of, or the advisability of investing in, purchasing, or selling securities, or issues or promulgates analysis or reports concerning securities. Like the Exchange Act, the jurisdiction of the Advisers Act extends to both investment advisers located in the United States and to investment advisers located outside the United States that advise US-resident investors.

Broker-dealers are excluded from the definition of “investment adviser” under the Advisers Act (and therefore would not need to separately register as investment advisers under the Advisers Act), if their investment advisory activities are “solely incidental” to their broker-dealer activities and they receive no special compensation in connection with their advisory activities.<sup>9</sup>

## Self-Regulatory Organizations; FINRA Membership

Self-regulatory organizations, or SROs, as defined in the Exchange Act, include national securities exchanges (such as the NYSE and Nasdaq), registered securities associations (such as FINRA), registered clearing agencies (such as DTC), and (for some purposes) the Municipal Securities Rulemaking Board.<sup>10</sup> SROs are required to regulate their members and protect investors and the public interest, and their rules are subject to review and approval by the SEC. SROs also serve important enforcement functions.

The Exchange Act requires (with very limited exceptions) that SEC-registered broker-dealers also become members of an SEC-registered national securities association. FINRA is currently the only such association and, accordingly, virtually all SEC-registered broker-dealers are also FINRA members and must comply with FINRA's membership, conduct, and other rules.

Registered broker-dealers are not required to become a member of any securities exchange. However, if membership in one or more exchanges is desired, the broker-dealer will need to satisfy the applicable requirements of the relevant exchanges. In addition, if a broker-dealer does become a member of an exchange or other SRO, the broker-dealer's personnel must also be licensed with, and meet the personnel and qualification requirements of, such exchange or other SRO.

## US Federal Tax Laws; Passive Foreign Investment Companies

Depending on the sources of its income and the composition of its assets, a foreign private issuer may be considered a passive foreign investment company, or PFIC, under the US federal tax laws. The question of PFIC status is relevant to holders of an issuer's equity securities (or instruments convertible into equity), but not holders of non-convertible debt.

In particular, the US Internal Revenue Code defines a PFIC as any foreign corporation if, for any taxable year:

- passive income of the corporation equals or exceeds 75% of gross income of the corporation for that taxable year; or
- the average percentage of assets (by value) held by that corporation during the taxable year that produce passive income or are held for the production of passive income equals or exceeds 50% of its total assets during that taxable year.

Passive income for these purposes generally includes interest, dividends, rents, royalties, income from certain property transactions, commodities transactions and notional principal contracts, foreign-currency gains, and income equivalent to interest.

If a foreign private issuer is deemed to be a PFIC under the Code, holders of the issuer's equity securities who are subject to US federal income taxation face various unattractive tax consequences, which in turn can hinder the issuer's ability to market its equity securities in the US. A PFIC can assist holders to mitigate these consequences to a certain degree by agreeing to take various steps (including providing information on an ongoing basis to its securities holders).

### PRACTICE POINT

As with the Investment Company Act, a foreign private issuer should consult with US tax counsel at an early stage of a proposed securities offering to determine if the issuer may be considered a PFIC, and if so what steps need to be taken.

## ENDNOTES

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- <sup>1</sup> Exchange Act Sections 13(b)(2)-(7); Exchange Act Regulation 13B-2; *see also* Exchange Act Rules 13a-15(a), 15d-15(a) (reporting issuer must maintain “internal control over financial reporting”).
- <sup>2</sup> Exchange Act Section 30A. In addition, any “domestic concern” whether or not registered with the SEC is subject to substantially identical anti-bribery provisions. 15 U.S.C. Section 78dd-2(a). A domestic concern for these purposes means any US citizen, national, or resident, or any entity (such as a corporation or a partnership) that has its principal place of business in the United States or which is organized under the laws of a US state or territory. 15 U.S.C. Section 78dd-2(h)(1).
- <sup>3</sup> *See* 15 U.S.C. Section 78dd-2(a).
- <sup>4</sup> *See* 15 U.S.C. Section 78dd-2(h)(1).
- <sup>5</sup> Pub. L. 107-56.
- <sup>6</sup> Title III of the PATRIOT Act is the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.
- <sup>7</sup> 31 U.S.C. Chapter 53, § 5311 *et seq.*
- <sup>8</sup> Defined in 31 U.S.C. § 5312, “financial institution” includes banking organizations (including commercial banks, trust companies, savings banks, savings and loan associations, credit unions, private banks, US branches or agencies of foreign banks) and a wide range of other types of entities that engage in financial activities, including broker-dealers, insurance companies, and investment companies.
- <sup>9</sup> *See* Sections 202(a)(11) and 203 of the Advisers Act. Although the SEC Staff has taken the position that the exclusion of broker-dealers from the investment adviser definition is meant to apply solely to SEC-registered broker-dealers, the Staff has extended the exclusion to non-US broker-dealers if resulting transactions with US investors are conducted in accordance with the exemption from broker-dealer registration provided by Exchange Act Rule 15a-6. *See Charterhouse Tilney.*
- <sup>10</sup> *See* Section 3(a)(26) of the Exchange Act.



# ANNEX A

## Non-Financial Disclosure Requirements of Form F-1, Form F-3, and Form 20-F

This checklist summarizes the non-financial disclosures required by Form F-1, Form F-3, and Form 20-F (when used either as a registration statement or an annual report). Issuers eligible to use Form F-3 are generally permitted to incorporate much of this non-financial information by reference to the issuer's annual report on Form 20-F. In addition, certain non-IPO issuers may incorporate this information into Form F-1.

Note that, whether or not required to be included in a registration statement or prescribed by any form, Securities Act Rule 408 and Exchange Act Rule 12b-20 require inclusion of "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. In addition, the checklist is only a summary of certain key provisions. Please refer to the relevant form for the full text of the disclosure requirements.

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<b>Forepart of registration statement and outside front cover page of the prospectus</b> (Regulation S-K Item 501) The outside front cover of the prospectus must include, among other things: <ul style="list-style-type: none"> <li>• Name of issuer, including an English translation of a foreign name</li> <li>• Title and amount of securities being offered</li> <li>• Offering price of the securities</li> <li>• US stock market or principal US trading market on which the securities are traded</li> <li>• Cross-reference to the risk factors section</li> <li>• Required SEC, state, and other (that is, "subject to completion") legends</li> <li>• Names of the lead or managing underwriters</li> <li>• The date of the prospectus</li> </ul>	✓	✓		
<b>Inside front and outside back cover pages of the prospectus</b> (Regulation S-K Item 502) <ul style="list-style-type: none"> <li>• Table of contents for the prospectus</li> <li>• A legend describing the prospectus-delivery requirements for dealers</li> </ul>	✓	✓		
<b>Prospectus summary</b> (Regulation S-K Item 503(a)) <ul style="list-style-type: none"> <li>• A summary of the prospectus written in plain English</li> </ul>	✓	✓		

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<b>Address and telephone number</b> (Regulation S-K Item 503(b)) <ul style="list-style-type: none"> <li>The address and telephone number of the issuer's principal executive offices should be provided on the prospectus cover or in the prospectus summary</li> </ul>	✓	✓	✓	✓
<b>Risk factors</b> (Regulation S-K Item 105) <ul style="list-style-type: none"> <li>A discussion of the most significant factors that make the offering speculative or risky. This discussion should follow the prospectus summary.</li> </ul>	✓	✓		
<b>Risk factors</b> (Form 20-F, Item 3.D) <ul style="list-style-type: none"> <li>Prominently disclose risk factors that are specific to the issuer or its industry and make an offering speculative or one of high risk.</li> <li>Companies are encouraged, but not required, to list the risk factors in the order of their priority to the issuer</li> <li>The risk factors section is intended to be a summary of more detailed discussion contained elsewhere in the document</li> </ul>	✓		✓	✓
<b>Directors and senior management</b> (Form 20-F, Item 1.A) <ul style="list-style-type: none"> <li>Provide the names, business addresses, and functions of the issuer's directors and senior management</li> </ul>	✓		✓	
<b>Advisers</b> (20-F, Item 1.B) <ul style="list-style-type: none"> <li>Provide the names and addresses of the issuer's principal bankers and legal advisers to the extent the issuer has a continuing relationship with such entities, the sponsor for listing (where required by US regulations), and the legal advisers to the issuer</li> </ul>	✓		✓	
<b>Auditors</b> (Form 20-F, Item 1.C) <ul style="list-style-type: none"> <li>Provide the names and addresses of the issuer's auditors for the preceding three years (together with their membership in a professional body)</li> </ul>	✓		✓	
<b>Offer statistics</b> (Form 20-F, Item 2.A) <ul style="list-style-type: none"> <li>For each method of offering (for example, rights offering and general offering), state the total expected amount of the issue, including the expected issue price or the method of determining the price and the number of securities expected to be issued</li> </ul>	✓	✓		

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Method and expected timetable</b> (Form 20-F, Item 2.B)</p> <ul style="list-style-type: none"> <li>The time period during which the offer will be open, information regarding shortening or lengthening of such time period, and where and to whom purchase or subscription applications shall be addressed</li> <li>Method and time limits for paying up securities; where payment is partial, the manner and dates on which amounts due are to be paid</li> <li>Method and time limits for delivery of equity securities to subscribers or purchasers</li> <li>In the case of pre-emptive purchase rights, specify the procedure for the exercise of any right of preemption, the negotiability of subscription rights, and the treatment of subscription rights not exercised</li> <li>Provide a full description of the manner in which results of the distribution of securities are to be made public, and when appropriate, the manner for refunding excess amounts paid by applicants (including whether interest will be paid)</li> </ul>	✓	✓	✓	
<p><b>Capitalization and indebtedness</b> (Form 20-F, Item 3.B)</p> <p>Include the following:</p> <ul style="list-style-type: none"> <li>A statement of capitalization and indebtedness (distinguishing between guaranteed and non-guaranteed, and secured and unsecured, indebtedness) as of a date no earlier than 60 days before the date of the document</li> <li>The statement should show the issuer's capitalization on an actual basis and, if applicable, as adjusted to reflect the sale of new securities being issued and the intended application of the net proceeds therefrom</li> </ul>	✓	✓	✓	
<p><b>Reasons for the offer and use of proceeds</b> (Form 20-F, Item 3.C)</p> <ul style="list-style-type: none"> <li>The estimated net amount of the proceeds broken down into each principal intended use thereof. If the issuer has no specific plans for the proceeds, it should discuss the principal reasons for the offering</li> <li>If the proceeds are being used directly or indirectly to acquire assets, other than in the ordinary course of business, briefly describe the assets and their cost</li> <li>If the proceeds may or will be used to finance acquisitions of other businesses, give a brief description of such businesses and information on the status of the acquisitions</li> <li>If any material part of the proceeds is to be used to discharge, reduce, or retire indebtedness, describe the interest rate and maturity of such indebtedness and, for indebtedness incurred within the past year, the uses to which the proceeds of such indebtedness were put</li> </ul>	✓	✓		

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>History and development of the issuer</b> (Form 20-F, Item 4.A)</p> <ul style="list-style-type: none"> <li>• The legal and commercial name of the issuer</li> <li>• The date of incorporation and the length of life of the issuer, except where indefinite</li> <li>• The domicile and legal form of the issuer, the legislation under which the issuer operates, its country of incorporation, and the address and telephone number of its registered office (or principal place of business if different from its registered office). Provide the name and address of the issuer's agent in the US, if any.</li> <li>• The important events in the development of the issuer's business, for example, any material reclassification, merger, or consolidation of the issuer; acquisitions or dispositions of material assets other than in the ordinary course of business; material changes in conduct of the business; material changes in the types of products produced or services rendered; name changes; or any bankruptcy, receivership, or similar proceedings with respect to the issuer or significant subsidiaries. (Note: since the beginning of the last financial year for annual reports on Form 20-F)</li> <li>• A description of the issuer's principal capital expenditures and divestitures since the beginning of the issuer's last three financial years to the date of the offering or listing document</li> <li>• Principal capital expenditures and divestitures currently in progress, including the distribution of these investments geographically and the method of financing</li> <li>• Any public takeover offers by third parties in respect of the issuer's shares or by the issuer in respect of other companies' shares that have occurred during the last and current financial year and the price and outcome of such offers</li> <li>• The issuer must state that the SEC maintains an internet site that contains reports, proxy and information statements, and other information that issuers that file electronically with the SEC and state the address of that site (<a href="http://www.sec.gov">http://www.sec.gov</a>), and give the issuer's internet address, if available</li> </ul>	✓		✓	✓
<p><b>Business overview</b> (Form 20-F, Item 4.B)</p> <ul style="list-style-type: none"> <li>• The nature of the issuer's operations and its principal activities, including the main categories of products sold and/or services performed for each of the last three financial years and any significant new products and/or services</li> <li>• The principal markets in which the issuer competes, including a breakdown of total revenues by category of activity and geographic market for each of the last three financial years</li> <li>• The seasonality of the issuer's main business</li> <li>• The sources and availability of raw materials, including a description of whether prices of principal raw materials are volatile</li> <li>• The marketing channels and any special sales methods used by the issuer</li> <li>• Summary information regarding the extent to which the issuer is dependent, if at all, on patents or licenses, industrial, commercial, or financial contracts (including contracts with customers or suppliers) or new manufacturing processes, where such factors are material to the issuer's business or profitability</li> <li>• The basis for any statements made by the issuer regarding its competitive position</li> <li>• The material effects of government regulations on the issuer's business</li> <li>• Issuers that have not received operating revenues for three years prior to filing Form F-1 must disclose their plan of operations similar to that required by Regulation S-K Item 101(a)(2)</li> </ul>	✓		✓	✓



Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Organizational structure</b> (Form 20-F, Item 4.C)</p> <ul style="list-style-type: none"> <li>• If the issuer is part of a group, include a brief description of the group and the issuer's position within the group</li> <li>• A listing of the issuer's significant subsidiaries, including name, country of incorporation or residence, proportion of ownership interest, and, if different, proportion of voting power held</li> </ul>	✓		✓	✓
<p><b>Property, plant and equipment</b> (Form 20-F, Item 4.D)</p> <ul style="list-style-type: none"> <li>• Material tangible fixed assets, including leased properties, and any major encumbrances thereon, including a description of the size and uses of the property; productive capacity and extent of utilization of the issuer's facilities; how the assets are held; the products produced; and the location</li> <li>• Any environmental issues that may affect the issuer's utilization of the assets</li> <li>• Any material plans to construct, expand, or improve facilities, including the nature of and reason for the plan, an estimate of the amount of expenditures including amounts already paid, the method of financing the activity, the estimated dates of start and completion of the activity, and the increase of production capacity anticipated after completion</li> </ul>	✓		✓	✓
<p><b>Unresolved Staff comments</b> (Form 20-F, Item 4.A)</p> <ul style="list-style-type: none"> <li>• If the registrant is an accelerated filer or a large accelerated filer as defined in Exchange Act Rule 12b-2 or is a well-known seasoned issuer and has received written comments from the SEC Staff regarding its periodic reports under the Exchange Act not less than 180 days before the end of its fiscal year to which the annual report relates, and such comments remain unresolved, disclose the substance of any such unresolved comments the registrant believes are material</li> <li>• The disclosure may provide other information, including the position of the registrant with respect to any such comment</li> </ul>				✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Operating results</b> (Form 20-F, Item 5.A)</p> <ul style="list-style-type: none"> <li>• Significant factors, including unusual or infrequent events or new developments, materially affecting the issuer's income from operations, indicating the extent to which income was so affected, as well as any other significant component of revenue or expenses necessary to understand the issuer's results of operations</li> <li>• If the financial statements disclose material changes in net sales or revenues, discuss the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of products or services being sold or to the introduction of new products or services</li> <li>• Describe the impact of inflation, if material. If the currency in which financial statements are presented is of a country that has experienced hyperinflation, provide a five-year history of annual rates of inflation together with a discussion of the impact on the issuer</li> <li>• The impact of foreign currency fluctuations on the issuer, if material, and the extent to which foreign currency net investments are hedged by currency borrowings and other hedging instruments</li> <li>• Any governmental economic, fiscal, monetary, or political policies or factors that have materially affected, or could materially affect, the issuer's operations or investments by US shareholders</li> </ul>	✓		✓	✓
<p><b>Liquidity and capital resources</b> (Form 20-F, Item 5.B)</p> <ul style="list-style-type: none"> <li>• The issuer's liquidity (both short and long term), including: <ul style="list-style-type: none"> <li>– internal and external sources of liquidity and a brief discussion of any material unused sources of liquidity</li> <li>– a statement by the issuer that the working capital is sufficient or a description of how it proposes to provide additional working capital</li> <li>– the sources and amounts of the issuer's cash flows, including the nature and extent of any legal or economic restrictions on the ability of subsidiaries to transfer funds to the issuer and the impact such restrictions have had or are expected to have on the issuer to meet its cash obligations</li> <li>– the level of borrowings at the end of the period under review, the seasonality of borrowing requirements, and the maturity profile of borrowings and committed borrowing facilities, with a description of any restrictions on their use</li> </ul> </li> <li>• The type of financial instruments used, the maturity profile of debt, currency, and interest rate structure. The discussion also should include funding and treasury policies and objectives in terms of the manner in which treasury activities are controlled, currency in which cash is held, extent to which borrowings are at fixed rates, and the use of financial instruments for hedging</li> <li>• The issuer's material commitments for capital expenditures as of the end of the latest financial year and any subsequent interim period and an indication of the general purpose of such commitments and the anticipated sources of funds needed to fulfill such commitments</li> </ul>	✓		✓	✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<b>Research and development, patents, and licenses</b> (Form 20-F, Item 5.C) <ul style="list-style-type: none"> <li>A description of the issuer's research and development policies for the last three years</li> </ul>	✓		✓	✓
<b>Trend information</b> (Form 20-F, Item 5.D) <ul style="list-style-type: none"> <li>The most significant recent trends in production, sales and inventory, the state of the order book, and costs and selling prices since the latest financial year</li> <li>For at least the current financial year, any known trends, uncertainties, demands, commitments, or events that are reasonably likely to have a material effect on the issuer's net sales or revenues, income from continuing operations, profitability, liquidity, or capital resources, or that would cause reported information not necessarily to be indicative of future operating results or financial condition</li> </ul>	✓		✓	✓
<b>Off-balance-sheet arrangements</b> (Form 20-F Item 5.E) <ul style="list-style-type: none"> <li>Discussion in a separately captioned section of the issuer's off-balance-sheet arrangements that have or are reasonably likely to have a material effect on the issuer's financial condition, changes in financial condition, revenues and expenses, results of operations, liquidity, capital expenditures, or capital resources.</li> <li>To the extent necessary for an understanding of the off-balance-sheet arrangements and their effects: <ul style="list-style-type: none"> <li>The nature and business purpose of the arrangements</li> <li>The importance of the arrangements in respect of the issuer's liquidity, capital resources, market risk, or credit risk support, or other benefits</li> <li>The financial impact of the arrangements on the issuer (for example, revenues, expenses, cash flows, or securities issued) and the company's exposure to risk as a result of the arrangements (for example, retained interests or contingent liabilities)</li> </ul> </li> <li>Any known event, demand, commitment, trend, or uncertainty that will result in or is reasonably likely to result in the termination, or material reduction in availability to the company, of its off-balance sheet arrangements that provide material benefits to it, and the course of action that the company has taken or proposes to take in response to any such circumstances</li> </ul>	✓		✓	✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Tabular disclosure of contractual obligations</b> (Form 20-F Item 5.F)</p> <ul style="list-style-type: none"> <li>The issuer must provide in a table an overview of its aggregate contractual obligations as of the latest fiscal year balance sheet date</li> <li>Disclosure is required of the amounts, aggregated by type of contractual obligation, for at least the periods specified by the SEC (less than one year, one to three years, three to five years, and more than five years)</li> <li>The required categories of contractual obligations are long-term debt obligations, capital (finance) lease obligations, operating leases, purchase obligations, and other long-term liabilities reflected on the balance sheet under the GAAP of the primary financial statements. If the primary financial statements do not distinguish between capital and operating leases, these can be presented under one category</li> <li>The issuer may disaggregate the specified categories and use the categories most suitable to its business (provided that the table includes all obligations that fall under the specified categories)</li> </ul>	✓			✓
<p><b>Directors and senior management</b> (Form 20-F, Item 6.A)</p> <ul style="list-style-type: none"> <li>With respect to the issuer's directors and senior management, and any employees such as scientists or designers upon whose work the issuer is dependent, disclose: <ul style="list-style-type: none"> <li>Name, business experience, functions, and areas of experience in the issuer</li> <li>Principal business activities performed outside the issuer, including in the case of directors other principal directorships</li> <li>Date of birth or age (if required to be reported in the home country)</li> <li>The nature of any family relationship between any of the persons named above</li> <li>Any arrangement or understanding with major shareholders, customers, suppliers, or others pursuant to which any such person was selected</li> </ul> </li> </ul>	✓		✓	✓
<p><b>Compensation</b> (Form 20-F, Item 6.B)</p> <ul style="list-style-type: none"> <li>For the last full financial year for the issuer's directors and members of its administrative, supervisory, or management bodies, disclose: <ul style="list-style-type: none"> <li>The amount of compensation paid, and benefits in kind granted, to such persons by the issuer and its subsidiaries for services in all capacities to the issuer and its subsidiaries by any person</li> <li>Disclosure of compensation is required on an individual basis unless individual disclosure is not required in the issuer's home country and is not otherwise publicly disclosed by the issuer</li> <li>If any portion of the compensation was paid: (1) pursuant to a bonus or profit-sharing plan, provide a brief description of the plan and the basis upon which such persons participate in the plan; or (2) in the form of stock options, provide the title and amount of securities covered by the options, the exercise price, the purchase price (if any), and the expiration date of the options</li> <li>The total amounts set aside or accrued by the issuer or its subsidiaries to provide pension, retirement, or similar benefits</li> </ul> </li> </ul>	✓		✓	✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Board practices</b> (Form 20-F, Item 6.C)</p> <ul style="list-style-type: none"> <li>For the issuer’s last completed financial year, disclose the following information with respect to the issuer’s directors, and members of its administrative, supervisory, or management bodies: <ul style="list-style-type: none"> <li>Date of expiration of the current term of office and the period during which the person has served in that office</li> <li>Directors’ service contracts with the issuer or any of its subsidiaries providing for benefits upon termination of employment or an appropriate negative statement</li> <li>Details relating to the issuer’s audit committee and remuneration committee, including the names of committee members and a summary of the terms of reference under which the committee operates</li> </ul> </li> </ul>	✓		✓	✓
<p><b>Employees</b> (Form 20-F, Item 6.D)</p> <ul style="list-style-type: none"> <li>Provide the number of employees at the end of the period or the average for the period for each of the past three financial years (and changes in such numbers, if material)</li> <li>If possible, provide a breakdown of persons employed by main category of activity and geographic location</li> <li>Disclose any significant change in the number of employees, and information regarding the relationship between management and labor unions</li> <li>If the issuer employs a significant number of temporary employees, disclose the number of temporary employees on average during the most recent financial year</li> </ul>	✓		✓	✓
<p><b>Share ownership</b> (Form 20-F, Item 6.E)</p> <ul style="list-style-type: none"> <li>With respect to the persons listed in “Compensation” above, disclose their ownership of issuer shares and stock options as of the most recent practicable date (including disclosure on an individual basis of the number of shares and percent of shares outstanding of that class, and whether they have different voting rights)</li> <li>For options, disclose the title and amount of securities called for by the options, the exercise price, the purchase price, if any, and the expiration date of the options</li> <li>Any arrangements for involving the employees in the capital of the issuer, including any arrangement that involves the issue or grant of options or shares or securities of the issuer</li> </ul>	✓		✓	✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Major shareholders</b> (Form 20-F, Item 7.A)</p> <ul style="list-style-type: none"> <li>• With regard to the beneficial owners of 5% or more (or a lower percentage if required by the home country) of each class of the issuer's voting securities, disclose: <ul style="list-style-type: none"> <li>– Their names, the number of shares, and the percentage of outstanding shares of each class owned by each of them as of the most recent practicable date, or an appropriate negative statement if there are no major shareholders</li> <li>– Any significant change in the percentage ownership during the past three years</li> <li>– Whether the major shareholders have different voting rights, or an appropriate negative statement</li> </ul> </li> </ul> <p>Note: Beneficial ownership is defined to include the power to direct voting or disposition of shares or to receive the economic benefit of ownership</p> <ul style="list-style-type: none"> <li>• Disclose the portion of each class of securities held in the US and the number of record holders in the US</li> <li>• Disclose whether the issuer is directly or indirectly owned or controlled by another corporation(s), by any foreign government, or by any other natural or legal person(s) severally or jointly. If so, give the name(s) of such controlling corporation(s), government, or other person(s), and briefly describe the nature of such control, including the amount and proportion of capital held giving a right to vote</li> <li>• Discuss any arrangements the operation of which may at a subsequent date result in a change in control of the issuer</li> </ul>	✓		✓	✓
<p><b>Related-party transactions</b> (Form 20-F, Item 7.B)</p> <ul style="list-style-type: none"> <li>• Describe transactions and loans during the preceding three financial years (and any interim period) or, for an annual report on Form 20-F, since the beginning of the last financial year and to the latest practicable date, between the issuer and: <ul style="list-style-type: none"> <li>– enterprises that directly or indirectly control or are controlled by, or are under common control with, the issuer</li> <li>– associates</li> <li>– significant shareholders (beneficial ownership of a 10% voting interest is presumed to be significant) and close members of such person's family</li> <li>– key management personnel and close members of such person's family</li> <li>– enterprises in which a substantial voting interest is owned by significant shareholders or key management personnel or over which any such person is able to exercise significant influence (beneficial ownership of a 10% voting interest is presumed to be significant)</li> </ul> </li> </ul>	✓		✓	✓
<p><b>Interests of experts and counsel</b> (Form 20-F, Item 7.C)</p> <ul style="list-style-type: none"> <li>• If any of the named experts or counselors was employed on a contingent basis, owns shares of the issuer or its subsidiaries in an amount material to that person, has a material direct or indirect economic interest in the issuer, or depends on the success of the offering, provide a brief description of the nature and terms of such contingency or interest</li> </ul>	✓	✓		

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Legal or arbitration proceedings</b> (Form 20-F, Item 8.A.7)</p> <ul style="list-style-type: none"> <li>• Provide information with respect to legal or arbitration proceedings that may have, or have had in the recent past, significant effects on the issuer's financial position or profitability, including governmental proceedings pending or known to be contemplated</li> <li>• Include any material proceeding in which any director, any member of senior management, or any affiliate is adverse to the issuer or its subsidiaries, or has a material interest adverse to the issuer or its subsidiaries</li> <li>• For annual reports on Form 20-F, report dispositions of previously reported litigation that occurred during the last fiscal year</li> </ul>	✓		✓	✓
<p><b>Dividend policy</b> (Form 20-F, Item 8.A.8)</p> <ul style="list-style-type: none"> <li>• Describe the issuer's policy on dividend distributions</li> </ul>	✓		✓	✓
<p><b>Significant changes</b> (Form 20-F, Item 8.B)</p> <ul style="list-style-type: none"> <li>• Disclose whether or not any significant change has occurred since the date of the annual financial statements, and/or since the date of the most recent interim financial statements, if any, included in the document</li> </ul>	✓		✓	✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Offering and listing details</b> (Form 20-F, Item 9.A)</p> <ul style="list-style-type: none"> <li>• Provide the following information. <i>Note: when using Form 20-F as a registration statement under the Exchange Act, include only items 4 through 7 below; when using Form 20-F as an annual report, include only item 4 below</i> <ol style="list-style-type: none"> <li>1) The expected offering price or the method of determining the price and the amount of expenses specifically charged to the subscriber or purchaser</li> <li>2) If there is no established market for the securities, the manner of determining the offering price as well as of the exercise price of warrants and the conversion price of convertible securities, including who established the price or who is formally responsible for the determination of the price, the various factors considered in such determination, and the parameters or elements used as a basis for establishing the price</li> <li>3) If the issuer's shareholders have pre-emptive purchase rights and where the exercise of the right of pre-emption of shareholders is restricted or withdrawn, the issuer shall indicate the basis for the issue price if the issue is for cash, together with the reasons for such restriction or withdrawal, and the beneficiaries of such restriction or withdrawal if intended to benefit specific persons</li> <li>4) The principal host market(s) and principal market(s) outside the host market and the corresponding trading symbol on those markets for each class of the issuer's common equity, significant trading suspensions, if any, in the prior three years, and information about any lack of liquidity if the securities are not regularly traded in an organized market</li> <li>5) The type and class of securities to be offered. Whether the securities are registered or bearer, the number of offered securities to be issued for each kind of share. The nominal par or equivalent value on a per share basis and, where applicable, the minimum offer price. Arrangements for transfer and any restrictions on the free transferability of the offered securities</li> <li>6) Any limitation or qualifications of the rights of holders of the offered securities and the effect of any such limitation or qualifications on the rights evidenced by the securities to be listed or offered</li> <li>7) A description of terms of any warrants or rights being offered, and if securities are redeemable, a description of redemption provisions</li> </ol> </li> </ul>	✓	✓	✓	✓



Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Plan of distribution</b> (Form 20-F, Item 9.B)</p> <ul style="list-style-type: none"> <li>Names and addresses of the underwriters</li> <li>Subscription by major shareholders, directors, or members of the management, supervisory, or administrative bodies to the offering and whether any person intends to subscribe for more than 5% of the offering</li> <li>Identification of any group of targeted potential investors to whom the securities are offered. Whether the offering is being made in two or more countries using different tranches and if a tranche has been or is being reserved for certain of these, indication of any such tranche</li> <li>Any preferential allocation arrangements</li> <li>Any over-allotment option or greenshoe</li> <li>Any distribution otherwise than through underwriters, including arrangements with brokers or dealers</li> <li>Whether the securities are to be offered in connection with the writing of exchange-traded call options</li> <li>Any simultaneous private or public offering</li> <li>Description of underwriting arrangements</li> <li>Any material relationship between an underwriter and the issuer and in certain cases information regarding the managing underwriter's experience</li> </ul>	✓	✓		
<p><b>Markets</b> (Form 20-F, Item 9.C)</p> <ul style="list-style-type: none"> <li>All stock exchanges and other regulated markets on which the securities to be offered or listed are traded and any applications for future listing</li> <li>The dates on which the shares will be listed</li> </ul>	✓	✓	✓	✓
<p><b>Selling shareholders</b> (Form 20-F, Item 9.D)</p> <ul style="list-style-type: none"> <li>Names and addresses of selling shareholders and the nature of any position, office, or other material relationship that the selling shareholders have had within the past three years with the issuer or any of its predecessors or affiliates</li> <li>The number and class of securities being offered by each selling shareholder, and the percentage of the existing equity capital</li> <li>The number and percentage of the securities for each particular type of securities beneficially held by the selling shareholder before and immediately after the offering</li> </ul>	✓	✓		
<p><b>Dilution</b> (Form 20-F, Item 9.E)</p> <ul style="list-style-type: none"> <li>Where there is a substantial disparity between the public offering price and the effective cash cost to directors or senior management, or affiliated persons, of equity securities acquired by them in transactions during the past five years, or which they have the right to acquire, include a comparison of the public contribution in the proposed public offering and the effective cash contributions of such persons</li> <li>Disclose the amount and percentage of immediate dilution resulting from the offering, computed as the difference between the offering price per share and the net book value per share for the equivalent class of security, as of the latest balance sheet date</li> <li>In the case of a subscription offering to existing shareholders, disclose the amount and percentage of immediate dilution if they do not subscribe to the new offering</li> </ul>	✓	✓		

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Expenses of the issue</b> (Form 20-F, Item 9.F)</p> <ul style="list-style-type: none"> <li>Total amount of underwriting discounts or commissions, as well as the percentage such commissions represent of the total amount of the offering and the amount of discounts or commissions per share.</li> <li>A reasonably itemized statement of the major categories of offering expenses and by whom the expenses are payable, if other than the issuer</li> <li>The portion of such expenses to be borne by any selling shareholder</li> </ul>	✓	✓		
<p><b>Share capital</b> (Form 20-F, Item 10.A)</p> <p><i>Note: Not applicable for offerings of securities other than common equity</i></p> <ul style="list-style-type: none"> <li>The amount of issued capital and, for each class of share capital: (1) the number of shares authorized; (2) the number of shares issued and fully paid and issued but not fully paid; (3) the par value per share, or that the shares have no par value; and (4) a reconciliation of the number of shares outstanding at the beginning and end of the year</li> <li>If more than 10% of capital has been paid for with assets other than cash within the past five years, that fact should be stated</li> <li>If there are shares not representing capital, the number and main characteristics of such shares shall be stated</li> <li>Indicate the number, book value, and face value of shares in the issuer held by or on behalf of the issuer itself or by subsidiaries of the issuer</li> <li>Description of authorized but unissued capital and rights to subscribe for such capital</li> <li>Description of outstanding options to purchase share capital</li> <li>A three-year history of share capital, including changes in the amount of the issued capital and/or the number and classes of shares of which it is composed, together with a description of changes in voting rights attached to the various classes of shares during that time. The reason for any reduction of the amount of capital and the ratio of capital reductions also shall be given</li> <li>An indication of the resolutions, authorizations, and approvals by virtue of which the shares have been or will be created and/or issued, the nature of the issue, and amount thereof, and the number of shares which have been or will be created and/or issued, if predetermined</li> </ul>	✓	✓		

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Memorandum and articles of association</b> (Form 20-F, Item 10.B)</p> <p><i>Note: If this information has been reported previously in a registration statement on Form 20-F or a registration statement filed under the Securities Act and has not changed, the issuer may incorporate this information by a specific reference in the annual report to the previous registration statement</i></p> <ul style="list-style-type: none"> <li>• The issuer's objects and purposes, and where they can be found in the memorandum and articles</li> <li>• The register and the entry number therein</li> <li>• Provisions of the articles of association or charter and bylaws with respect to powers and rights of directors</li> <li>• The rights, preferences, and restrictions attaching to each class of the shares</li> <li>• Action necessary to change the rights of holders of the stock</li> <li>• Conditions for convoking annual general meetings and extraordinary general meetings of shareholders, including the conditions of admission</li> <li>• Any limitations on the rights to own securities</li> <li>• Any provision that could delay, defer, or prevent a change in control of the issuer</li> <li>• Any bylaw provision governing the ownership threshold above which shareholder ownership must be disclosed</li> <li>• With respect to some of the items mentioned above, description of material differences between the application of home-country law and US law in these areas</li> <li>• Any condition imposed by the memorandum and articles of association on changing the capital, where such condition is more stringent than is required by law</li> </ul>	✓	✓	✓	✓
<p><b>Material contracts</b> (Form 20-F, Item 10.C)</p> <ul style="list-style-type: none"> <li>• A summary of each material contract (other than contracts entered into in the ordinary course of business), to which the issuer or any member of the group is a party, for the two years immediately preceding publication of the document, including dates, parties, general nature of the contracts, terms and conditions, and amount of any consideration passing to or from the issuer or any other member of the group. Such contracts must also be filed as an exhibit to the report</li> </ul>	✓	✓	✓	✓
<p><b>Exchange controls</b> (Form 20-F, Item 10.D)</p> <ul style="list-style-type: none"> <li>• Describe any government laws, decrees, regulations, or other legislation of the home country of the issuer that might affect: <ul style="list-style-type: none"> <li>– the import or export of capital, including the availability of cash and cash equivalents for use by the issuer's group</li> <li>– the remittance of dividends, interest, or other payments to nonresident holders of the issuer's securities</li> </ul> </li> </ul>	✓	✓	✓	✓
<p><b>Taxation</b> (Form 20-F, Item 10.E)</p> <ul style="list-style-type: none"> <li>• Information regarding taxes (including withholding provisions) to which shareholders in the US may be subject</li> <li>• Whether the issuer assumes responsibility for the withholding of tax at the source and applicable provisions of any reciprocal tax treaties between the home country and the US, or a statement, if applicable, that there are no such treaties</li> </ul>	✓	✓	✓	✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Dividends and paying agents</b> (Form 20-F, Item 10.F)</p> <p><i>Note: Not applicable for offerings of securities other than common equity</i></p> <ul style="list-style-type: none"> <li>• Date on which entitlement to dividends arises, and any procedures for nonresident holders to claim dividends</li> <li>• Paying agents in countries where admission has taken place or is expected to take place</li> </ul>	✓	✓		
<p><b>Statement by experts</b> (Form 20-F, Item 10.G)</p> <ul style="list-style-type: none"> <li>• Where a statement or report is attributed to a person as an expert, provide such person's name, address, and qualifications and a statement to the effect that such statement or report is included, in the form and context in which it is included, with the consent of that person. The consents should also be filed as an exhibit</li> </ul>	✓	✓	✓	
<p><b>Documents on display</b> (Form 20-F, Item 10.H)</p> <ul style="list-style-type: none"> <li>• Where the documents concerning the issuer which are referred to in the document may be inspected</li> <li>• Exhibits and documents on display generally should be translated into English, or a summary in English should be provided</li> </ul>	✓	✓	✓	✓
<p><b>Quantitative analysis of market risk</b> (Form 20-F, Item 11(a))</p> <ul style="list-style-type: none"> <li>• Provide quantitative information, as of the end of the latest financial year, about market risk, including interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market rate or price risks (for example, equity price risk)</li> <li>• Categorize market risk sensitive instruments into instruments entered into for trading purposes and instruments entered into for purposes other than trading purposes</li> <li>• Within both the trading and other than trading portfolios, present separate quantitative information, to the extent material, for each market risk exposure category (that is, interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market risks, such as equity price risk)</li> <li>• Discuss material limitations, if any, that cause the disclosures about market risk not to reflect the net market exposures of the entity</li> <li>• Present summarized market risk information for the preceding fiscal year. In addition, discuss the reasons for material quantitative changes in market risk exposures between the current and preceding fiscal years</li> <li>• If issuer changes disclosure alternatives or key model characteristics, assumptions, and parameters used in providing quantitative information about market risk, and if the effects of such a change are material, explain reasons for the change and provide summarized comparable information under the new disclosure method for the year preceding the current year or provide disclosures for the current and preceding fiscal year under the old method</li> </ul>	✓		✓	✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Qualitative information about market risk</b> (Form 20-F, Item 11(b))</p> <ul style="list-style-type: none"> <li>• To the extent material, describe: <ul style="list-style-type: none"> <li>– The issuer’s primary market risk exposures, including interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market rate or price risks (for example, equity price risk)</li> <li>– How those exposures are managed, including, but not limited to, a discussion of the objectives, general strategies, and instruments, if any, used to manage those exposures</li> <li>– Changes in either the primary market risk exposures or how those exposures are managed, when compared to what was in effect during the most recently completed fiscal year, and what is known or expected to be in effect in future reporting periods</li> <li>– Qualitative information about market risk should be presented separately for market risk sensitive instruments entered into for trading purposes and those entered into for purposes other than trading</li> </ul> </li> </ul>	✓		✓	✓
<p><b>Description of debt securities being registered</b> (Form 20-F, Item 12.A)</p> <ul style="list-style-type: none"> <li>• Interest, conversions, maturity, redemption, amortization, sinking funds, or retirement</li> <li>• The kind and priority of any lien securing the issue, as well as a brief identification of the principal properties subject to each lien</li> <li>• Subordination of the rights of holders of the securities to other security holders or creditors</li> <li>• If the securities are subordinated, give the aggregate amount of outstanding indebtedness that is senior to the subordinated debt and briefly describe any limitations on the issuance of additional senior indebtedness, or state that there is no limitation</li> <li>• Restrictive covenants</li> <li>• Events of default and whether or not the issuer is required to provide periodic evidence of the absence of a default or of compliance with the terms of the indenture</li> <li>• Modification of the terms of the security or the rights of security holders</li> <li>• If rights may be materially limited or qualified by any other authorized class of securities, describe such limitations or qualifications</li> <li>• The tax effects of any “original issue discount”</li> <li>• The name and address of the trustee and paying agents. Note any material relationship between trustee and issuer, the percentage of the class of securities that is needed to require the trustee to take action, and what indemnification the trustee may require before proceeding to enforce the lien</li> <li>• The currency or currencies in which the debt is payable</li> <li>• Any law or decree determining the extent to which the securities may be serviced</li> <li>• The consequences of any failure to pay principal, interest, or any sinking or amortization installment</li> <li>• If the securities are guaranteed, the name of the guarantor and a brief outline of the contract of guarantee</li> </ul>	✓	✓	✓	✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<b>Description of warrants or rights to purchase the securities being registered</b> (Form 20-F, Item 12.B) <ul style="list-style-type: none"> <li>The amount of securities for which the warrants or rights are exercisable</li> <li>The period during and the price at which the warrants or rights are exercisable</li> <li>The amount of warrants or rights outstanding</li> <li>Provisions for changes or adjustments in the exercise price</li> <li>Any other material terms of the warrants or rights</li> </ul>	✓	✓	✓	✓
<b>Other securities</b> (Form 20-F, Item 12.C) <ul style="list-style-type: none"> <li>If securities other than equity, debt, warrants, or rights are being offered, a brief description of the rights evidenced by the securities</li> </ul>	✓	✓	✓	✓
<b>Description of ADSs being registered</b> (Form 20-F, Item 12.D). <ul style="list-style-type: none"> <li>The name of the depository and the address of its principal executive office</li> <li>The title of the ADRs and the deposited security.</li> <li>Briefly describe the ADSs, including: <ul style="list-style-type: none"> <li>the amount of deposited securities represented by one unit of ADRs</li> <li>any procedure for voting</li> <li>the procedure for collecting and distributing dividends</li> <li>the procedures for transmitting notices, reports, and proxy soliciting material</li> <li>the sale or exercise of rights</li> <li>the deposit or sale of securities resulting from dividends, splits, or plans of reorganization</li> <li>amendment, extension, or termination of the deposit arrangements</li> <li>inspection rights</li> <li>any transfer or withdrawal restrictions applicable to the underlying securities</li> <li>any limitation on the depository's liability</li> </ul> </li> </ul>	✓	✓	✓	✓
<ul style="list-style-type: none"> <li>All fees and charges that a holder of ADRs may have to pay, including the annual fee for general depository services</li> </ul>				✓
<ul style="list-style-type: none"> <li>All payments and fees made by the depository to the foreign issuer of the deposited securities</li> </ul>				✓
<b>Defaults, dividend arrearages, and delinquencies</b> (Form 20-F, Item 13) <i>Note: These items may be incorporated by reference from any previously furnished Form 6-K</i> <ul style="list-style-type: none"> <li>If there has been a material default in the payment of principal, interest, a sinking or purchase fund installment, or any other material default not cured within 30 days, in respect of indebtedness of the issuer or any of its significant subsidiaries that exceeds 5% of the issuer's consolidated assets, identify the indebtedness and the nature of the default. If the material default was in the payment of principal, interest, a sinking or purchase fund installment, include the amount of the default and total arrearages on the date of filing</li> <li>Describe dividend arrearages and any other material default not cured within 30 days on any series of preferred stock of the issuer or its significant subsidiaries</li> </ul>				✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Material modifications to the rights of security holders</b> (Form 20-F, Item 14.A-D)</p> <ul style="list-style-type: none"> <li>Describe material modifications to the instruments governing any class of registered securities, including by means of issuing or modifying any other class of securities</li> <li>Describe any withdrawal or substitution of a material amount of collateral securing a registered security, including a reference to the provisions of the underlying indenture authorizing the withdrawal or substitution (unless the withdrawal or substitution has been made in compliance with the requirements of the US Trust Indenture Act of 1939)</li> <li>Identify any changes to trustees or paying agents during the last financial year, including the names and addresses of the new trustees or paying agents, if any</li> </ul>				✓
<p><b>Use of proceeds</b> (Form 20-F, Item 14.E)</p> <ul style="list-style-type: none"> <li>Describe the actual use of proceeds from securities sold under any previously filed registration statement under the Securities Act, unless all proceeds have been accounted for in previous Form 20-F filings</li> <li>Unless unchanged from a previous Form 20-F, provide details relating to any previous registration statement under the Securities Act, including: <ul style="list-style-type: none"> <li>effective date and file number of registration statement</li> <li>offering date (or an explanation of why the offering has not commenced or has been terminated)</li> <li>managing underwriters, if any</li> <li>title of securities registered and, if applicable, class of securities into which a registered convertible security may be converted</li> <li>amount registered, aggregate offering price, amount sold to date, and aggregate offering price of the amount sold to date (for the account of the issuer and of any selling shareholders)</li> <li>expenses for underwriting discounts and commissions, finders' fees, expenses paid to or for underwriters, other expenses, and total expenses incurred from the effective date of the registration statement to the end of the most recent financial period (indicating which of such amounts are estimates and which payments have been made to directors, officers, general partners, 10% shareholders, affiliates, or others)</li> <li>net proceeds to the issuer after expenses mentioned above</li> <li>itemization of uses of proceeds by specific categories specified in Item 14.E.4(g) of Form 20-F, including payments made to directors, officers, general partners, 10% shareholders, affiliates, or others</li> <li>description of any material difference between the actual use of proceeds and the use of proceeds described in the prospectus</li> </ul> </li> </ul>				✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Controls and procedures</b> (Form 20-F, Item 15)</p> <ul style="list-style-type: none"> <li>• Disclose the conclusions of the issuer’s principal executive officer or officers and principal financial officer or officers, or persons performing similar functions, about the effectiveness of the issuer’s disclosure controls and procedures (as defined in Exchange Act Rule 13a-15(e) or 15d-15(e), based on their evaluation of the controls and procedures as of the end of each fiscal year in the case of foreign private issuers or as of the end of each fiscal quarter in the case of all other non-investment companies</li> <li>• Provide an annual internal control report from management, covering financial reporting</li> <li>• For large accelerated filers and accelerated filers, provide the registered public accounting firm’s attestation report on management’s assessment of the issuer’s internal control over financial reporting</li> <li>• Disclose any change in internal control over financial reporting identified in connection with management’s evaluation that occurred during the period covered by the annual report that has materially affected, or is reasonably likely to materially affect, the issuer’s internal control over financial reporting</li> </ul>				✓
<p><b>Audit committee financial expert</b> (Form 20-F, Item 16.A)</p> <ul style="list-style-type: none"> <li>• The company must disclose (1) whether it has at least one audit committee financial expert serving on the audit committee and, if so, (2) that person’s name and whether that person is independent as that term is defined in the listing standards applicable to the company. If there is more than one financial expert, the issuer may, but is not required to, disclose the names of the other experts</li> <li>• If the company does not have an audit committee financial expert, the company must disclose that fact and the reasons why such an expert is not available</li> </ul>				✓
<p><b>Code of ethics</b> (Form 20-F, Item 16.B)</p> <ul style="list-style-type: none"> <li>• The issuer must disclose whether it has adopted a written code of ethics that applies to its principal executive officer, principal financial officer, principal accounting officer or controller, or persons serving similar functions. If the company has not adopted such a code of ethics, it must explain why it has not done so.</li> <li>• Disclosure is also required of the nature of any amendment to or waiver of the code of ethics affecting the above officers (and, in the case of a waiver, to whom the waiver was granted and on what date)</li> <li>• The code of ethics must be filed as an exhibit to Form 20-F, be available for free upon request or be posted on the issuer’s website.</li> </ul>				✓



Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Principal accountant fees and services</b> (Form 20-F, Item 16.C)</p> <ul style="list-style-type: none"> <li>The issuer must disclose the aggregate amount of audit fees, audit-related fees, tax fees, and all other fees that were billed for each of the two most recent fiscal years for products and services provided by the principal accountant. The company must also describe in subcategories the nature of the services, provided that they are categorized as audit-related fees, tax fees, and all other fees</li> <li>The issuer must disclose the audit committee's policies and procedures concerning pre-approval of audit and non-audit services to be performed by the auditor</li> <li>The issuer must disclose the percentage of audit-related fees, tax fees, and all other fees described above that were approved by the audit committee</li> <li>If greater than 50%, disclosure is required of the percentage of hours expended on the principal accountant's engagement to audit the registrant's financial statements for the most recent fiscal year that were attributed to work performed by persons other than the principal accountant's full-time, permanent employees</li> </ul>				✓
<p><b>Exemptions from the listing standards for audit committees</b> (Form 20-F, Item 16.D)</p> <ul style="list-style-type: none"> <li>The issuer must provide the disclosure required by Exchange Act Rule 10A-3(d) if it has taken advantage of certain exemptions from the independence standards for audit committees provided by Exchange Act Rule 10A-3</li> </ul>				✓
<p><b>Purchases of equity securities by the issuer and affiliated purchasers</b> (Form 20-F, Item 16.E)</p> <ul style="list-style-type: none"> <li>The issuer must disclose, in a prescribed tabular format, certain information on a monthly basis with respect to any purchase made by the registrant or any affiliated purchaser (as defined in §240.10b-18(a)(3)) of shares of the issuer's equity securities that are registered pursuant to Section 12 of the Exchange Act</li> </ul>				✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Change in and disagreements with issuer’s certifying accountant</b> (Form 20-F, Item 16.F)<sup>1</sup></p> <ul style="list-style-type: none"> <li>• The issuer must disclose the following information relating to any changes in and disagreements with its certifying accountant: <ul style="list-style-type: none"> <li>– Whether, in the two most recent fiscal years, an independent accountant that was previously engaged as the principal accountant to audit the issuer’s financial statements, or to audit a significant subsidiary and on whom the principal accountant expressed reliance in its report, has resigned, declined to stand for re-election, or was dismissed and the date thereof</li> <li>– Whether the principal accountant’s report on the financial statements for either of the past two years contained an adverse opinion or a disclaimer of opinion, or was qualified or modified as to uncertainty, audit scope, or qualification. If so, the issuer must describe the nature of each such opinion, disclaimer, modification, or qualification</li> <li>– Whether the decision to change accountants was recommended or approved by the board of directors, or by any audit or similar committee of the board of directors</li> <li>– Whether any disagreements or reportable events occurred within the last two fiscal years and any interim period preceding the change of accountant</li> <li>– Whether during the two most recent fiscal years or any subsequent interim period, the issuer had similar, material transactions to those which led to the disagreements with the former accountants, and whether such transactions were accounted for or disclosed in a manner different from that which the former accountants would have concluded was required. If so, the issuer would be required to disclose the existence and nature of the disagreement or reportable event, and the effect on the financial statements according to the method required by the former accountants</li> </ul> </li> <li>• If there has been a change in certifying accountant, the issuer must provide its former accountant a copy of the disclosures that it intends to make in response to Item 16F and request the former accountant to furnish the issuer with a letter stating whether it agrees with the disclosures made by the issuer and, if not, stating the respects in which it does not agree. The issuer must also file the former accountant’s letter as an exhibit to the annual report or registration statement containing the Item 16F disclosure. If, however, the change in accountants occurs less than 30 days prior to the filing of the annual report or registration statement and the former accountant’s letter is unavailable at the time of filing, the letter may be filed within 10 business days after the filing of the annual report or registration statement</li> </ul>	✓	✓	✓	✓
<p><b>Corporate governance practices</b> (Form 20-F, Item 16.G)</p> <ul style="list-style-type: none"> <li>• If the issuer’s securities are listed on a US national securities exchange, it must provide a concise summary of any significant ways in which its corporate governance practices differ from those followed by domestic US issuers under the listing standards of the relevant exchange</li> </ul>				✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Certifications required by Section 302 of Sarbanes Oxley</b> (Form 20-F, following signatures)</p> <p>Provide a separate certification for each principal executive officer and principal financial officer of the registrant stating the following:</p> <ol style="list-style-type: none"> <li>1) I have reviewed this annual report on Form 20-F of [identify company];</li> <li>2) Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;</li> <li>3) Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations, and cash flows of the company as of, and for, the periods presented in this report;</li> <li>4) The company's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the company and have: <ol style="list-style-type: none"> <li>a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the company, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;</li> <li>b) designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;</li> <li>c) evaluated the effectiveness of the company's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and</li> <li>d) disclosed in this report any change in the company's internal control over financial reporting that occurred during the period covered by the annual report that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting;</li> </ol> </li> <li>5) The company's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the company's auditors and the audit committee of the company's board of directors (or persons performing the equivalent functions): <ol style="list-style-type: none"> <li>a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the company's ability to record, process, summarize, and report financial information; and</li> <li>b) any fraud, whether or not material, that involves management or other employees who have a significant role in the company's internal control over financial reporting.</li> </ol> </li> </ol> <p>See Exchange Act Rules 13a-14 and 15d-14.</p>				✓

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Certifications required by Section 906 of Sarbanes Oxley</b> (to accompany Form 20-F)</p> <ul style="list-style-type: none"> <li>• Provide a separate certification for each principal executive officer and principal financial officer of the registrant stating the following: <ul style="list-style-type: none"> <li>– the accompanying Annual Report on Form 20-F of the company for the year ended [_____] (the Report) fully complies with the requirements of Section 13(a) or Section 15(d), as applicable, of the Exchange Act; and</li> <li>– the information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the issuer.</li> </ul> </li> </ul>				✓
<p><b>SEC position on indemnification for Securities Act liabilities</b> (Regulation S-K Item 510)</p> <ul style="list-style-type: none"> <li>• Issuers are required to include a statement to the effect that insofar as indemnification for liabilities arising out of the Securities Act may be permitted to directors, officers, or persons controlling the issuer, the issuer has been informed that in the opinion of the SEC, such indemnification is against public policy and is unenforceable</li> </ul>	✓	✓		
<p><b>Material changes: Form F-1, Form F-3</b> (Form F-1 Item 4A, Form F-3 Item 5)</p> <ul style="list-style-type: none"> <li>• Describe material changes in issuer’s affairs that have occurred since the end of the latest financial year for which certified financial statements were included in the latest filing under the Exchange Act and that have not been described in Form 6-K or Form 8-K and incorporated by reference</li> <li>• If not included in the Exchange Act documents incorporated by reference: <ul style="list-style-type: none"> <li>– financial statements of acquired or to be acquired companies in accordance with Regulation S-X Rule 3-05</li> <li>– pro forma financial information in accordance with Regulation S-X Article 11</li> <li>– restated financial statements if there is a change in accounting principles or a correction of an error that requires material retroactive restatements</li> <li>– restated financial statements where there has been one or more business combinations accounted for by the pooling of interests method subsequent to the most recent financial year-end and the acquired businesses, considered in the aggregate, are significant under Rule 11-01(b)</li> <li>– any financial information required because of a material disposition of assets outside the normal course of business</li> </ul> </li> <li>• If financial statements incorporated by reference in the registration statement are not sufficiently current to comply with Item 8.A of Form 20-F, updated financial statements must be presented in the prospectus or in a subsequent filing under the Exchange Act that is incorporated by reference in the prospectus</li> <li>• For an issuer’s fiscal years ending before December 15, 2011, financial statements or information required to be furnished by these items shall be reconciled to either Item 17 or Item 18 of Form 20-F, whichever is applicable to the primary financial statements. For an issuer’s fiscal years ending on or after December 15, 2011, financial statements or information required to be furnished by these shall be reconciled pursuant to Item 18 of Form 20-F</li> </ul>	✓	✓		

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Incorporation of documents by reference</b> (Form F-1 Item 5, Form F-3 Item 6)</p> <ul style="list-style-type: none"> <li>The issuer's latest Form 20-F, Form 40-F, Form 10-K, or Form 10 filed pursuant to the Exchange Act should be incorporated by reference</li> <li>Any report on Form 10-Q or Form 8-K filed since the date of filing of the annual report will also be incorporated by reference</li> <li>The prospectus shall state that all subsequent reports on Form 20-F, Form 40-F, or Form 10-K, and all subsequent filings on Form 10-Q and Form 8-K, filed before the termination of the offering, must be incorporated by reference (applicable only to Form F-3)</li> <li>The issuer may incorporate by reference any Form 6-K meeting the requirements of Form F-1 or Form F-3, depending on whichever is being filed</li> <li>If the issuer is registering capital stock, the issuer must incorporate by reference the Exchange Act filings that describe such capital stock (applicable only to Form F-3)</li> <li>In addition, the issuer must state that it will: <ul style="list-style-type: none"> <li>provide at no cost to each person to whom a prospectus is delivered, and who submits an oral or written request, a copy of any or all of the information that has been incorporated by reference in the prospectus but not delivered with the prospectus</li> <li>provide the name, address, and telephone number to which the request for this information must be made</li> <li>provide its website address, including the uniform resource locator (URL) where the incorporated reports and other documents may be accessed (applicable only to Form F-1)</li> </ul> </li> <li>The issuer must identify the reports and other information that it files with the SEC and state that the SEC maintains an internet site that contains reports, proxy, and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (<a href="http://www.sec.gov">http://www.sec.gov</a>). All filers must give their internet address, if available</li> </ul>	✓	✓		
<p><b>Indemnification of directors and officers</b> (Regulation S-K Item 702)</p> <ul style="list-style-type: none"> <li>State the general effect of any statute, charter provisions, bylaws, contract, or other arrangements under which any controlling persons, director, or officer of the issuer is insured or indemnified in any manner against liability that they might incur in their capacity as such</li> </ul>	✓	✓		
<p><b>Recent sales of unregistered securities</b> (Regulation S-K Item 701)</p> <ul style="list-style-type: none"> <li>Provide the information specified in Item 701 of Regulation S-K regarding all securities of the issuer sold by the issuer during the past three years that were not registered under the Securities Act</li> </ul>	✓			

Disclosure	Form F-1	Form F-3	Registration statement on Form 20-F	Annual report on Form 20-F
<p><b>Exhibits and financial statement schedules</b> (Regulation S-K Item 601, Form 20-F, Items 18-19)</p> <ul style="list-style-type: none"> <li>• For Securities Act registration statements refer to Regulation S-K Item 601 for a chart specifying all exhibits required to be filed as part of the registration statement. Also, with respect to Form F-1 refer to Regulation S-X and Item 18 of Form 20-F</li> <li>• For annual reports and registration statements under the Exchange Act refer to the instructions to Item 19 of Form 20-F</li> </ul>	✓	✓	✓	✓
<p><b>Undertakings</b> (Regulation S-K Item 512)</p> <ul style="list-style-type: none"> <li>• Refer to Regulation S-K Item 512 for various undertakings required to be made by the issuer in connection with different forms of registration statements and different types of offerings</li> </ul>	✓	✓		

## ENDNOTES

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- <sup>1</sup> See Section 204.03 of the NYSE Listed Company Manual. These disclosures are substantially similar to those required by domestic US issuers. Foreign private issuers that are listed on the NYSE are also required by that exchange to notify the market about a change in their auditors and furnish that information in a Form 6-K. To the extent the issuer's home country requires information about a change in certifying accountant to be reported on a current basis, the issuer should also provide that information in a Form 6-K.





# ANNEX B

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## NYSE Quantitative Listing Criteria and Corporate Governance Standards

The NYSE's requirements for initial listing and listing maintenance are set out below. Foreign private issuers may satisfy either the general NYSE listing standards applicable to domestic US issuers or the NYSE's Alternate Listing Standards for foreign private issuers. They apply only to foreign private issuers with a broad, liquid market for their securities in their country of origin.<sup>1</sup>

### Quantitative Initial Listing Standards<sup>2</sup>

Under the NYSE initial listing standards, an issuer typically must meet the following minimum distribution and market value criteria<sup>3</sup> and must also meet one of the two financial standards described below.<sup>4</sup>

#### Minimum Distribution Requirements

- *IPOs*: An IPO issuer must have 400 holders of 100 shares or more<sup>5</sup> and 1.1 million publicly held shares.<sup>6</sup>
- *Transfer or quotation*: An issuer seeking to transfer to the NYSE or list its existing securities on the NYSE must have either:
  - 400 holders of 100 shares or more;<sup>7</sup> or
  - 2,200 total stockholders, together with average monthly trading volume of 100,000 shares for the most recent six months;<sup>8</sup> or
  - 500 total stockholders, together with average monthly trading volume of 1 million shares for the most recent 12 months and 1.1 million publicly held shares.<sup>9</sup>

#### Market Value of Publicly Held Shares

The aggregate market value of publicly held shares must be at least \$40 million for IPO issuers<sup>10</sup> or \$100 million for issuers seeking to transfer to the NYSE or list their existing securities.<sup>11</sup> In addition, a company must have a closing price or, if listing in connection with an IPO, an IPO price per share of at least \$4 at the time of initial listing.

#### Financial Standards

A company seeking to list must meet the requirements of either the Earnings Test or the Global Market Capitalization Test:

- *Earnings Test*: An issuer's pre-tax earnings (from continuing operations and after minority interest, amortization, and equity in the earnings or losses of investees, subject to certain adjustments) must total:
  - at least \$10 million in the aggregate for the last three fiscal years including a minimum of \$2 million in each of the two most recent fiscal years and positive amounts in all three years;
  - at least \$12 million in the aggregate for the last three fiscal years together with a minimum of \$5 million in the most recent fiscal year and \$2 million in the next most recent fiscal year;<sup>12</sup> or
  - if the issuer is an EGC<sup>13</sup> and it avails itself of the Securities Act and Exchange Act provisions permitting EGCs to report only two years of financial statements, it may meet the final prong of this test if it has at least \$10 million in aggregate pre-tax earnings for the last two years with at least \$2 million in both years.

- *Global Market Capitalization Test*: An issuer must have at least \$200 million in global market capitalization.<sup>14</sup>

## Alternate Listing Standards for Foreign Private Issuers Only

The NYSE provides Alternate Listing Standards for foreign private issuers that do not list under the standards listed for domestic issuers listed above. These alternative minimum distribution, market value criteria, and financial standards are described below.<sup>15</sup>

### FPI Minimum Distribution Requirements

A foreign private issuer must have:

- 5,000 worldwide holders of 100 shares or more; and
- 2.5 million shares held publicly worldwide.<sup>16</sup>

### FPI Market Value of Publicly Held Shares

The aggregate worldwide market value of publicly held shares of the foreign private issuer must be at least \$100 million. In addition, an issuer must have a closing price or, if listing in connection with an IPO, an IPO price per share of at least \$4 at the time of listing.

### Financial Standards

A foreign private issuer seeking to list must satisfy the requirements of either the Earnings Test or the Valuation/Revenue Tests:

- *Earnings Test*:
  - The pre-tax earnings (from continuing operations and after minority interest, amortization, and equity in the earnings or losses of investees, subject to certain adjustments) of the foreign private issuer must be at least \$100 million in the aggregate for the last three fiscal years, including a minimum of \$25 million in each of the most recent two fiscal years;<sup>17</sup> or
  - If the issuer is an EGC and it avails itself of the Securities Act and Exchange Act provisions permitting EGCs to report only two years of financial statements, it may meet the final prong of this test if it has at least \$100 million in aggregate pre-tax earnings for the last two years with at least \$25 million in each year.
- *Valuation/Revenue Tests*:
  - *Valuation/Revenue with Cash Flow Test*:<sup>18</sup>
    - At least \$500 million in global market capitalization, at least \$100 million in revenues during the most recent 12-month period, and \$100 million in the aggregate cash flows for the last three fiscal years, including \$25 million in each of the two most recent fiscal years (subject to certain adjustments); or
    - If the issuer is an EGC and it avails itself of the Securities Act and Exchange Act provisions permitting EGCs to report only two years of financial statements, it may meet the final prong of this test if it has at least \$100 million aggregate cash flows in the last two fiscal years with at least \$25 million in each year.
  - *Pure Valuation/Revenue Test*:<sup>19</sup>
    - At least \$750 million in global market capitalization and \$75 million in revenues during the most recent fiscal year.

## Quantitative Maintenance Requirements

To maintain its listing on the NYSE, a domestic US issuer or foreign private issuer must meet certain quantitative maintenance standards, which are summarized below.

### Minimum Distribution Requirements

The NYSE may promptly initiate suspension and delisting procedures against an issuer if:

- the total number of stockholders is less than 400; or
- the total number of stockholders is less than 1,200 and the average monthly trading volume for the most recent 12 months is less than 100,000 shares; or
- the number of publicly held shares is less than 600,000.<sup>20</sup>

### Minimum Financial Standards

The NYSE will consider an issuer to be below compliance (and so eligible for suspension and delisting) if an issuer's average global market capitalization over a consecutive 30 trading-day period is less than \$50 million<sup>21</sup> and, at the same time, total stockholders' equity is less than \$50 million. An issuer that falls below an average global market capitalization of \$15 million over a consecutive 30 trading-day period will be subject to prompt suspension and delisting procedures.<sup>22</sup>

When determining an issuer's ability to meet the market capitalization test in any of the financial standard tests above, include the total number of outstanding shares of common stock (excluding treasury shares, if any) along with any shares of common stock issuable upon conversion of any other outstanding equity security. All such shares should be included in the calculation of market value so long as the security is the "substantial equivalent" of the issuer's common stock. All securities included in the calculation must be either publicly traded (or quoted) or convertible into a publicly traded (or quoted) security.

### Price Criteria

An issuer will be considered to be below compliance standards and accordingly may be subject to suspension and delisting if the average closing price of its listed security is less than \$1.00 over a consecutive 30 trading-day period. The NYSE will grant the issuer six months to cure the deficiency so long as the issuer (1) files a press release disclosing the deficiency within four days following notification; and (2) notifies the NYSE that it intends to return its share price and average share price to more than \$1.00 within 10 business days following NYSE notification. A foreign private issuer has 30 days following notification to issue a press release disclosing that it has fallen below the continued listing standards. In the event that an issuer does not comply with the press release requirement, the NYSE will issue a press release noting the issuer's failure to meet the continued listing requirements. If, on the final trading day of any calendar month during the six-month cure period, the issuer's shares have a closing price of at least \$1.00 and an average closing price of \$1.00 over the prior 30 trading days, then the issuer will be deemed to be in compliance. However, if the six-month cure period expires without the securities meeting these requirements, then the NYSE will initiate the suspension and delisting of the securities.<sup>23</sup>

## Other Maintenance Requirements

An issuer may also be subject to suspension and delisting on a number of additional grounds, including:

- a substantial reduction in operating assets and/or scope of operations;
- the failure of an issuer to make timely, adequate, and accurate disclosures of information to its shareholders and the investing public; and
- the failure to observe good accounting practices in reporting of earnings and financial position.<sup>24</sup>

## NYSE Corporate Governance Requirements

In addition to the quantitative and maintenance listing standards detailed above, an issuer must meet certain corporate governance standards for an initial listing, with two key exceptions:

- *Foreign Private Issuers:* Foreign private issuers are permitted to follow home-country practice in lieu of the NYSE's corporate governance standards, other than the NYSE's requirements that it must: (1) have an audit committee that meets the requirements of Exchange Act Rule 10A-3; and (2) provide prompt notification from its CEO of non-compliance with the applicable provisions of the NYSE's corporate governance rules. Whether a listed foreign private issuer follows the NYSE corporate governance standards or its home-country practice, it must disclose any ways in which its corporate governance practices differ from those followed by domestic US issuers under NYSE listing standards.<sup>25</sup>
- *Controlled Companies:* A "controlled company" is an issuer in which more than 50% of the voting power for the election of directors is held by an individual, a group, or another company. MLPs often qualify as controlled companies. A "controlled company" is not required to comply with the NYSE's requirements to have a majority of independent directors, a nominating/corporate governance committee, or a compensation committee.<sup>26</sup>

## Majority of Independent Directors

A majority of the issuer's board of directors must consist of independent directors.<sup>27</sup> A director will qualify as independent only if the board affirmatively determines that the director does not have any material relationships with the company (either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company).<sup>28</sup> In making its determination, the board of directors must consider a candidate's commercial, industrial, banking, consulting, legal, accounting, charitable, and familial relationships, among others. The NYSE notes that a director's stock ownership, even if significant, should not in and of itself negate a determination of independence.<sup>29</sup>

A director would not be independent if:

- currently or during the previous three years, either the director was an employee of the company or an immediate family member of the director was an executive officer of the company;<sup>30</sup>
- during any 12-month period within the last three years, the director (or any of the director's immediate family members) has received more than \$120,000 in direct compensation from the company (other than in the form of director and committee fees, pension, or other forms of deferred compensation for prior service, provided such compensation is not contingent in any way on continued service);<sup>31</sup>
- (A) the director is a current partner or employee of a firm that is the company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the company's audit within that time;<sup>32</sup>

- the director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee;<sup>33</sup> or
- the director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues.<sup>34</sup>

An "immediate family member" is broadly defined to include a person's spouse, parents, children, and siblings, as well as mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone who shares that person's home (other than a domestic employee).

"Listed company" or "company" for the purpose of determining independence includes any parent or subsidiary in a consolidated group with the company.<sup>35</sup>

Furthermore, with respect to service on the compensation committee, the board of directors must affirmatively conclude that the director is able to be independent from management after consideration of all relevant factors, including, but not limited to:<sup>36</sup>

- the director's compensation, including any consulting, advisory, or other compensatory fees paid by the listed company; and
- any affiliation between such director and the listed company, any of its subsidiaries, or any affiliates of its subsidiaries.

## Executive Session

The listed company must hold regularly scheduled meetings of non-management directors without management present. Furthermore, a listed company that chooses to include all non-management directors at such meetings should also hold an executive session solely for independent directors at least once a year.<sup>37</sup>

## Nominating/Corporate Governance Committee

The listed company must have a fully independent nominating/corporate governance committee,<sup>38</sup> which is governed by a written charter that:

- addresses the committee's purpose and responsibilities, which must include identifying and selecting or recommending director nominees, developing, and recommending corporate governance principles, and overseeing the evaluation of the board and management;<sup>39</sup> and
- provides for an annual performance evaluation of the committee.<sup>40</sup>

The nominating/corporate governance committee charter should also address how the committee:

- qualifies its members;
- appoints and removes its members;
- is structured and operates (including the authority to delegate to subcommittees); and
- reports to the board.<sup>41</sup>

Finally, the committee charter should also specify that the committee has the sole authority over the retention and termination of any company engaged to identify director candidates, including the terms and fees relating to such search.

## Compensation Committee

Companies must have a fully independent compensation committee,<sup>42</sup> which is governed by a written charter that:

- addresses its purpose and responsibilities, including, at a minimum, direct responsibility for:
  - setting corporate goals and objectives relevant to CEO compensation, evaluating CEO performance, and determining and approving CEO compensation levels in light of such evaluation;<sup>43</sup>
  - recommending compensation, incentive-compensation plans, and equity-based plans for non-CEO executives that are subject to board approval to the board;<sup>44</sup> and
  - producing a report on executive compensation as required by the SEC to be included in the company's annual proxy statement or annual report filed with the SEC;<sup>45</sup>
- provides for an annual performance evaluation of the compensation committee;<sup>46</sup> and
- sets forth the following rights and responsibilities with respect to the use of compensation consultants, legal counsel, or other advisers by the compensation committee:
  - the ability, in its sole discretion, to retain or obtain the advice of a compensation consultant, independent legal counsel, or other adviser upon consideration of all of the factors relevant to that person's independence from management, including the following:
    - any other services to be provided to the issuer by the employer of the compensation consultant, legal counsel, or other adviser;
    - any fees to be received from the issuer by the employer of the compensation consultant, legal counsel, or other adviser taken as a percentage of the total revenue of such employer;
    - the policies and procedures of the employer of the compensation consultant, legal counsel, or other adviser that are designed to prevent conflicts of interest;
    - any business or personal relationships between any member of the compensation committee and the proposed compensation consultant, legal counsel, or other adviser;
    - whether such compensation consultant, legal counsel, or other adviser owns any stock of the listed company;
    - any business or personal relationship of the compensation consultant, legal counsel, other adviser, or the person employing the adviser with an executive officer of the listed company; and
    - responsibility for the appointment, compensation, and oversight of the work of any such compensation consultant, independent legal counsel, or other adviser. The listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to such compensation consultant, independent legal counsel, or other adviser.

The compensation committee charter should also address committee member qualifications, committee member appointment and removal, committee structure and operations (including authority to delegate to subcommittees), and committee reporting to the board.<sup>47</sup>

## Audit Committee

### Composition

Companies must have an audit committee composed of at least three members that meet all of the NYSE independence requirements as well as the independence and other requirements of Exchange Act Rule 10A-3 (implementing Section 301 of Sarbanes-Oxley).<sup>48</sup> The NYSE does not mandate a minimum number of members for foreign private issuers.

The audit committee members must be “financially literate,” and at least one member must have accounting or financial management expertise, as determined by the company’s board based on its business judgment. For any audit committee member that serves on the audit committees of more than three public companies at the same time, the board must determine that such service would not impact such member’s ability to serve effectively on its audit committee, and it must disclose its determination on or through the company’s website or in the company’s annual proxy statement or, if the company does not file an annual proxy statement, in its annual report filed with the SEC.<sup>49</sup>

## Charter

The audit committee must have a written charter that addresses:

- the committee’s purpose, which at a minimum must be to:
  - assist the board with oversight of: (1) the integrity of the company’s financial statements; (2) the company’s compliance with legal and regulatory requirements; (3) the independent auditor’s qualifications and independence; and (4) the performance of the company’s internal audit function and independent auditors;<sup>50</sup> and
  - prepare an audit committee statement as required by the SEC to be included in the company’s annual proxy statement or annual report filed with the SEC;<sup>51</sup>
- an annual performance evaluation of the audit committee;<sup>52</sup> and
- the duties and responsibilities of the audit committee, which at a minimum must include those set out in Exchange Act Rule 10A-3(b)(2), (3), (4) and (5) (concerning responsibilities relating to: (1) registered public accounting firms; (2) complaints relating to accounting, internal accounting controls or auditing matters; (3) authority to engage advisers; and (4) funding as determined by the audit committee),<sup>53</sup> as well as to:
  - at least annually, obtain and review a report by the independent auditor describing: (1) the firm’s internal quality-control procedures; (2) any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by government or professional bodies, within the preceding five years respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (3) all relationships between the independent auditor and the company (to assess the auditor’s independence);<sup>54</sup>
  - meet to review and discuss the company’s annual audited financial statements;<sup>55</sup> quarterly unaudited financial statements with management and the independent auditor, including the company’s MD&A disclosures;<sup>56</sup> earnings press releases;<sup>57</sup> financial information and earnings guidance provided to analysts and rating agencies;<sup>58</sup> and policies with respect to risk assessment and risk management;<sup>59</sup>
  - meet separately, periodically, with management, with internal auditors and with independent auditors;<sup>60</sup>
  - review with the independent auditors any audit problems or difficulties and management’s response;<sup>61</sup>
  - set clear hiring policies for employees or former employees of the independent auditors;<sup>62</sup> and
  - report regularly to the board.<sup>63</sup>

## Internal Audit

Companies must have an internal audit function that evaluates the company’s risk management processes and internal control systems, and reports its findings to management and the audit committee. This function may be provided by a third party other than the company’s independent auditor.<sup>64</sup>

## Shareholder Meetings

Each fiscal year, a listed company must hold an annual meeting of its shareholders.<sup>65</sup>

## Shareholder Approval of Certain Transactions

Shareholder approval is required for each of the following material transactions, with certain exceptions:

- the implementation of equity-compensation plans and material revisions thereto;<sup>66</sup>
- an issuance of more than 1% of the outstanding common stock or 1% of the voting power outstanding of the issuer (measured either by amount of shares or voting power) to a related party (that is, directors, officers, or substantial security holders of the issuer) or to a subsidiary, affiliate, or company owned by the related party, or any company or entity in which a related party has a substantial direct or indirect interest;<sup>67</sup>
- an issuance of more than 20% of the outstanding common stock of the issuer (measured either by amount of shares or voting power);<sup>68</sup> and
- an issuance that will result in a change of control of the issuer.<sup>69</sup>

## Corporate Governance Guidelines

Companies must adopt and disclose corporate governance guidelines that must address:

- director qualification standards;
- director responsibilities;
- director access to management and, as necessary and appropriate, independent advisers;
- director compensation;
- director orientation and continuing education;
- management succession; and
- annual performance evaluation of the board.

The company must make its corporate governance guidelines available on its website, and it must state in its annual proxy statement or, if the company does not file an annual proxy statement, in its annual report filed with the SEC, that the guidelines are available on its website and provide the website address.<sup>70</sup>

## Code of Business Conduct and Ethics

Companies must adopt and disclose a code of business conduct and ethics for directors, officers, and employees.

This code should address, among other things:

- conflicts of interest;
- corporate opportunities;
- confidentiality;
- fair dealing;
- protection and use of company assets;
- compliance with laws, rules, and regulations (including insider trading laws); and
- encouraging the reporting of illegal or unethical behavior.



The code must contain compliance standards and procedures to facilitate its effective operation and must require that only the board or a board committee may waive any provision of the code for executive officers or directors and that any such waiver be disclosed to shareholders within four business days.

The company must make the code available on its website, and it must state in its annual proxy statement or, if the company does not file an annual proxy statement, in its annual report filed with the SEC, that this information is available on its website and provide the website address.<sup>71</sup>

### **Certification Requirements**

Each year the CEO must certify to the NYSE that they are not aware of any violation by the company of NYSE corporate governance listing standards. In addition, the CEO must promptly notify the NYSE in writing after any executive officer of the company becomes aware of any non-compliance with any NYSE corporate governance listing standard.<sup>72</sup>

### **Written Affirmation**

In addition to the CEO certification mentioned above, a foreign private issuer must provide to the NYSE, within 30 days of the date the foreign private issuer files its annual report with the SEC, a wide-ranging "written affirmation" with exhibits that describe the issuer's compliance or non-compliance with the NYSE's corporate governance requirements. Besides the annual written affirmation, a foreign private issuer must submit an interim written affirmation when:

- an audit committee member who was deemed independent is no longer independent;
- a member has been added to the audit committee;
- the issuer or a member of its audit committee is eligible to rely on and is choosing to rely on a Rule 10A-3 exemption;
- the issuer or a member of its audit committee is no longer eligible to rely on or is choosing to no longer rely on a previously applicable Rule 10A-3 exemption;
- a member has been removed from the issuer's audit committee resulting in the issuer no longer having a Rule 10A-3 compliant audit committee;
- the issuer determined that it no longer qualifies as a foreign private issuer and will be considered a domestic company under Section 303A.<sup>73</sup>

### **NYSE Communication and Notification Requirements**

The NYSE requires that any listed company promptly notify the public of any information that it might reasonably expect to materially affect the market for its securities. A listed company should also act promptly to counter any unsubstantiated stories that produce unusual market activity or price variations.<sup>74</sup>

If the company will announce a material event or make a statement regarding a rumor between 7:00 a.m. and 4:00 p.m. Eastern Standard Time, it must notify the NYSE by telephone at least 10 minutes before it releases the announcement. The company must also provide the text of any written announcement to the NYSE at least 10 minutes prior to releasing the announcement. This will allow the NYSE to determine if a trading halt should be imposed.<sup>75</sup>

## Corporate Governance Requirements for Foreign Private Issuers

As noted above, foreign private issuers are permitted to follow home-country practice in lieu of the NYSE's corporate governance standards, other than the NYSE's requirements that it must: (1) have an audit committee that meets the requirements of Exchange Act Rule 10A-3; and (2) provide prompt notification from its CEO of non-compliance with the applicable provisions of the NYSE's corporate governance rules. As described earlier, a foreign private issuer must also provide an annual written affirmation as well as an interim written affirmation to the NYSE.<sup>76</sup>

Whether a listed foreign private issuer follows the NYSE corporate governance standards or its home-country practice, it must disclose any ways in which its corporate governance practices differ from those followed by domestic US issuers under NYSE listing standards.<sup>77</sup> A detailed and cumbersome analysis is not required; a brief, general summary of differences is enough. A foreign private issuer that is required to file an annual report on Form 20-F with the SEC must include the statement of significant differences in that annual report. All other foreign private issuers may either (i) include the statement of significant differences in an annual report filed with the SEC or (ii) make the statement of significant differences available on or through the listed company's website. If the statement of significant differences is made available on or through the listed company's website, the listed company must disclose that fact in its annual report filed with the SEC and provide the website address.<sup>78</sup>

## ENDNOTES

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- <sup>1</sup> See generally NYSE Listed Company Manual, § 103.00 (*NYSE Manual*).
- <sup>2</sup> Both affiliated companies and companies listing following emergence from bankruptcy have different listing standards.
- <sup>3</sup> When considering a listing application from a company organized under the laws of Canada, Mexico, or the US (North America), the NYSE will include all North American holders and trading volume in applying the minimum stockholder and trading volume requirements. For securities that trade in the format of American Depositary Receipts (ADRs), volume in the ordinary shares will be adjusted on an ADR equivalent basis. See *NYSE Manual* at § 102.01B. The distribution of shares held outside of North America does not count towards the domestic listing requirements. See *NYSE Manual* § 103.00 (noting domestic listing requirements call for a minimum distribution of a company's shares within the US or, in the case of North American companies, within North America).
- <sup>4</sup> See *NYSE Manual* § 102. In addition, in certain circumstances, the NYSE will take into account certain other qualitative factors, including: the company must be a going concern, the degree of national interest in the company, the character of the markets for its products, its relative stability and position in its industry, and whether it is engaged in an expanding industry with prospects for maintaining its position. Higher minimum standards might apply if there is a lack of public interest in the securities of a company as evidenced, for example, by low trading volume on another exchange, lack of dealer interest in the over-the-counter market, unusual geographic concentration of holders of shares, slow growth in the number of shareholders, and a low rate of transfers. See *NYSE Manual* § 102.01C. A company formed by a reverse merger is subject to additional initial listing requirements. See NYSE Rule 102.01F. In order to qualify for initial listing a reverse merger company must also: (i) have been trading for at least one year on the US over-the-counter market, on another national securities exchange, or on a regulated foreign exchange, and, in the case of a domestic issuer, have filed a Form 8-K containing all required information under Item 2.01(f), including audited financial statements or, in the case of a foreign private issuer, have filed all such information on Form 20-F; (ii) have maintained a minimum closing price of \$4 per share for at least 30 of the most recent 60 trading days preceding the filing of the initial listing application; and (iii) have filed all periodic financial reports required by the SEC or other regulatory authority during the year preceding the initial listing, including one annual report containing audited financial statements for a full fiscal year after the filing of the initial Form 8-K or 20-F, as applicable. In addition, in order to qualify for listing, the reverse merger company must (i) have timely filed all periodic financial reports required by the SEC or other regulatory authority during the year preceding the listing date, including one annual report containing audited financial statements for a full fiscal year; and (ii) have maintained a minimum closing price of \$4 per share for at least 30 of the most recent 60 trading days prior to the listing date. However, a reverse merger company will not be required to meet the above additional conditions if it lists in connection with a firm-commitment underwritten public offering with gross proceeds of at least \$40 million.
- <sup>5</sup> See *NYSE Manual* § 102.01A. If the issuer has less than 100 shares, the requirement relating to the number of publicly held shares will be reduced proportionately.
- <sup>6</sup> See *id.* If the unit of trading is less than 100 shares, the requirement relating to the number of publicly held shares will be reduced proportionately. Shares held by directors, officers, or their immediate families and other concentrated holdings of 10% or more are excluded in calculating the number of publicly held shares.
- <sup>7</sup> See *NYSE Manual* § 102.01A. If the issuer has less than 100 shares, the requirement relating to the number of publicly held shares will be reduced proportionately.
- <sup>8</sup> See *id.*
- <sup>9</sup> See *id.* If the unit of trading is less than 100 shares, the requirement relating to number of publicly held shares will be reduced proportionately. Shares held by directors, officers, or their immediate families and other concentrated holdings of 10% or more are excluded in calculating the number of publicly held shares.
- <sup>10</sup> See *NYSE Manual* § 102.01B. For IPOs, the NYSE will rely on a written commitment from the underwriter regarding the anticipated value of the offering.
- <sup>11</sup> See *NYSE Manual* § 102.01B. For IPOs, the NYSE will rely on a written commitment from the underwriter regarding the anticipated value of the offering. Under certain limited circumstances, the NYSE may allow an issuer to list without conducting a public offering (a "direct listing"). Prior to February 2018, the NYSE would only approve a direct listing if the issuer's non-listed common equity securities had a minimum aggregate market value of \$100 million with a sustained trading on a private placement market. In February 2018, the NYSE amended the rule to permit an issuer that did not have the requisite private market in its non-listed common equity securities to list in connection with the effectiveness of a resale registration statement so long as it could provide an independent third-party valuation evidencing an aggregate market value of at least \$250 million for such publicly held shares and a financial advisor to the issuer consulted with the issuer's designated market maker to identify the market for the securities upon listing. See Section 102.01B of the Listed Company Manual and SEC Release 34-92627 dated February 2, 2018.
- <sup>12</sup> See *NYSE Manual* § 102.01C(I).
- <sup>13</sup> As defined in Section 2(a)(19) of the Securities Act and Section 3(a)(80) of the Exchange Act.
- <sup>14</sup> See *NYSE Manual* § 102.01C(II).

- 15 In addition, a foreign private issuer listing its equity securities in the form of ADRs must sponsor its ADRs and enter into an agreement with a US depository bank to provide such services as cash and stock dividend payments, transfer of ownership, and distribution of company financial statements and notices, such as shareholder meeting material. *See generally NYSE Manual § 103.04.*
- 16 *See NYSE Manual § 103.01A.* Shares held by directors, officers, or their immediate families, and other concentrated holdings of 10% or more are excluded in calculating the number of publicly held shares. If an issuer either has a significant concentration of stock, or if changing market forces have adversely impacted the public market value of an issuer which otherwise would qualify for listing on the NYSE such that its public market value is no more than 10% below \$100 million, the NYSE will generally consider \$100 million in stockholders' equity as an alternate measure of size and therefore, as an alternative basis to list the issuer.
- 17 *See NYSE Manual § 103.01B(I).*
- 18 *See NYSE Manual § 103.01B(II)(a).* For IPOs, the company's underwriters must provide a written representation that demonstrates the company's ability to meet the global market capitalization requirement based upon the completion of the offering.
- 19 *See NYSE Manual § 103.01B(II)(b).* For IPOs, the company's underwriters must provide a written representation that demonstrates the company's ability to meet the global market capitalization requirement based upon the completion of the offering. For all other companies, market capitalization valuation will be determined over a six-month average.
- 20 *See NYSE Manual § 802.01A.* If the unit of trading is less than 100 shares, the requirement relating to the number of shares publicly held will be reduced proportionately. Shares held by directors, officers, or their immediate families, and other concentrated holdings of 10% or more are excluded in calculating the number of publicly held shares.
- 21 *See NYSE Manual § 802.01B(I).*
- 22 *See generally NYSE Manual § 802.01B.*
- 23 *See NYSE Manual § 802.01C.* For any curative actions requiring the approval of the issuer's shareholders, the issuer must include such approval requirement in its notification to the NYSE, seek and obtain such approval by the next annual meeting, and then effect such action without delay. Note that the NYSE may exercise discretion with respect to the minimum price criteria after evaluating the financial status of the issuer if the security that has fallen below compliance is other than the issuer's primary trading common stock (for example, a tracking stock or a preferred class).
- 24 *See generally NYSE Manual § 802.01D* for additional enumerated criteria.
- 25 *See NYSE Manual § 303A.11.*
- 26 *See NYSE Manual § 303A.00.*
- 27 *See NYSE Manual § 303A.01.* Issuers listing in connection with an IPO have one year following the initial listing date to meet the majority independent board of directors requirement and may phase in independent committees as follows: at least one independent director per committee at the time of listing, a majority of independent directors within 90 days following listing, and fully independent committees, as required, within one year.
- 28 *See NYSE Manual § 303A.02.*
- 29 *See Commentary to NYSE Manual § 303A.02.*
- 30 *See NYSE Manual § 303A.02(b)(i).*
- 31 *See NYSE Manual § 303A.02(b)(ii).*
- 32 *See NYSE Manual § 303A.02(b)(iii).*
- 33 *See NYSE Manual § 303A.02(b)(iv).*
- 34 *See NYSE Manual § 303A.02(b)(v).*
- 35 *See Commentary to NYSE Manual § 303A.02(b).*
- 36 *See NYSE Manual § 303A.02(a)(ii).*
- 37 *See NYSE Manual § 303A.03.*
- 38 *See NYSE Manual § 303A.04(a).*
- 39 *See NYSE Manual § 303A.04(b)(i).*
- 40 *See NYSE Manual § 303A.04(b)(ii).*
- 41 *See Commentary to NYSE Manual § 303A.04.*

42 See *NYSE Manual* § 303A.05(a). As of July 1, 2013, compensation committee members must satisfy additional independence requirements as set forth in § 303A.02(a)(ii). In determining the independence of a director who will serve on an issuer's compensation committee, the board of directors must consider all factors specifically relevant to determining whether that director has a relationship to the issuer that is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to (i) any sources of compensation of such director, including any consulting, advisory, or other compensatory fee paid by the issuer; and (ii) whether such director is affiliated with the issuer, any of its subsidiaries, or any affiliates of its subsidiaries. Smaller reporting companies are not required to comply with § 303A.02(a)(ii) or the second paragraph of the Commentary to § 303A.02(a). See § 303A.02.

43 See *NYSE Manual* § 303A.05(b)(i)(A).

44 See *NYSE Manual* § 303A.05(b)(i)(B).

45 See *NYSE Manual* § 303A.05(b)(i)(C).

46 See *NYSE Manual* § 303A.05(b)(ii) and b(iii).

47 See Commentary to *NYSE Manual* § 303A.05.

48 See *NYSE Manual* §§ 303A.06, 303A.07(a).

49 See *NYSE Manual* § 303A.07(a); see also Commentary to *NYSE Manual* § 303A.07(a). While the NYSE does not require that an audit committee include a person who satisfies the definition of audit committee financial expert as set out in Item 407(d)(5)(ii) of Regulation S-K, a board may presume that such a person has accounting or related financial management expertise. Foreign private issuers are not required to comply with § 303A.07.

50 See *NYSE Manual* § 303A.07(b)(i)(A).

51 See *NYSE Manual* § 303A.07(b)(i)(B).

52 See *NYSE Manual* § 303A.07(b)(ii).

53 See *NYSE Manual* § 303A.07(b)(iii).

54 See *NYSE Manual* § 303A.07(b)(iii)(A).

55 See *NYSE Manual* § 303A.07(b)(iii)(B).

56 See *id.*

57 See *NYSE Manual* § 303A.07(b)(iii)(C).

58 See *id.*

59 See *NYSE Manual* § 303A.07(b)(iii)(D).

60 See *NYSE Manual* § 303A.07(b)(iii)(E).

61 See *NYSE Manual* § 303A.07(b)(iii)(F).

62 See *NYSE Manual* § 303A.07(b)(iii)(G).

63 See *NYSE Manual* § 303A.07(b)(iii)(H).

64 See *NYSE Manual* § 303A.07(c); see also Commentary to *NYSE Manual* § 303A.07(c).

65 See *NYSE Manual* § 302.00. There is no exception to this requirement based on home-country requirements for foreign private issuers.

66 See *NYSE Manual* § 312.03(a); see also Commentary to *NYSE Manual* § 303A.08.

67 See *NYSE Manual* § 312.03(b). Note that § 312.03(b) of the *NYSE Manual* exempts "Early Stage Companies" as defined in § 312.04(k) from the shareholder approval requirements for related-party transactions.

68 See *NYSE Manual* § 312.03(c). Shareholder approval will not be required for any issuance involving: (1) any public offering for cash; (2) any bona fide private financing, if it involves a sale of common stock, for cash, at a price at least equal to the lesser of either the stock's official closing price or the average official closing price for the five trading days immediately preceding entry into the binding agreement; or (3) securities convertible into or exercisable for common stock, for cash, if the conversion or exercise price is at least equal to the lesser of either the stock's official closing price or the average official closing price for the five trading days immediately preceding entry into the binding agreement.

69 See *NYSE Manual* § 312.03(d).

70 See *NYSE Manual* § 303A.09; see also Commentary to *NYSE Manual* § 303A.09.

71 See *NYSE Manual* § 303A.10; see also Commentary to *NYSE Manual* § 303A.10.

72 See *NYSE Manual* §§ 303A.12(a), 303A.12(b).

73 See *NYSE Manual* § 303A.12(c), NYSE Instructions for Submission of Foreign Private Issuer Section 303A Written Affirmations.

- <sup>74</sup> See *NYSE Manual* § 202.05.
- <sup>75</sup> See *NYSE Manual* § 202.06(B).
- <sup>76</sup> See *NYSE Manual* §§ 303A.00, 303A.12(b), 303A.12(c).
- <sup>77</sup> See *NYSE Manual* § 303A.11.
- <sup>78</sup> See Commentary to *NYSE Manual* § 303A.11.

# ANNEX C

## Nasdaq Quantitative Listing Criteria and Corporate Governance Standards

There are three distinct markets within Nasdaq: the Nasdaq Global Market (NGM), the Nasdaq Global Select Market (NGSM), and the Nasdaq Capital Market (NCM). The NGSM mandates the highest initial listing requirements, while its maintenance requirements are identical to those of the NGM. The NGM, in turn, has more stringent quantitative listing and maintenance requirements than the NCM.

Except as noted below, the quantitative listing and maintenance criteria applicable to non-Canadian foreign private issuers for the NGM, NGSM, and NCM are identical to those of domestic US issuers and Canadian issuers. However, all foreign private issuers (including Canadian issuers) may elect to follow home-country practice in lieu of compliance with certain Nasdaq corporate governance requirements. An issuer of a security listed on either the NGM or NCM may, at any time, apply to transfer the respective security to the NGSM as long as it satisfies all of the requirements for listing on the NGM and it meets the additional financial and liquidity requirements described below.<sup>1</sup>

### NGM Quantitative Listing and Maintenance Standards

#### NGM Quantitative Initial Listing Standards

An issuer, whether a domestic US issuer or a foreign private issuer, generally must meet one of the following standards to be listed on the NGM.<sup>2</sup>

	Entry Standard 1	Entry Standard 2	Entry Standard 3/4
	Income Standard	Equity Standard	Market Value or Total Assets/Total Revenue Standard
Minimum bid price <sup>3</sup>	At least \$4 per share	At least \$4 per share	At least \$4 per share
Publicly held shares <sup>4</sup>	At least 1.1 million	At least 1.1 million	At least 1.1 million
Number of round lot holders <sup>5</sup>	At least 400	At least 400	At least 400
Stockholders' equity	At least \$15 million <sup>6</sup>	At least \$30 million <sup>7</sup>	—
Number of registered and active market-makers	At least three <sup>8</sup>	At least three <sup>9</sup>	At least four <sup>10</sup>
Market value of publicly held shares	At least \$8 million <sup>11</sup>	At least \$18 million <sup>12</sup>	At least \$20 million <sup>13</sup>
Annual pre-tax income from continuing operations in the most recently completed fiscal year or in two of the last three most recently completed fiscal years	At least \$1 million <sup>14</sup>	—	—

	Entry Standard 1	Entry Standard 2	Entry Standard 3/4
	Income Standard	Equity Standard	Market Value or Total Assets/Total Revenue Standard
Operating history	—	Two-year operating history <sup>15</sup>	—
Market value of listed securities	—	—	\$75 million for Market Value Standard <sup>16</sup>
Total assets and total revenue	—	—	\$75 million, each in total assets and total revenue, for the most recently completed fiscal year or two of the last three most recently completed fiscal years (Total Assets/Total Revenue Standard) <sup>17</sup>

### NGM Quantitative Maintenance Standards

Once an issuer has been listed on the NGM, it must continue to satisfy one of the following maintenance standards.

	Maintenance Standard 2	Maintenance Standard 3/4
	Equity Standard	Market Value/Total Assets/Total Revenue Standard
Minimum bid price <sup>18</sup>	\$1 per share	\$1 per share
Total Holders <sup>19</sup>	At least 400	At least 400
Stockholders' equity	At least \$10 million <sup>20</sup>	—
Market value of publicly held shares	At least \$5 million <sup>21</sup>	At least \$15 million <sup>22</sup>
Number of publicly held shares	At least 750,000 <sup>23</sup>	At least 1.1 million <sup>24</sup>
Registered and active market-makers	At least two <sup>25</sup>	At least four <sup>26</sup>
Market value of listed securities	—	\$50 million for market value standard <sup>27</sup>
Market capitalization/total assets and total revenue	—	Market capitalization of at least \$50 million or \$50 million each, in total assets and total revenue, for the most recently completed fiscal year or two of the last three most recently completed fiscal years <sup>28</sup>



## NGSM Quantitative Listing and Maintenance Standards

### NGSM Quantitative Initial Listing Standards

The issuer must meet one of the following financial standards:

Financial Requirement	Standard 1: Earnings	Standard 2: Capitalization with Cash Flow	Standard 3: Capitalization with Revenue	Standard 4: Assets with Equity
Aggregate income from continuing operations before income taxes	At least \$11 million over the prior three fiscal years <sup>29</sup>	—	—	—
Positive income from continuing operations before income taxes in each of the prior three fiscal years	Required <sup>30</sup>	—	—	—
Income from continuing operations before income taxes	At least \$2.2 million in each of the two most recent fiscal years <sup>31</sup>	—	—	—
Aggregate cash flows	—	At least \$27.5 million over the prior three fiscal years <sup>32</sup>	—	—
Positive cash flows in each of the prior three fiscal years	—	Required <sup>33</sup>	—	—
Average market capitalization over the prior 12 months	—	At least \$550 million <sup>34</sup>	At least \$850 million <sup>35</sup>	At least \$160 million <sup>36</sup>
Total revenue in the previous fiscal year	—	At least \$110 million <sup>37</sup>	At least \$90 million <sup>38</sup>	At least \$80 million <sup>39</sup>
Total revenue in the previous fiscal year	—	—	—	At least \$55 million <sup>40</sup>
Minimum bid price <sup>41</sup>	\$4 per share	\$4 per share	\$4 per share	\$4 per share

### Liquidity Requirements

An issuer must also meet the following liquidity requirements:

- 2,200 total holders<sup>42</sup> or 450 round lot holders;<sup>43</sup> and
- 1.25 million publicly held shares<sup>44</sup> with a \$45 million minimum market value.<sup>45</sup>

In computing each of the above, Nasdaq will not consider shares held by an officer, director, or 10% or greater shareholder of the company.<sup>46</sup>

In addition, where the issuer meets the requirements of the NGM Income Standard or the NGM Equity Standard (as detailed above), it must have at least three registered and active market-makers.<sup>47</sup> Otherwise, the issuer must have at least four registered and active market-makers.<sup>48</sup>

## NGSM Quantitative Maintenance Requirements

Once an issuer has been listed on the NGSM, it is subject to the same maintenance standards as issuers listed on the NGM, as described above.<sup>49</sup>

## NCM Quantitative Listing and Maintenance Standards

### NCM Quantitative Initial Listing Standards

For initial listing on the NCM, an issuer must meet one of the following standards:

	Standard 1: Equity	Standard 2: Market Value of Listed Securities	Standard 3: Net Income
Stockholders' equity	At least \$5 million <sup>50</sup>	At least \$4 million <sup>51</sup>	At least \$4 million <sup>52</sup>
Market value of publicly held shares	At least \$15 million <sup>53</sup>	At least \$15 million <sup>54</sup>	At least \$5 million <sup>55</sup>
Two-year operating history	Required <sup>56</sup>	—	—
Market value of listed securities	—	At least \$50 million <sup>57</sup>	—
Net income	—	—	At least \$750,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years <sup>58</sup>

Additionally, each issuer must satisfy the following requirements:

- at least 300 round lot shareholders;<sup>59</sup>
- at least 1 million publicly held shares;<sup>60</sup>
- a minimum bid price of \$4 a share;<sup>61</sup>
- at least three registered and active market-makers;<sup>62</sup> and
- in the case of ADRs, at least 400,000 must be issued.<sup>63</sup>

### NCM Maintenance Requirements

For continued listing on NCM, an issuer must maintain:

- either: (1) stockholders' equity of at least \$2.5 million (Equity Standard); (2) a market value of listed securities of at least \$35 million (Market Value of Listed Securities Standard); or (3) net income of at least \$500,000 in the most recently completed fiscal year or in two of the last three most recently completed fiscal years (Net Income Standard);<sup>64</sup>
- at least 300 public shareholders;<sup>65</sup>
- at least 500,000 publicly held shares;<sup>66</sup>
- a market value of publicly held shares of at least \$1 million;<sup>67</sup>
- a minimum bid price of \$1 a share;<sup>68</sup> and
- at least two registered and active market-makers, one of which may be a market-maker entering a stabilizing bid.<sup>69</sup>

## Failure to Meet Continuing Listing Requirements (NGM, NGSM, and NCM)

The Listing Qualifications Department will immediately notify any company that fails to meet a maintenance requirement. Depending on the type of deficiency, the Listings Qualifications Department will issue one of the following four types of notifications: (i) a Staff Delisting Determination, which is a notification that, unless appealed, will subject the company to immediate suspension and delisting; (ii) a notification of deficiency for which the company may submit a plan of compliance to the Listing Qualifications Department for review; (iii) a notification of deficiency, which automatically grants the company a cure or compliance period; or (iv) a letter of public reprimand.<sup>70</sup>

## Nasdaq Corporate Governance Requirements

In addition to the quantitative listing criteria set out above, listed companies must comply with the Nasdaq rules relating to corporate governance described below, with two key exceptions:

- *Foreign Private Issuers:* A listed foreign private issuer is permitted to follow home-country practice in lieu of Nasdaq's corporate governance standards, other than the Nasdaq requirements that it must (1) provide Nasdaq with notification of any non-compliance by the issuer with Nasdaq corporate governance requirements; (2) have an audit committee that meets the requirements (including independence requirements) of Exchange Act Rule 10A-3; and (3) abide by the Nasdaq voting rights requirements. A foreign private issuer making its IPO or first US listing on Nasdaq that follows home-country practice in lieu of the Nasdaq corporate governance requirements must disclose in its registration statement or on its website each requirement which it does not follow and describe the home-country practice followed by it in lieu of such requirements.<sup>71</sup>
- *Controlled Companies:* A controlled company is one in which more than 50% of the voting power for the election of directors is held by an individual, a group or another company. MLPs often qualify as controlled companies. A controlled company is not required to comply with Nasdaq requirements to have a majority of independent directors or a compensation committee, and requirements relating to independent director oversight of director nominations.<sup>72</sup>

## Majority of Independent Directors

A majority of the issuer's board of directors must consist of independent directors.<sup>73</sup> The board of directors must affirmatively determine that the director has no relationship with the issuer that would impair his or her independence,<sup>74</sup> and the issuer must disclose in its annual proxy (or, if it does not file a proxy, on its annual report on Form 10-K – or Form 20-F for foreign private issuers, if applicable – filed with the SEC) those directors that the board of directors has determined to be independent.<sup>75</sup>

Ownership of an issuer's stock, by itself, is not a bar to an independence finding.<sup>76</sup> The Nasdaq rules define an independent director to mean a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship that, in the opinion of the company's board of directors, would not interfere with the exercise of independent judgment in carrying out the responsibilities of a director.<sup>77</sup>

A director cannot be independent if he or she:

- is, or at any time in the past three years was, employed by the issuer or any parent or subsidiary (as defined below) of the issuer;<sup>78</sup>
- has accepted, or who has a family member (as defined below) who has accepted, any payments from the issuer or any parent or subsidiary of the issuer in excess of \$120,000 during any period of 12 consecutive months within the three years preceding the determination of independence,<sup>79</sup> other than:

- compensation for board or board committee service;<sup>80</sup>
- compensation paid to a family member who is a non-executive employee of the issuer or a parent or subsidiary of the issuer;<sup>81</sup> or
- benefits under a tax-qualified retirement plan, or non-discretionary compensation;<sup>82</sup>
- is a family member of an individual who is, or at any time during the past three years was, employed by the issuer or any parent or subsidiary of the issuer as an executive;<sup>83</sup>
- is, or has a family member who is, a partner in, or controlling shareholder or executive officer of, any organization to which the issuer made, or from which the issuer received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or \$200,000, whichever is more,<sup>84</sup> other than:
  - payments arising solely from investments in the issuer's securities;<sup>85</sup> or
  - payments under non-discretionary charitable contribution matching programs;<sup>86</sup>
- is, or has a family member who is, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the issuer serves on the compensation committee of such other entity;<sup>87</sup> or
- is, or has a family member who is, a current partner of the issuer's outside auditor, or was a partner or employee of the issuer's outside auditor who worked on the issuer's audit at any time during any of the past three years.<sup>88</sup>

For these purposes, a "parent or subsidiary" covers entities that the issuer controls and consolidates with its financial statements as filed with the SEC (but not if the issuer reflects such entity solely as an investment in its financial statements).<sup>89</sup> A "family member" is defined to include a person's spouse, parents, children, and siblings, whether by blood, marriage, or adoption, or anyone residing in such person's home.<sup>90</sup>

## Meetings of Independent Directors

Independent directors must have regularly scheduled meetings at which only independent directors are present.<sup>91</sup> Those meetings should occur not less than twice a year.<sup>92</sup>

## Director Nominees

Director nominees must be selected, or recommended for the board of directors' selection, either by a majority of the independent directors in a vote in which only independent directors participate or by a nominations committee comprised solely of independent directors.<sup>93</sup> Each issuer must certify that it has adopted a formal written charter or board resolution addressing the nominations process (and such related matters as may be required under the federal securities laws).<sup>94</sup> In certain circumstances a single non-independent director, who is not a current officer or employee (or family member of an officer or employee), may serve for up to two years on an independent nominations committee composed of at least three members.<sup>95</sup>

## Compensation Committee

An issuer must have, and certify that it has and will continue to have, a compensation committee composed of at least two independent directors who may not accept directly or indirectly any consulting, advisory, or other compensation from the issuer or any of its subsidiaries.<sup>96</sup> In order to serve as a member of the listed company's compensation committee, the board of directors must affirmatively determine that the director does not have a relationship to the company that is material to that director's ability to be independent from management. Relevant factors in this determination include, but are not limited to:<sup>97</sup>

- the source of any compensation received by such director, including any consulting, advisory, or other compensatory fee paid by the company to such director; and
- any affiliations between the director and the company, a subsidiary of the company, or an affiliate of a subsidiary of the company.

Under certain limited circumstances, if the compensation committee is composed of at least three members, one director who does not otherwise meet the independence requirements<sup>98</sup> and who is not currently an executive officer or employee or a family member of an executive officer may serve on the compensation committee for up to two years if the board of directors determines it is required by the best interests of the issuer and its shareholders. Such an exception must be disclosed on the company's website or in the proxy statement for the next annual meeting subsequent to such determination (or, if the company does not file a proxy, in its Form 10-K or 20-F), and such disclosure must include the nature of the relationship and the reasons for the determination. In addition, the issuer must provide any disclosure required by Instruction 1 to Item 407(a) of Regulation S-K regarding its reliance on this exception.

The compensation committee must have a written charter that:<sup>99</sup>

- addresses the scope of the committee's responsibilities, including structure, process, and membership requirements;
- addresses the committee's responsibility for determining, or recommending to the board for determination, the compensation of the chief executive officer and all other executive officers of the company (the chief executive officer may not be present during voting or deliberations on his or her compensation); and
- sets forth the following rights and responsibilities with respect to the use of compensation consultants, legal counsel, or other advisers by the compensation committee:
- the ability, in its sole discretion, to retain or obtain the advice of a compensation consultant, independent legal counsel, or other adviser. The compensation committee will be directly responsible for the appointment, compensation, and oversight of the services provided by any such compensation consultant, legal counsel, or other adviser. The compensation committee may retain or obtain the advice of such consultant, legal counsel, or other adviser only after considering the following:
  - any other services provided to the issuer by the employer of such compensation consultant, legal counsel, or other adviser;
  - any other fees paid by the issuer to the employer of the compensation consultant, legal counsel, or other adviser as a percentage of the total revenue of that employer;
  - the policies and procedures of the employer of the compensation consultant, legal counsel, or other adviser with respect to the prevention of conflicts of interest;
  - any business or personal relationships between any member of the compensation committee and such compensation consultant, legal counsel, or other adviser;
  - any ownership of the issuer's equity by such compensation consultant, legal counsel, or other adviser; and
  - any business or personal relationship between the compensation consultant, legal counsel, or other adviser or such person's employer and any of the issuer's executive officers.

## Audit Committees

### Sarbanes-Oxley

An issuer's audit committee must satisfy the independence and other requirements of Exchange Act Rule 10A-3 (implementing Section 301 of Sarbanes-Oxley).<sup>100</sup>

## Charter

Each issuer must certify that it has a written audit committee charter and that the audit committee has reviewed and assessed the adequacy of the audit committee charter on an annual basis.<sup>101</sup> The charter must specify:

- the scope of the audit committee's responsibilities, and how it carries out those responsibilities, including structure, processes, and membership requirements;<sup>102</sup>
- the audit committee's responsibility for ensuring its receipt from the outside auditors of a formal written statement delineating all relationships between the auditor and the issuer, and the audit committee's responsibility for engaging in a dialogue with the auditor with respect to any disclosed relationships or services that might impact the objectivity and independence of the auditor and for taking, or recommending that the full board take, appropriate action to oversee the independence of the outside auditor;<sup>103</sup>
- the committee's purpose of overseeing the accounting and financial reporting processes of the issuer and the audits of the financial statements of the issuer;<sup>104</sup> and
- the specific audit committee responsibilities and authority necessary to comply with the audit committee requirements of Sarbanes-Oxley concerning responsibilities relating to: (1) registered public accounting firms; (2) complaints relating to accounting, internal accounting controls or auditing matters; (3) authority to engage advisers; and (4) funding as determined by the audit committee.<sup>105</sup>

## Composition

The issuer must have, and certify that it has and will continue to have, an audit committee of at least three members, each of whom must:

- be independent, within the meaning of the Nasdaq director independence rules discussed above;
- meet the requirements for audit committee independence set out in Exchange Act Rule 10A-3(b)(1), that, subject to certain limited exceptions:<sup>106</sup> (1) such member be a member of the board of directors of the issuer; (2) such member (other than in his or her capacity as a member of the board of directors, the audit committee, or another board committee) not accept directly or indirectly any consulting, advisory, or other compensatory fee from the issuer or any subsidiary thereof; and (3) such member not be an affiliated person<sup>107</sup> of the issuer or any subsidiary thereof;
- not have participated in the preparation of the financial statements of the issuer or any current subsidiary of the issuer at any time during the past three years; and
- be able to read and understand fundamental financial statements, including an issuer's balance sheet, statement of comprehensive income, and cash flow statement, at the time of appointment.<sup>108</sup>

In addition, each issuer must certify that it has, and will continue to have, one member of the audit committee who has past employment experience in finance or accounting or other comparable experience or background which results in financial sophistication.<sup>109</sup> Note that a director who qualifies as an audit committee financial expert under Item 407(d)(5)(ii) and (iii) of Regulation S-K will be presumed to meet this financial sophistication requirement.<sup>110</sup> Under certain circumstances a single director who meets the independence requirements of Exchange Act Rule 10A(m)(3) but not the independence requirements of the Nasdaq rules, who is not a current officer or employee (or family member of an officer or employee), may serve for up to two years on an audit committee. Such a person may not, however, chair the audit committee.<sup>111</sup>

## Responsibility and Authority

The audit committee must have the specific responsibilities and authority needed to satisfy Exchange Act Rule 10A-3(b)(2), (3), (4) and (5) (concerning responsibilities relating to: (1) registered public accounting firms; (2) complaints relating to accounting, internal accounting controls, or auditing matters; (3) authority to engage advisers; and (4) funding as determined by the audit committee).<sup>112</sup>

## Cure Periods

The Nasdaq rules provide for certain cure periods if an audit committee member ceases to be independent for reasons outside the member's reasonable control, or if there is a vacancy on the audit committee.<sup>113</sup>

## Shareholder Meetings

An issuer must hold an annual meeting of shareholders no later than one year after the end of the issuer's fiscal year-end.<sup>114</sup> A newly listed company that was not previously subject to a requirement to hold an annual meeting is required to hold its first meeting within one year after its first fiscal year-end following listing.<sup>115</sup>

## Quorum

An issuer must provide for a quorum as specified in its bylaws for any meeting of the holders of its common stock; provided that in no case shall such quorum be less than 33 $\frac{1}{3}$ % of the outstanding shares of the issuer's common voting stock.<sup>116</sup> Issuers organized as limited partnerships are required to have a quorum of at least 33 $\frac{1}{3}$ % of the outstanding limited partnership interests.

## Proxy Solicitation

An issuer must solicit proxies and provide proxy statements for all meetings of shareholders and must provide copies of such proxy solicitation to Nasdaq.<sup>117</sup> Note, however, that foreign private issuers are not subject to the US proxy rules.<sup>118</sup>

## Conflicts of Interest and Related-Party Transactions

An issuer must have its audit committee or another independent committee of the board of directors review all related-party transactions for potential conflicts of interest on an ongoing basis. A "related-party transaction" for this purpose means those transactions required to be disclosed pursuant to Item 404 of Regulation S-K (and includes transactions and loans between management and the issuer for amounts over \$120,000) or, in the case of foreign private issuers, pursuant to Item 7.B of Form 20-F (and includes transactions and loans between the issuer and enterprises under common control of the issuer, associates, and individuals owning an interest in the voting power of the company that gives them significant influence or key management).<sup>119</sup>

## Shareholder Approval of Certain Transactions

An issuer must obtain shareholder approval prior to the issuance of securities:

- when a stock option or purchase plan is to be established or materially amended or other equity compensation arrangement made or materially amended, pursuant to which stock may be acquired by officers, directors, employees, or consultants,<sup>120</sup> subject to limited exceptions;<sup>121</sup>
- when the issuance or potential issuance will result in a change of control of the issuer;<sup>122</sup>
- in connection with the acquisition of the stock or assets of another company: (1) if any director, officer, or substantial shareholder of the issuer has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in a 5% or greater increase in outstanding common shares or voting power;<sup>123</sup> or (2) where, other than in a public offering for cash: (a) the common stock to be issued has or will have upon issuance voting power equal to 20% or more of the voting power outstanding

before the issuance of the stock or convertible securities, or (b) the number of shares of common stock to be issued is or will be 20% or more of the number of shares of common stock outstanding before the issuance of the stock or convertible securities;<sup>124</sup> or

- in connection with a transaction other than a public offering involving the sale, issuance, or potential issuance by the issuer of common stock (or securities convertible into or exercisable for common stock) at a price below the lesser of either the closing price or the average closing price for the previous five days on nasdaq.com, which together with sales by certain affiliates of the issuer equals 20% or more of the common stock or voting power outstanding before the issuance.<sup>125</sup>

An exception may be made upon application to Nasdaq when a delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and the audit committee (or other comparable body of the board of directors comprised solely of independent, disinterested directors) expressly approves reliance on this exception.<sup>126</sup>

Only shares actually issued and outstanding (excluding treasury shares or shares held by a subsidiary) are to be used for any calculation under the shareholder approval requirement. Shareholder approval must be obtained prior to the issuance of certain private financing instruments, generally in the form of convertible securities under which the number of shares that will be issued is uncertain until the conversion occurs, unless the instrument contains certain features (potentially a cap on the number of shares that can be issued upon conversion or a floor on the conversion price) and the issuance will not result in a change of control.<sup>127</sup>

Shareholder approval is not required for a public offering. Generally, any securities offering registered with the SEC and which is publicly disclosed and distributed in the same general manner and extent as a firm-commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules.<sup>128</sup>

## **Auditor Registration**

An issuer must be audited by an independent public accountant that is registered as a public accounting firm with the Public Company Accounting Oversight Board, as provided for in Section 102 of Sarbanes Oxley.<sup>129</sup>

## **Code of Conduct**

An issuer must adopt a code of conduct applicable to all directors, officers, and employees and make it publicly available. A code of conduct satisfying this requirement must comply with the definition of a "code of ethics" set out in Section 406(c) of Sarbanes Oxley and any regulations promulgated thereunder. Also, the code must provide for an enforcement mechanism. Any waivers of the code for directors or executive officers must be approved by the issuer's board and must be disclosed on a Form 8-K or, where a Form 8-K is not required, must be distributed via press release (foreign private issuers shall disclose such waivers either by distributing a press release or including disclosure in a Form 6-K or in the next Form 20-F or 40-F). Alternatively, an issuer, including a foreign private issuer, may disclose waivers on its website in a manner that satisfies the requirements of Item 5.05(c) of Form 8-K.<sup>130</sup>

## **Notification of Non-Compliance**

An issuer must promptly notify Nasdaq as soon as an executive officer of the issuer discovers any non-compliance by the issuer with the Nasdaq corporate governance standards.<sup>131</sup>



## Corporate Governance Certification

After the initial certification, an updated certification form is required only if a change in the company's status results in the prior certification no longer being accurate. A foreign private issuer that relied on an exemption in its certification would have to file a new certification if the company ceased to be a foreign private issuer.<sup>132</sup>

## Nasdaq Communication and Notification Requirements

Except in "unusual circumstances," Nasdaq requires an issuer to make prompt disclosure to the public through any Regulation FD-compliant method of disclosure of material information that would reasonably be expected to affect the value of its securities or influence investors' decisions.<sup>133</sup>

The issuer must notify Nasdaq prior to the release of certain types of information (and should make that notification at least 10 minutes prior to the release if the release is made during Nasdaq market hours or prior to 6:50 a.m. Eastern Standard Time if the release is made outside of Nasdaq market hours), including:

- financial-related disclosure (including earnings releases and restatements);
- corporate reorganizations and acquisitions;
- new products or discoveries, or developments regarding customers or suppliers;
- material senior management changes or a change in control;
- resignation or termination of independent auditors or withdrawal of a previously issued audit report;
- events regarding its securities (*e.g.*, defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, or public or private sales of additional securities);
- significant legal or regulatory developments; and
- any event requiring the filing of a Form 8-K.<sup>134</sup>

An issuer (other than an issuer solely of ADRs) must notify Nasdaq on the appropriate form not later than 15 calendar days prior to certain events, including:

- establishing or materially amending a stock option plan, purchase plan, or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval;<sup>135</sup>
- issuing securities that may result in a change of control of the issuer;<sup>136</sup>
- issuing any common stock (or security convertible into common stock) in connection with the acquisition of the stock or assets of another company, if an officer, director, or substantial shareholder of the issuer has a 5% or greater interest (or if such persons collectively have a 10% or greater interest) in the company to be acquired;<sup>137</sup> or
- entering into a transaction that may result in the potential issuance of common stock (or securities convertible into common stock) greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.<sup>138</sup>

An issuer must also file a form prescribed by Nasdaq within 10 days after any aggregate increase or decrease of any class of shares listed on Nasdaq that exceeds 5% of the amount of securities of the class outstanding.<sup>139</sup>

## Corporate Governance Requirements for Foreign Private Issuers

A listed foreign private issuer is permitted to follow home-country practice in lieu of Nasdaq's corporate governance standards, other than the Nasdaq requirements that it must:<sup>140</sup>

- provide Nasdaq with notification of any non-compliance by the issuer with Nasdaq corporate governance requirements;<sup>141</sup> and
- have an audit committee that meets the requirements (including independence requirements) of Exchange Act Rule 10A-3.<sup>142</sup>

A listed foreign private issuer that follows home-country practice in lieu of the Nasdaq corporate governance requirements must disclose in its annual report on Form 20-F each requirement that it does not follow and describe the home-country practice followed by it in lieu of such requirement (if the listing foreign issuer is not required to file its annual report on Form 20-F, it may make this disclosure only on its website).<sup>143</sup> In addition, a foreign private issuer making its IPO or first US listing on Nasdaq must make the same disclosure in its registration statement or on its website.<sup>144</sup>

## ENDNOTES

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- 1 See Nasdaq Rules 5305(c) and (d).
- 2 A company formed by a reverse merger is subject to additional initial listing requirements. See Nasdaq Rule 5110(c). In order to apply for listing, a reverse merger company must also (i) have been trading for at least one year in the US over-the-counter market, on another national securities exchange, or on a regulated foreign exchange, following the filing with the SEC or other regulatory authority of all required information about the transaction, including audited financial statements for the reverse merger company; and (ii) have maintained a minimum closing price of \$4 per share for at least 30 of the most recent 60 trading days. In order to be approved for listing, at the time of approval, the reverse merger company must (i) have timely filed all periodic financial reports required by the SEC or other regulatory authority during the year preceding the initial listing, including one annual report containing audited financial statements for a full fiscal year; and (ii) have maintained a minimum closing price of \$4 per share for at least 30 of the most recent 60 trading days. However, a reverse merger company will not be required to meet the above additional conditions if it lists in connection with a firm-commitment underwritten public offering with gross proceeds of at least \$40 million.
- 3 See Nasdaq Rule 5405(a)(1).
- 4 See Nasdaq Rule 5405(a)(2). Note: Effective August 2019, Nasdaq requires the exclusion of restricted securities from the initial liquidity calculations for listing. See definitions in Nasdaq Rule 5005.
- 5 See Nasdaq Rule 5405(a)(3). A normal unit of trading is defined as 100 shares of a security. See Nasdaq Rule 5005(a)(35). Note: Effective August 2019, Nasdaq requires the exclusion of restricted securities from the initial liquidity calculations for listing. See definitions in Nasdaq Rule 5005.
- 6 See Nasdaq Rule 5405(b)(1)(B).
- 7 See Nasdaq Rule 5405(b)(2)(A).
- 8 See Nasdaq Rule 5405(b)(1)(D).
- 9 See Nasdaq Rule 5405(b)(2)(D).
- 10 See Nasdaq Rule 5405(b)(3)(C).
- 11 See Nasdaq Rule 5405(b)(1)(C).
- 12 See Nasdaq Rule 5405(b)(2)(C).
- 13 See Nasdaq Rule 5405(b)(3)(B).
- 14 See Nasdaq Rule 5405(b)(1)(A).
- 15 See Nasdaq Rule 5405(b)(2)(B).
- 16 See Nasdaq Rule 5405(a)(3)(A).
- 17 See Nasdaq Rule 5405(b)(4)(A).
- 18 See Nasdaq Rule 5450(a)(1).
- 19 See Nasdaq Rule 5450(a)(2).
- 20 See Nasdaq Rule 5450(b)(1)(A).
- 21 See Nasdaq Rule 5450(b)(1)(C).
- 22 See Nasdaq Rule 5450(b)(2)(C).
- 23 See Nasdaq Rule 5450(b)(1)(B).
- 24 See Nasdaq Rule 5450(b)(2)(B).
- 25 See Nasdaq Rule 5450(b)(1)(D).
- 26 See Nasdaq Rule 5450(b)(2)(D).
- 27 See Nasdaq Rule 5505(b)(2)(A).
- 28 See Nasdaq Rule 5450(b)(3)(A). For Total Assets/Total Revenue Standard only.
- 29 See Nasdaq Rule 5315(f)(3)(A)(i).
- 30 See Nasdaq Rule 5315(f)(3)(A)(ii).
- 31 See Nasdaq Rule 5315(f)(3)(A)(iii).
- 32 See Nasdaq Rule 5315(f)(3)(B)(i).

- 33 See Nasdaq Rule 5315(f)(3)(B)(ii).
- 34 See Nasdaq Rule 5315(f)(3)(B)(iii).
- 35 See Nasdaq Rule 5315(f)(3)(C)(i).
- 36 See Nasdaq Rule 5315(f)(3)(D)(i).
- 37 See Nasdaq Rule 5315(f)(3)(B)(iii).
- 38 See Nasdaq Rule 5315(f)(3)(C)(ii).
- 39 See Nasdaq Rule 5315(f)(3)(D)(ii).
- 40 See Nasdaq Rule 5315(f)(3)(D)(iii).
- 41 See Nasdaq Rule 5315(e). An issuer transferring from the NGM to the NGSM is not required to have a \$4 minimum bid price.
- 42 See Nasdaq Rule 5315(f)(1)(B). Companies affiliated with another company listed on NGSM and those with common stock or equivalents currently trading may, in the alternative, have a minimum of 550 beneficial shareholders and an average monthly trading volume over the prior 12 months of at least 1.1 million shares a month. See Nasdaq Rule 5315(f)(1)(A).
- 43 See Nasdaq Rule 5315(f)(1)(C).
- 44 See Nasdaq Rule 5315(e)(2).
- 45 See Nasdaq Rule 5315(f)(2)(C). "Seasoned companies" (those with common stock or equivalents trading) will be required to have a market value of at least \$110 million or \$100 million and a stockholders' equity of \$110 million. See Nasdaq Rules 5315(f)(2)(A) and (B). A closed-end management investment company registered under the Investment Company Act of 1940 will be required to have a market value of at least \$70 million. See Nasdaq Rule 5315(f)(2)(D).
- 46 See Nasdaq Rule 5310(d).
- 47 See Nasdaq Rule 5315(e)(3).
- 48 See Nasdaq Rule 5315(e)(1).
- 49 See Nasdaq Rule 5305(e).
- 50 See Nasdaq Rule 5505(b)(1)(A).
- 51 See Nasdaq Rule 5505(b)(2)(B).
- 52 See Nasdaq Rule 5505(b)(3)(B).
- 53 See Nasdaq Rule 5505(b)(1)(B).
- 54 See Nasdaq Rule 5505(b)(2)(C).
- 55 See Nasdaq Rule 5505(b)(3)(C).
- 56 See Nasdaq Rule 5505(b)(1)(C).
- 57 See Nasdaq Rule 5505(b)(2)(A). Current publicly traded companies must meet this requirement and the \$4 bid price requirement for 90 consecutive trading days prior to applying for listing if qualifying to list only under the Market Value of Listed Securities Standard.
- 58 See Nasdaq Rule 5505(b)(3)(A).
- 59 See Nasdaq Rule 5505(a)(3).
- 60 See Nasdaq Rule 5505(a)(2).
- 61 See Nasdaq Rule 5505(a)(1). The minimum closing price per share for an issuer that meets either the Equity (Nasdaq Rule 5505(b)(1)) or Net Income (Nasdaq Rule 5505(b)(3)) Standards may be \$3 per share. An issuer that meets the Market Value of Listed Securities Standard (Nasdaq Rule 5505(b)(2)) may have a minimum closing price of \$2 per share. In each case, the issuer must have: (i) net tangible assets over \$2 million (if the issuer has been in continuous operation for at least three years); (ii) net tangible assets over \$5 million (if the issuer has been in continuous operation for less than three years); or (iii) average revenue of at least \$6 million for the last three years; and the security meets such applicable closing price for at least five days prior to approval.
- 62 See Nasdaq Rule 5505(a)(4).
- 63 See Nasdaq Rule 5505(a)(5).
- 64 See Nasdaq Rule 5550(b).
- 65 See Nasdaq Rule 5550(a)(3).
- 66 See Nasdaq Rule 5550(a)(4).

67 See Nasdaq Rule 5550(a)(5).

68 See Nasdaq Rule 5550(a)(2).

69 See Nasdaq Rule 5550(a)(1).

70 See Nasdaq Rule 5810.

71 See Nasdaq Rules 5615(a)(3), 5606(c), 5625, and 5640. See also Nasdaq IM 5615-3.

72 See Nasdaq Rules 5615(c)(1) and (2).

73 See Nasdaq Rule 5605(b)(1).

74 See Nasdaq IM-5605.

75 See Nasdaq Rule 5605(b)(1).

76 See Nasdaq IM 5605.

77 See Nasdaq Rules 5005(a)(19), 5605(a)(2); see also Nasdaq IM 5605.

78 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(A).

79 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(B).

80 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(B)(i).

81 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(B)(ii).

82 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(B)(iii).

83 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(C).

84 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(D).

85 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(D)(i).

86 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(D)(ii).

87 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(E).

88 See Nasdaq Rules 5005(a)(19), 5605(a)(2)(F).

89 See Nasdaq IM 5605.

90 See Nasdaq Rules 5005(a)(17), 5605(a)(2) Excerpt.

91 See Nasdaq Rule 5605(b)(2) (the rule refers to these meetings as *executive sessions*).

92 See Nasdaq IM 5605-2.

93 See Nasdaq Rule 5605(e)(1)(A-B).

94 See Nasdaq Rule 5605(e)(2).

95 See Nasdaq Rule 5605(e)(3). Independent director oversight of director nominations does not apply in cases where the right to nominate a director belongs legally to a third party (although certain committee composition requirements remain). See Nasdaq Rule 5605(e)(4). Note that this rule also does not apply if the issuer is subject to a binding obligation inconsistent with the rule, and such obligation predates November 2003. See Nasdaq Rule 5605(e)(5); see also *Nasdaq Frequently Asked Questions: Corporate Governance Rules & The Interpretative Process*.

96 See Nasdaq Rule 5605(d)(2)(A). The director may receive fees from the issuer as a member of the compensation committee, the board of directors, or any other board committee or fixed compensation under a retirement plan (including any deferred compensation) for prior service with the issuer (provided that such compensation is not contingent in any way on continued service).

97 See Nasdaq Rule 5605(d)(2)(A).

98 See Nasdaq Rule 5605(d)(2)(B). Rule 5605(d)(2)(4) provides for a cure period for companies that fall out of compliance with these requirements. Rule 5650(d)(2)(5) includes certain exceptions for smaller reporting companies.

99 See Nasdaq Rules 5605(d)(1) and (3).

100 See Nasdaq IM 5605, Nasdaq IM 5605-3, Nasdaq IM 5605-4, Nasdaq IM 5605-5.

101 See Nasdaq Rule 5605(c)(1).

102 See Nasdaq Rule 5605(c)(1)(A).

103 See Nasdaq Rule 5605(c)(1)(B).

104 See Nasdaq Rule 5605(c)(1)(C).

105 See Nasdaq Rules 5605(c)(1)(D), 5605(c)(3).

106 See Nasdaq Rule 5605(c)(2)(A). As noted above, foreign private issuers are not required to meet most of these requirements (including the minimum number of members of the audit committee). See IM-5615-3.

107 See *generally* Exchange Act Rule 10A-3(b)(1). In the case of investment company issuers, the term “affiliated person” is replaced with “interested person,” as defined in Section 2(a)(19) of the Investment Company Act of 1940.

108 See Nasdaq Rule 5605(c)(2)(A).

109 See *id.*

110 See Nasdaq IM 5605-4.

111 See Nasdaq Rule 5605(c)(2)(B).

112 See Nasdaq Rule 5605(c)(3). Audit committees for issuers that are investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting-related services for the issuer, as well as the issuer’s employees.

113 See *generally* Nasdaq Rules 5605(c)(4)(A), (c)(4)(B).

114 See Nasdaq Rule 5620(a). An issuer organized as a limited partnership is only required to hold an annual meeting of the limited partners if such meeting would otherwise be required under state law or the issuer’s partnership agreement. See Nasdaq Rule 5615(a)(4)(D).

115 See Nasdaq IM 5620.

116 See Nasdaq Rules 5620(c) and 5615(a)(4)(E).

117 See Nasdaq Rule 5620(b). An issuer organized as a limited partnership will only be required to solicit a proxy if a meeting of the limited partners will be held where a vote will be required.

118 See Nasdaq Rule 5615(a)(3).

119 See Nasdaq Rule 5630(a).

120 See Nasdaq Rule 5635(c). See *also* Nasdaq IM 5635-1 paragraph (2). “Material amendments” to an equity compensation arrangement include any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spin-off, or similar transaction), any material increase in benefits to participants, any material expansion of the class of participants eligible to participate in the plan, and any expansion in the types of options or awards provided under the plan.

121 See Nasdaq Rule 5635(c). The exceptions include: (1) warrants or rights issued generally to all security holders of the issuer or stock purchase plans available on equal terms to all security holders of the issuer; (2) certain tax-qualified, non-discriminatory employee benefit and parallel non-qualified plans; (3) plans or arrangements involving mergers or acquisitions, either when conversions, replacements, or adjustments of outstanding options or other equity compensation awards are necessary to reflect the transaction, or when shares available under certain plans acquired in acquisitions or mergers are to be used for certain post-transaction grants; and (4) employment inducements to new employees. The items described under (2) and (4) above must be approved by the issuer’s independent compensation committee or a majority of independent directors. See Nasdaq Rule 5635(c)(1)-(4).

122 See Nasdaq Rule 5635(b).

123 See Nasdaq Rule 5635(a)(2).

124 See Nasdaq Rule 5635(a)(1)(A-B).

125 See Nasdaq Rule 5635(d)(1).

126 See Nasdaq Rule 5635(f).

127 See Nasdaq Rule 5635(e)(1); see *also* Nasdaq IM 5635-4.

128 See Nasdaq IM 5635-3.

129 See Nasdaq Rule 5210(b); see *also* 15 U.S.C. Section 7212.

130 See Nasdaq Rule 5610.

131 See Nasdaq Rule 5625.

132 See *generally* Nasdaq Rule 5600; see *also* *Nasdaq Frequently Asked Questions: – Non-US Companies*.

133 See Nasdaq Rule 5250(b)(1); see *also* Nasdaq IM 5250-1.

134 See Nasdaq IM 5250-1.

- 135 See Nasdaq Rule 5250(e)(2)(A)(i).
- 136 See Nasdaq Rule 5250(e)(2)(B).
- 137 See Nasdaq Rule 5250(e)(2)(C).
- 138 See Nasdaq Rule 5250(e)(2)(D).
- 139 See Nasdaq Rule 5250(e)(1).
- 140 See Nasdaq Rule 5615(a)(3).
- 141 See Nasdaq Rules 5615(a)(3), 5625; *see also* Nasdaq IM 5615-3.
- 142 See Nasdaq Rule 5615(a)(3); *see also* Nasdaq IM 5615-3.
- 143 See Nasdaq Rule 5615(a)(3)(B)(i).
- 144 See Nasdaq Rule 5615(a)(3)(B)(ii).





# ANNEX D

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## MD&A

### The 2003 MD&A Release

In December 2003, the SEC published interpretive guidance on MD&A requirements (the 2003 MD&A Release).<sup>1</sup> The 2003 MD&A Release addressed:

- the overall presentation of MD&A;
- the focus and content of MD&A;
- disclosure regarding liquidity and capital resources; and
- disclosure regarding critical accounting estimates.

As a general matter, the SEC stated that the most important information should be most prominently disclosed, and encouraged issuers to include an executive-level overview of MD&A. In addition, under the 2003 MD&A Release, issuers were instructed to:

- focus on material information and eliminate information that does not promote understanding of their financial condition, liquidity and capital resources, changes in financial condition, and results of operations;
- identify and discuss key performance indicators, including non-financial performance indicators, that management uses to manage the business and that are material to investors; and
- identify and disclose known trends, events, demands, commitments, and uncertainties that are reasonably likely to have a material effect on financial condition or operating performance.

### Overall Presentation

The SEC commented in the 2003 MD&A Release that the presentation of MD&A was frequently lengthy, complex, and confusing. Issuers were encouraged to prepare MD&A with a strong focus on the most important information. In particular, issuers should:

- consider including a tabular presentation of financial or other information;
- assess the usefulness of headings they include, and consider adding additional headings as needed; and
- include an introductory section with an executive-level discussion identifying the most important matters with which management is concerned in evaluating an issuer's financial results.

### Content and Focus

The 2003 MD&A Release emphasized that disclosure should focus on material information necessary to understand the issuer's financial condition and operating performance, and its prospects for the future. Issuers were urged to:

- identify key variables, which may be non-financial;
- evaluate whether material information disclosed in other documents (such as earnings releases or analysts' calls) should be included in MD&A;
- provide a balanced view of the underlying dynamics of the business, including a description of an issuer's successes as well as failures;

- focus on known material events and uncertainties that would cause reported financial information not to be necessarily indicative of future financial performance; and
- focus on (and analyze) known trends, demands, commitments, events, and uncertainties to assess whether these trends or uncertainties are reasonably likely to have a material impact on the issuer's liquidity, capital resources, or results of operations.

## Liquidity and Capital Resources

An issuer must include in the MD&A material information regarding:

- historical sources of cash and capital expenditures;
- an evaluation of the amounts and certainties of cash flows;
- the existence and timing of commitments for capital expenditures and other known and reasonably likely cash requirements;
- expected changes in the mix and relative cost of capital resources;
- which balance sheet or income or cash flow items should be considered in assessing liquidity; and
- sources and needs for capital going forward.

The SEC stated that an issuer should identify:

- known material cash requirements;
- sources and uses of cash, discussing the primary drivers of cash flows, and the indicative value of historical cash flows;
- historical financing arrangements and their importance to cash flows, including debt financings, off-balance sheet financing arrangements, issuances of derivatives, and the impact of known or reasonably likely changes in credit ratings;
- prospective financings that are reasonably likely to occur, including potential amounts, terms, and impact on the issuer;
- material debt covenants, to the extent an issuer is likely to be in breach of those covenants or those covenants have an impact on the issuer's ability to take on additional debt or equity financing; and
- known material trends relating to cash management.

## Critical Accounting Estimates

Under the 2003 MD&A Release, issuers should provide disclosure about critical accounting estimates or assumptions where:

- the nature of the estimates or assumptions is material due to the levels of subjectivity and judgment needed to account for highly uncertain matters or the susceptibility of those matters to change; and
- the impact of the estimates and assumptions on financial condition or operating performance is material.

The SEC stated that this disclosure should supplement, not duplicate, the description of accounting policies included in the notes to the financial statements. In particular, an issuer should present its analysis of the uncertainties involved in applying a principle at a given time or the variability that is likely to result from its application over time. An issuer should also discuss specifically why its accounting estimates or assumptions might change, and how the estimate has changed in the past or may change in the future.

## The 2010 MD&A Release

Following the 2003 MD&A Release, and triggered in part by the perceived lack of financial transparency of financial institutions and companies as a contributing factor in the financial crisis of 2008, in 2010 the SEC issued further MD&A interpretive guidance (the 2010 MD&A Release).<sup>2</sup> The SEC simultaneously proposed – but has not yet adopted – amended rules to require issuers to provide, in a separately captioned subsection of MD&A, a comprehensive explanation of its short-term borrowings.<sup>3</sup>

In the 2010 MD&A Release, the SEC:

- reiterated MD&A principles applicable to disclosure of critical liquidity matters to ensure that MD&A disclosure keeps pace with the increasingly diverse and complex financing alternatives available to companies;
- made clear that an issuer cannot use financing structures (whether “on-balance sheet” or “off-balance sheet”) designed to mask the issuer’s reported financial condition, and requires transparent disclosure;
- emphasized that leverage ratios and other financial measures included in filings with the SEC must be calculated and presented in a way that does not obscure the company’s leverage profile or reported results; and
- addressed divergent practices arising in the context of tabular disclosure of contractual obligations to focus companies on providing informative and meaningful disclosure about their future payment obligations.

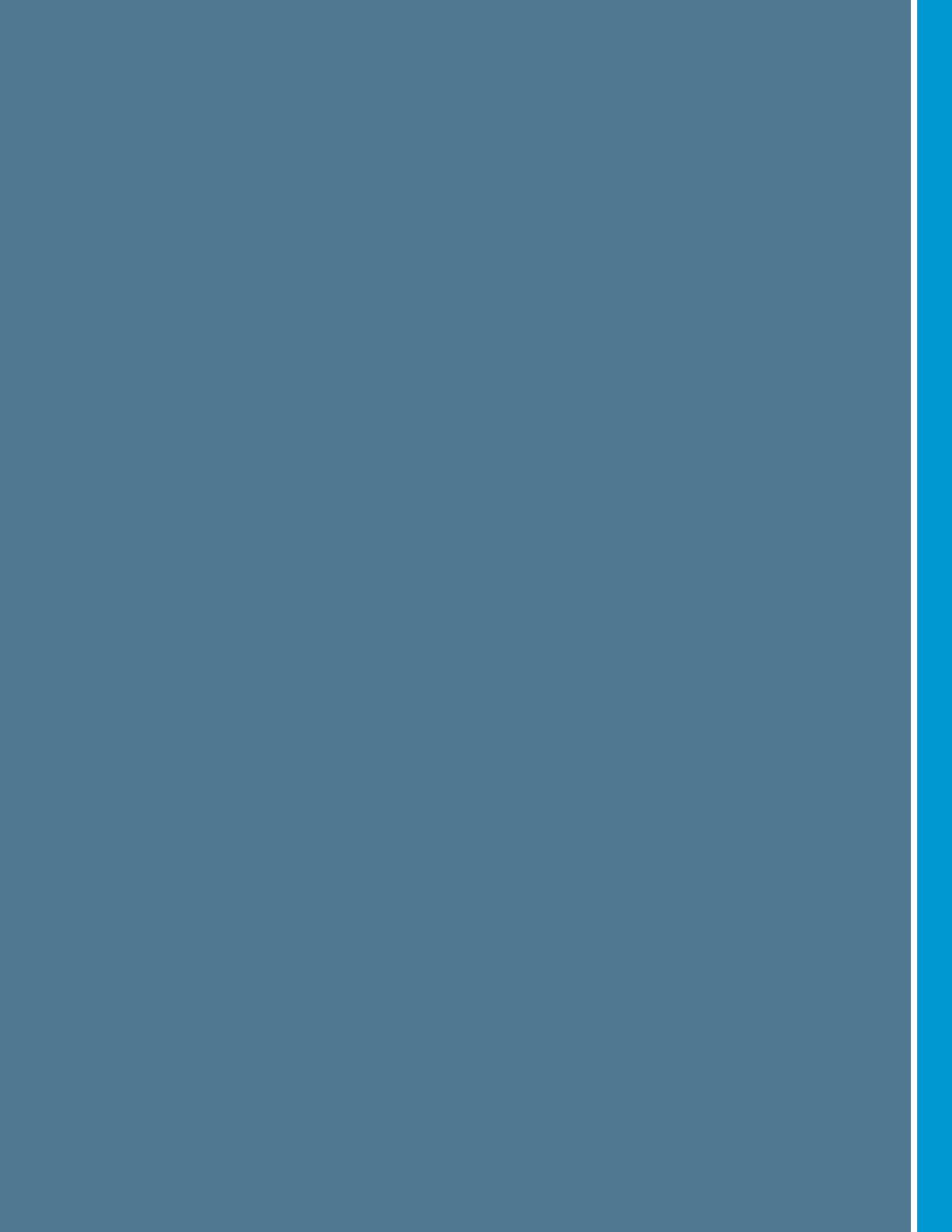
The 2010 MD&A Release outlined the following key points that could affect disclosure of particular liquidity and capital resources issues:

- Important uncertainties relating to liquidity might include: difficulties in accessing the debt markets, reliance on commercial paper or other short-term borrowings, changes in the terms requested by counterparties to liquidity arrangements, changes in the valuation of collateral, and counterparty risk.
- If a company’s financial statements do not adequately convey possible liquidity issues that arise in the middle of a financial reporting period, additional disclosure should be considered to enable understanding of their financial statements. For example, “if borrowings during the reporting period are materially different than the period-end amounts recorded in the financial statements, disclosure about the intra-period variations is required.”<sup>4</sup>
- Transactions involving the transfer of financial assets, such as repurchase agreements and other short-term financings that may not be fully disclosed on period-end balance sheets, may require additional disclosure if the transaction is reasonably likely to result in the use of a material amount of cash or other liquid assets.
- Companies should consider describing material cash and risk management policies. For example, if a company relies on portfolios of cash and investments to meet liquidity needs, it should describe the composition and nature of the portfolio and any related risks.
- Companies should clearly explain the methodology for leverage ratios and measures, in particular for any inputs that are unusual, infrequent, or non-recurring, or that are otherwise adjusted so that the ratio that is calculated differs from industry norms.

## ENDNOTES

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- <sup>1</sup> See *Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33-8350 (Dec. 29, 2003).
- <sup>2</sup> See *Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis*, Release No. 33-9144 (September 28, 2010) [*2010 MD&A Guidance*].
- <sup>3</sup> See *Proposed Rule: Short-Term Borrowings Disclosure*, Release No. 33-9143 (September 28, 2010).
- <sup>4</sup> See *2010 MD&A Guidance* at p. 5.



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