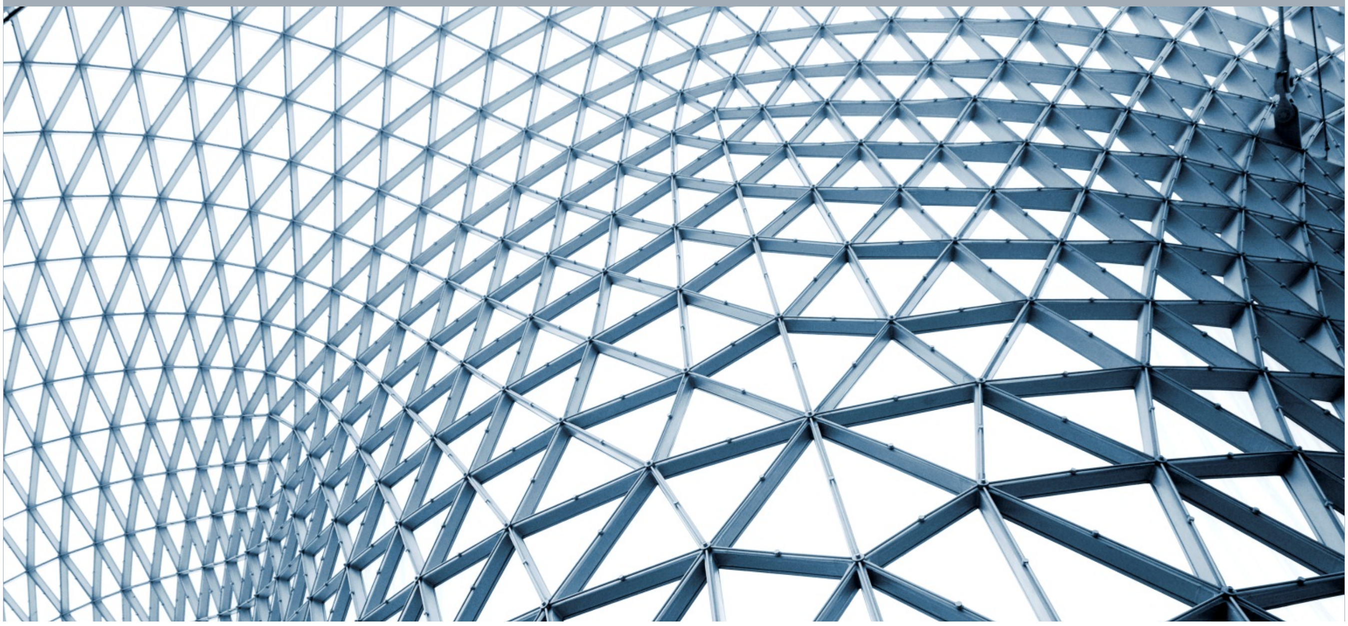
Shearman & Sterling LLP

# US Securities and NASDAQ Regulation
# A Compliance Manual for Non-US Companies

September 2014



# US Securities and NASDAQ Regulation

# A Compliance Manual for Non-US Companies

As a result of registration of ordinary shares including in the form of American Depositary Shares ("ADSs") under the US securities laws and the listing of ordinary shares or ADSs on the NASDAQ Stock Market ("NASDAQ"), non-US companies become subject to certain ongoing reporting and other requirements imposed by both the US Securities and Exchange Commission (the "SEC") and NASDAQ.

This manual summarizes the primary reporting obligations and other duties imposed by the Securities Act of 1933 (the "Securities Act"), the Securities Exchange Act of 1934 (the "Exchange Act"), the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") and other US securities laws upon a non-US company (the "Company") as an SEC registrant and upon its officers, directors and certain of its shareholders. It also summarizes the reporting obligations and other duties that are imposed as a result of the listing of the Company's ordinary shares or ADSs on NASDAQ.

In addition, we provide guidance on recommended best practice for compliance with the various US securities and NASDAQ regulations, and links to relevant regulatory compliance tools. This guidance and these tools are marked with the following symbol: ☞.

Information is current as of September 2014. This manual is a summary only of the principal US securities and NASDAQ regulations applicable to the Company. You should refer to the current definitive text of the relevant rules and forms before making decisions or using the forms to prepare any reports or filings.

September 2014

This manual is intended only as a general discussion of the topics included. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this manual, you may contact your usual Shearman & Sterling representative or any of the following:


Europe

Tobia Croff
Milan
+39.02.0064.1509
tobia.croff@shearman.com

David Dixter
London
+44.20.7655.5633
david.dixter@shearman.com

Domenico Fanuele
Rome
+39.06.697.679.210
dfanuele@shearman.com

Apostolos Gkoutzinis
London
+44.20.7655.5532
apostolos.gkoutzinis@shearman.com

Marc O. Plepelits
Frankfurt
+49.69.9711.1299
mplepelits@shearman.com

Richard J.B. Price
London
+44.20.7655.5097
rprice@shearman.com

Sami L. Toutounji
Paris
+33.1.53.89.70.62
stoutounji@shearman.com

Americas

Robert Ellison
São Paulo
+55.11.3702.2220
robert.ellison@shearman.com

Robert Evans III
New York
+1.212.848.8830
revans@shearman.com

Stuart K. Fleischmann
New York
+1.212.848.7527
sfleischmann@shearman.com

Christopher M. Forrester
Palo Alto
+1 650 838 3772
christopher.forrester@shearman.com

Stephen T. Giove
New York
+1 212 848 7325
sgiove@shearman.com

Jason R. Lehner
Toronto
+1.416.360.2974
jlehner@shearman.com

Manuel A. Orillac
New York
+1.212.848.5351
morillac@shearman.com

Alan Seem
Palo Alto
+1.650.838.3753
alan.seem@shearman.com

Antonia E. Stolper
New York
+1.212.848.5009
astolper@shearman.com

Robert C. Treuhold
New York
+1.212.848.7895
rtreuhold@shearman.com

Asia

Matthew Bersani
Hong Kong
+852.2978.8096
matthew.bersani@shearman.com

Masahisa Ikeda
Tokyo
+81.3.5251.1601
mikeda@shearman.com

Kyungwon Lee
Hong Kong
+852 2978 8078
kyungwon.lee@shearman.com

Andrew R. Schleider
Singapore
+65.6230.3882
aschleider@shearman.com

Shuang Zhao
Hong Kong
+852 2978 8002
shuang.zhao@shearman.com

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# Chapter 1: Executive Summary

# PERIODIC REPORTING IN COMPLIANCE WITH SEC REGULATIONS

## Annual Report on Form 20-F

- As a registered foreign private issuer (defined below), the Company is required to file an Annual Report on Form 20-F. The Form 20-F requires disclosure of the Company's financial and non-financial information similar to what must be disclosed on a Form F-1 registration statement/prospectus used in connection with a public offering of securities in the United States.

- The financial information in a Form 20-F must be prepared either (i) in accordance with or reconciled to US generally accepted accounting principles ("US GAAP") or (ii) in accordance with International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB"), in which case no US GAAP reconciliation is required.

- As part of its Form 20-F, the Company must file two forms containing certifications of the CEO and CFO. This is separate from the regular signing of the Form 20-F by an authorized officer.

## Timing

- The Company's Form 20-F must be filed not later than four months after the end of its fiscal year, *i.e.*, April 30 of each year if the Company's fiscal year ends on December 31. If the Company wants to coordinate its Form 20-F with its home country annual report to produce one integrated report, the Form 20-F can be filed at the same time as the home country annual report is published, so long as this is within the four-month period.

- If the Company wants to maintain its ability to offer securities off of a "shelf" registration statement, the Form 20-F must be filed within three months after the end of the Company's fiscal year.

## Periodic Reports on Form 6-K

- As a registered foreign private issuer, the Company is obligated to furnish to the SEC under cover of Form 6-K any **material** information:

  - required to be made public in the home country;

  - filed with and made public by any stock exchange on which the Company's securities are traded; or

  - distributed by the Company to its security holders either directly or by means of a press release.

- Any interim financial information furnished with a Form 6-K may be presented in accordance with the GAAP of the Company's primary financial statements and need not be presented in accordance with or reconciled to US GAAP. If, however, such interim financials are not prepared in accordance with IFRS as issued by the IASB, US GAAP reconciliation will be required in certain circumstances in connection with an SEC registered offering. See "Chapter 6: Offers and Purchases of Securities."

## Timing

- A report on Form 6-K must be submitted "promptly" after such information is made public by any of these means. We typically interpret the word "promptly" to mean on the same day of publication for financial information and other material information that would be likely to have an immediate market impact, and "as soon as practicable" but in no event more than 30 days (*i.e.*, at a minimum, monthly) after initial publication for other information.

## Electronic Filings Through EDGAR

- Non-US companies are required to file almost all of their disclosure documents with the SEC through the SEC's electronic system, known as "EDGAR." The rule does not change the substance of the disclosure required or the forms used.

- Non-US companies that prepare their financial statements in accordance with US GAAP must submit specified financial information within such statements in an interactive data format known as eXtensible Business Reporting Language ("XBRL"). XBRL consists of unique, computer-readable tags which are appended to a user's financial data by software programs or third-party providers with the goal of enabling more efficient retrieval and analysis of the information.

  - Non-US companies that prepare their financial statements under IFRS as issued by the IASB are not required to submit their financial statements in XBRL format, unless and until the SEC specifies a format for IFRS users in later rulemaking.

## SEC Review

- The SEC must review each issuer's disclosure at least once every three years.

## Foreign Private Issuer Exemptions

- As a registered foreign private issuer, the Company qualifies for the use of the "foreign private issuer" forms discussed below and is exempt from a number of SEC requirements that apply to US domestic reporting companies. So long as the Company retains its foreign private issuer status,[1] it is exempt from the following SEC requirements:
  - proxy statement rules;
  - insider trading reports (Forms 3, 4 and 5); and
  - "short-swing" profit recovery rule.

NASDAQ REPORTING REQUIREMENTS

## General Reporting Requirement

- NASDAQ requires listed companies to disclose to the public through any Regulation FD-compliant method (or combination of methods) any material information that would reasonably be expected to affect the value of their securities or influence investors' decisions. Typically, such information involves events of an unusual or non-recurring nature. It may also be appropriate for the Company, in certain circumstances, to publicly deny false or inaccurate rumors which are likely to have, or have had, an effect on the trading in its securities or would likely have an influence on investment decisions.

## Timing

- NASDAQ's MarketWatch Department must be notified of material disclosures at least 10 minutes prior to the release to the public when such release is made during NASDAQ market hours (7:00 a.m. to 8:00 p.m. Eastern Standard Time) ("NASDAQ market hours").
- If the public release of the information is made outside of NASDAQ market hours, NASDAQ's MarketWatch Department must be notified prior to 6:50 a.m. Eastern Standard Time the following day or the same day, as the case may be.

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1 A foreign private issuer is any non-government foreign issuer, except issuers meeting the following conditions:
(i) more than 50% of the voting securities of the issuer are directly or indirectly held of record by United States residents; <u>and</u>
(ii) any of the following:
(a) more than 50% of the assets of the issuer are located in the United States;
(b) the business of the issuer is administered principally in the United States; or
(c) the majority of the executive officers or directors are United States citizens or residents.

- ☞ If practicable and consistent with home country disclosure requirements, the Company should provide the information prior to the opening of NASDAQ.

- ☞ Except in emergency circumstances, NASDAQ requires that the Company submit this information using the electronic disclosure submission system available at http://www.nasdaq.net.

- Regulation FD-compliant methods consist of furnishing a press release on Form 6-K to the SEC or any other method of disclosure (or combination of methods of disclosure) that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public (which, depending on the circumstances, could include holding conference calls, press conferences or webcasts, or posting information on a company website). See "Chapter 3: Disclosure – No Selective Disclosure" for further discussion of Regulation FD.

- In certain circumstances, NASDAQ may delay trading (in the case of an alert before NASDAQ market hours) or call a trading halt (in the case of an alert during NASDAQ market hours) to permit the information to be disseminated to the public.

- ☞ In the event that the Company becomes the subject of rumors, you should exercise extreme care and contact counsel immediately. Public response to such rumors must be carefully crafted to avoid adverse effects on trading in the Company's securities and possible litigation.

## Form 20-F

- NASDAQ requires the Company to make a copy of its Form 20-F available to its shareholders by physically posting it to shareholders, by complying with the US rules regarding Internet availability of proxy materials or by posting the Form 20-F on the Company's website.

  - If the Form 20-F is posted on the Company's website, the Company must also display on the website a prominent undertaking to provide shareholders, upon request, with a hard copy free of charge. Simultaneous with the website posting, the Company must issue a press release stating that its Form 20-F has been filed with the SEC, where to find it online and that shareholders may receive a hard copy free of charge on request.

## Interim Financial Reports

- NASDAQ imposes on non-US listed companies its own requirement for publication of interim financial statements even though the SEC does not impose such a requirement on non-US companies outside the context of a registered offering.

  - The Company is required to publish, on a Form 6-K, an interim balance sheet and income statement as of the end of its second quarter. This information, which must be presented in English but does not have to be reconciled to US GAAP, must be provided no later than six months following the end of the Company's second quarter.

## SEC Filings

- The Company is not required to file a document with NASDAQ if it has filed the document through EDGAR with the SEC. However, documents that are not filed through EDGAR must be filed with NASDAQ.

## Other Notices to NASDAQ

- The Company must notify NASDAQ no later than:
  - 10 calendar days prior to the record date involved in a dividend or other distribution (other than an ordinary interest payment on a debt security), a stock split, or a rights or other subscription offering that results in the potential issuance of shares representing less than 10% of either the total shares or voting power outstanding prior to the offering; and
  - 15 calendar days prior to the record date involved in a reverse stock split or a rights or other subscription offering that results in the potential issuance of shares representing greater than 10% of either the total shares or voting power outstanding prior to the offering.
- The Company will also be required to give prompt written notice to NASDAQ regarding certain actions and events, including changes in the Company name or jurisdiction of organization, its trading symbol, the title of Company securities or their par value, the depositary or registrar, or the aggregate number of shares outstanding by five percent or more.
- *Notification of Noncompliance.* The Company must provide NASDAQ with prompt notification after an executive officer becomes aware of any noncompliance by the Company with NASDAQ's corporate governance requirements.

## Shareholder Approval

- NASDAQ requires US companies to obtain shareholder approval prior to undertaking certain corporate actions that could have a dilutive effect on their shareholdings or otherwise have corporate governance implications, such as certain issuances of shares representing more than 20% of a company's outstanding share capital, acquisitions of businesses by insiders of the company if the shares issued as consideration are above a certain threshold, or a change of control of the company.
- NASDAQ defers to different home country practice in the case of non-US companies provided that the Company submits a written statement from an independent counsel in its home country certifying that the home country practices are not prohibited by home country law. This letter is required only once, at the time of initial listing or before the Company first adopts a non-conforming practice.

## Direct Registration Program

- The Company is required to ensure that its listed securities are "eligible" for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act, such as the one offered by the Depositary Trust Corporation ("DTC"). A Direct Registration Program permits an investor's ownership to be recorded and maintained on the books of the issuer or the transfer agent without the issuance of physical stock certificates. A foreign private issuer is not subject to this requirement if it submits to NASDAQ a written statement from an independent counsel in its home country certifying that a law or regulation in the home country prohibits compliance.

- ➢ To be eligible, the Company is required to use a transfer agent that meets DTC's requirements for direct registered securities. The transfer agent must also instruct DTC to designate the company's securities as "direct registered eligible securities."

DEPOSITARY

- The Company must provide all the materials it generally sends to shareholders to its Depositary for forwarding to holders of ADSs.

☞ Appendix A of this manual contains a summary chart of these filing requirements.

CORPORATE GOVERNANCE

## General

- All SEC reporting companies must meet a set of corporate governance requirements that were adopted as part of or pursuant to the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). Most of the Sarbanes-Oxley corporate governance requirements apply to non-US companies, but only a few of the Dodd-Frank corporate governance requirements apply.

- NASDAQ also has a set of corporate governance standards for its listed companies, which sometimes, but not always, overlap with the Sarbanes-Oxley and Dodd-Frank requirements. In the case of non-US companies, NASDAQ standards allow a company to follow home country corporate governance practices except for compliance with certain requirements that are detailed below.

☞ Our Annual Surveys of Selected Corporate Governance Practices provide information on the general governance and director and executive compensation practices of the 100 largest US companies. The surveys, as well as other corporate governance information, are available at http://corpgov.shearman.com.

## Sarbanes-Oxley and Dodd-Frank Acts

- The principal Sarbanes-Oxley and Dodd-Frank corporate governance and related requirements applicable to non-US companies are as follows:

  - ➢ *Personal Loans*: Personal loans made by the Company after July 30, 2002 to directors and executive officers are prohibited without exception.

  - ➢ *Disclosure Controls and Procedures*: The Company is required to maintain and periodically evaluate a system of disclosure controls and procedures.

  - ➢ *Certifications*: The CEO and CFO each must file two forms with the Company's Form 20-F certifying to: compliance of the report with SEC requirements; material correctness and completeness of the report; fair presentation of the financial statements/information; design of the Company's disclosure controls and procedures and internal control over financial reporting; effectiveness of the Company's disclosure controls and procedures; and deficiencies, if any, in the Company's internal financial controls.

- *Internal Control over Financial Reporting*: Subject to certain exceptions provided by the Jumpstart Our Business Startups Act (the "JOBS Act"), the Company's Form 20-F must contain a management report on internal control over financial reporting, which effectively requires the design or formalization by management of such controls, and an external auditor's attestation report on management's report.

- *Audit Committee*: The Company must have an audit committee comprised entirely of independent directors, subject to certain specified exceptions, that: (i) is responsible for selecting and overseeing the Company's external auditors, (ii) has established procedures for handling complaints regarding the Company's accounting practices, (iii) has authority to engage advisors and (iv) has sufficient funding for payment of external auditors, advisers and ordinary administrative expenses. If the Company fails to meet these audit committee requirements, it will be prohibited from listing on any US stock exchange, including NASDAQ.

- *Compensation Committee*: US companies must have a compensation committee comprised entirely of independent directors. As a non-US company, the Company is exempt from this requirement if it discloses in its Form 20-F the reasons why it does not have an independent compensation committee.

- *Code of Ethics*: The Company must disclose in its Form 20-F whether or not, and if not, why not, it has established a code of ethics that applies to its principal executive officer, principal financial officer, and principal accounting officer or controller.

- *Audit Committee Financial Expert*: The Company must disclose in its Form 20-F whether or not, and if not, why not, it has a financial expert on its audit committee, the person's name and whether the person is an independent director.

- *Off-Balance Sheet and Contractual Obligations*: The Company is subject to enhanced disclosure requirements in its Form 20-F relating to its off-balance sheet arrangements, if any, and to enhanced, tabular disclosure requirements with respect to its contractual obligations.

- *Non-GAAP Financial Measures*: With specified exemptions, the Company is subject to enhanced disclosure with respect to its presentation of non-GAAP financial measures in all public disclosures, including the Form 20-F.

- *Pre-Approval of Audit and Non-Audit Services; Prohibited Non-Audit Services*: The audit committee/board of directors must pre-approve all audit and permissible non-audit services to be provided by the auditor of the Company's financial statements. The Company must disclose its pre-approval policies and procedures in its Form 20-F. There are 10 categories of non-audit services that the auditor is prohibited from performing.

- *Auditor Reporting*: Auditors must report certain matters to the audit committee prior to filing any audit reports with the SEC, including critical accounting policies and alternative accounting treatments.

- *Auditor Employment*: Starting with employment relationships that began after May 6, 2003, the Company is not allowed to hire, in an accounting or financial reporting oversight role, a member of the audit engagement team until one "cooling-off" audit year has lapsed since the audit year the services were rendered.

- *Accountant Fees and Compensation*: The Company must disclose in its Form 20-F the aggregate fees billed for specified categories of services provided by its external auditor over the two most recent fiscal years. The Company should seek assurance from its audit firm that, during an audit and professional engagement period, no audit partner involved in the audit is being compensated for procuring non-audit work from the Company.

- *Audit Partner Rotation*: The lead and concurring partners on the Company's external auditor team must rotate off the audit engagement for the Company after five years and may not be re-engaged until a five-year time-out period has elapsed. Other external audit partners directly involved in audit or attestation services for the Company must be rotated off after seven years and cannot be re-engaged until a two-year time-out period has elapsed. For all audit partners described above, the first fiscal year beginning after May 6, 2003 constituted the first year of service.

- *Attorney Conduct*: US lawyers who assist their clients with their SEC-related work and who come across evidence of a material violation must report the violation "up the ladder" at the Company.

☞ The Sarbanes-Oxley rules are described in detail in "Chapter 3: Disclosure" and "Chapter 4: Corporate Governance."

## NASDAQ Corporate Governance Standards

- NASDAQ has corporate governance standards relating primarily to the following:
  - the independence of the majority of a company's board of directors;
  - the adoption of corporate governance guidelines;
  - the adoption of a code of business conduct and ethics;
  - the composition, duties and responsibilities of a company's audit committee, compensation committee and nominations committee;
  - shareholder approval of certain transactions, including equity compensation plans; and
  - shareholder approval of change of control.
- The NASDAQ standards defer to home country practice in the case of non-US companies, except for the NASDAQ standards relating to:
  - the requirement to provide NASDAQ with prompt notification after an executive officer becomes aware of any noncompliance by the Company with NASDAQ's corporate governance requirements;
  - the responsibilities and authority of an audit committee;
  - the independence of an audit committee; and

- the Company's eligibility to participate in a Direct Registration Program (unless prohibited from complying with this rule by a law or regulation in the Company's home country).

- In instances where home country practices differ from the NASDAQ standards, the Company is required to submit to NASDAQ a written statement from an independent counsel in its home country certifying that the home country practices are not prohibited by home country law. This letter is required only once, either at the time of initial listing or before the Company first adopts a non-conforming practice.

- In addition, the Company must disclose each NASDAQ requirement that it does not follow, and the home country practice that the Company follows in lieu of the requirement, in its Form 20-F. The Company is also encouraged, but not required, to provide such disclosures on its website.

  - Under rules adopted by NASDAQ to implement the Dodd-Frank Act, a company that follows a home country practice in lieu of the requirement to have an independent compensation committee must disclose in its Form 20-F the reasons why it does not have an independent compensation committee.

- A number of non-US companies have taken affirmative steps to comply with all the NASDAQ standards except in instances where a home country rule expressly regulates a subject differently from a NASDAQ standard.

☞ The Company should compare its corporate governance practices, and home country requirements, with the NASDAQ standards to identify differences for disclosure purposes and to assess if any changes should be made to existing practices. The NASDAQ standards are described in detail in "Chapter 4: Corporate Governance" to assist the Company with that assessment.

## SALES OF SECURITIES BY AFFILIATES OF THE COMPANY

- Securities held by affiliates of an issuer may be sold in the United States only in accordance with the registration requirements of the Securities Act, or pursuant to an exemption from these requirements.

  - Generally, an affiliate is any person who exerts a controlling influence over, is under common control with, or is controlled by, the Company. As a general matter, a 10% shareholder may be considered an affiliate, especially if such person is represented on the Company's board of directors. Determination of whether a person is or is not an affiliate is highly fact-specific and should be made in consultation with US securities counsel.

- Historically, the most important exemption from the US registration requirements for affiliates is Rule 144. In general, Rule 144 permits an affiliate to sell securities without registration in ordinary brokerage transactions, to a market maker, or in riskless principal transactions, subject to volume and timing limitations and certain other procedural requirements that are described under "Chapter 6: Offers and Purchases of Securities." Rule 144's restrictions are different (and greater) for companies that are not SEC reporting companies than for those that are, such as the Company.

## OBLIGATIONS TO FILE BENEFICIAL OWNERSHIP REPORTS

- Any person (including any natural person, company, government or political subdivision thereof) and any "Group" of persons within the meaning of the Exchange Act that, at the time an issuer registers under the

Exchange Act, is or thereafter becomes the "beneficial owner" of more than 5% of a class of equity securities that is registered under the Exchange Act becomes subject to an obligation to file reports of beneficial ownership with the SEC on the prescribed form and to send copies of the report to the issuer and NASDAQ.

- Generally, these reports are filed on a Schedule 13D.
- A shorter version of this form, Schedule 13G, may be filed in lieu of a Schedule 13D under certain circumstances.
- The Company, as an issuer, is exempt from the requirement to file beneficial ownership reports as to the acquisition of its own equity securities.
- "Beneficial owner," a technical term defined in the Exchange Act, generally encompasses not only securities that are owned of record, directly or indirectly, but also any securities with respect to which the person has the power to either direct the investment or disposition of, or exercise the power to vote, such securities.

## RESPONSIBILITIES OF PERSONS WITH ACCESS TO INSIDE INFORMATION

- The US securities laws prohibit the purchase or sale of the securities of any company by anyone in possession of material non-public information regarding that company. Set out below are two guidelines designed to assist in compliance with US securities laws in this area. Although these two guidelines may be regarded as almost self-evident, it is important that all relevant persons be aware of the potential liabilities under US law that would follow from any violation.
  - The first fundamental guideline is that no individual, regardless of his or her position within the Company, should purchase or sell any shares or ADSs of the Company while in possession of material information that is not yet publicly disseminated. For this purpose, information that has been released to the public, but not yet absorbed by the financial community, should be regarded as non-public and an improper basis for securities trading. Similarly, where there is material information that is not yet ripe for public disclosure, as in the early stages of a significant acquisition, no insider with access to the information should trade in the Company's shares or ADSs without first obtaining approval through appropriate channels and, if appropriate, after legal counsel has been consulted. Likewise, if an employee obtains inside information from another public corporation, he or she should not trade in the securities of that other corporation.
  - The second fundamental guideline is that each individual who has access to material information should exercise the utmost caution to keep that information confidential within the Company. If anyone becomes aware of a leak of material information, whether inadvertent or otherwise, he or she should report the leak immediately to the person or persons at the Company charged with responsibility for public disclosures. Any insider who "leaks" inside information to a "tippee" may be liable, along with the tippee, to third parties for the profit of the tippee.
- Although these guidelines are expressed in general terms, we must stress that the rules of US law with which they seek to ensure compliance are very wide-ranging and strict. Moreover, although the primary responsibility for compliance lies with the individuals concerned, the Company as a corporate entity may be subject to adverse consequences under US law as a result of any violation. Quite apart from any legal liability that may

ensue, any appearance of impropriety could severely damage investor confidence in the Company. In a similar fashion, violation of the corporate obligations discussed elsewhere in this manual could impose liability on individual members of management as the persons responsible for causing or permitting corporate misconduct.

☞ The Company should establish a formal, written policy concerning trading of the Company's securities by employees and certain other persons in order to protect against infractions of insider trading laws.

THE FOREIGN CORRUPT PRACTICES ACT

- Non-US companies that have registered securities under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act must comply with the provisions of the Foreign Corrupt Practices Act (the "FCPA").
  - The FCPA prohibits registrants and all officers, directors, employees and shareholders acting on behalf of such registrants from using any means of US interstate commerce to offer bribes to any foreign official, foreign political party, party official or candidate for political office for the purpose of influencing any act or decision in order to obtain business.
  - The FCPA also prohibits payments to anyone who acts on behalf of a company in an effort to influence the same class of persons. The FCPA also imposes accounting and record keeping standards on those who are subject to its provisions.

EMPLOYEE SHARE OPTION SCHEMES

- In connection with options to purchase shares or ADSs granted to employees resident in the United States under the Company's employee share option schemes, the Company is required to file with the SEC a registration statement on Form S-8 to register sales of shares by these employees upon the exercise of such options. This requirement arises under the Securities Act.
- Separately, the granting of options to employees could subject the options, as a separate class of securities from the shares, to registration under the Exchange Act, if 300 or more US holders end up holding options. Because the shares are already registered under the Exchange Act, practically the only effect of the additional application of this requirement to options would be that the options would have to be separately listed on the cover page of the Company's Form 20-F.
  - In any event, options are exempted from the Exchange Act registration requirement where (i) the options have been issued pursuant to one or more written compensatory stock option plans and (ii) the class of persons eligible to receive or hold compensatory employee stock options under such option plans is limited to employees, directors, consultants and advisors of the Company, its parents, its majority-owned subsidiaries or the majority-owned subsidiaries of its parents.

# Chapter 2: Periodic Reporting Requirements: SEC and NASDAQ Regulations

## ANNUAL REPORT ON FORM 20-F

### General Requirements

- As a registered foreign private issuer, the Company must file an annual report on Form 20-F. The Form 20-F contains financial and non-financial information similar to a Form F-1 registration statement/prospectus used in connection with a public offering of securities in the United States.

- The financial information in a Form 20-F must be prepared either (i) in accordance with or reconciled to US GAAP or (ii) in accordance with IFRS as issued by the IASB, in which case no US GAAP reconciliation is required.

- As part of its Form 20-F, the Company must file two forms containing the following certifications of the CEO and CFO: a "section 906" certification and a "section 302" certification. The section numbers refer to sections of the Sarbanes-Oxley Act. The section 906 and 302 certifications are separate from the regular signing of the Form 20-F by an authorized officer (see "Chapter 3: Disclosure – CEO/CFO Certifications").

### Timing

- The Company's Form 20-F must be filed not later than four months after the end of its fiscal year, *i.e.*, April 30 of each year if the Company's fiscal year ends on December 31.

- If the Company wants to maintain its ability to offer securities off of a "shelf" registration statement, the Form 20-F must be filed within three months after the end of the Company's fiscal year.

- The Company may wish to adopt a "fully integrated" approach to the preparation of its home country annual report and Form 20-F. This would involve the preparation of a home country annual report and the incorporation by reference of certain sections of that report into the Form 20-F to comply with the Form 20-F requirements. This would dispense with the need to prepare a separate annual report and Form 20-F, provided that the home country annual report sections to be incorporated by reference comply with the requirements of Form 20-F. As a result, the Company would file its Form 20-F with the SEC at the same time as the home country annual report is published, so long as this is within the four-month period.

☞ The preparation of the home country annual disclosure and the Form 20-F should be an integrated process to achieve efficiencies and ensure consistency of disclosure, regardless of whether a separate or integrated Form 20-F is published.

$ There is no fee for filing a Form 20-F.

## PERIODIC REPORTS ON FORM 6-K

### General Requirements

- As a registered foreign private issuer, the Company must furnish to the SEC under cover of Form 6-K any **material** information:

  - required to be made public in the home country;

- filed with and made public by any stock exchange on which the Company's securities are traded; or
- distributed by the Company to its security holders either directly or by means of a press release.

- Any interim financial information furnished with a Form 6-K may be presented in accordance with the GAAP of the Company's primary financial statements and need not be presented in accordance with or reconciled to US GAAP. If, however, such interim financials are not prepared in accordance with IFRS as issued by the IASB, US GAAP reconciliation will be required in certain circumstances in connection with an SEC registered offering. See "Chapter 6: Offers and Purchases of Securities."

## Timing

- Information in the foregoing categories must be furnished to the SEC "**promptly**" after being made public. If the Company establishes a policy of furnishing to the SEC all information it makes public, it may adopt a system of submitting Form 6-Ks with the SEC on a consolidated monthly basis. Under this procedure, it would collect the information to be furnished to the SEC under cover of Form 6-K during the month and file it all together.

- This system would not apply, however, to press releases of special significance, such as interim financial results and other material information that would be likely to have an immediate impact on the market price of the Company's securities. Such press releases should be furnished to the SEC as soon as practicable after they are made public. Typically, arrangements are made to submit this information on Form 6-K to the SEC on the **same day** as the information is released in the home country.

## What Constitutes Material Information?

- Not all information made public by the Company must be furnished to the SEC under cover of Form 6-K. The SEC requires the furnishing of information that the Company deems to be of material importance to its security holders, such as:
  - interim financial results;
  - changes in business;
  - changes in management or control;
  - acquisitions or dispositions of assets;
  - bankruptcy or receivership;
  - changes in the Company's certifying accountants;
  - changes in the Company's financial condition and results of operations;
  - material legal proceedings;
  - defaults on senior securities;

- material increases or decreases in the amount outstanding of securities or indebtedness;
- the results of the submission of matters to a vote of security holders;
- transactions with directors, officers, or principal security holders;
- the resignation of one or more of the Company's directors;
- a change in the Company's fiscal year; and
- the granting of options or payment of other compensation to directors or officers.

## Additional Materiality Guidelines

- The SEC requires US issuers to file a Form 8-K under the Exchange Act when any of the following developments occur. Form 8-K is loosely the US domestic equivalent of Form 6-K. Although these requirements do not apply to non-US companies such as the Company, they serve as a best practice guideline to determine what additional types of items are material.
  - entry into or termination of a material agreement not made in the ordinary course of business;
  - creation of a direct financial obligation or a contingent one under an off-balance sheet arrangement that is material to the Company;
  - triggering events that accelerate or increase a material direct or contingent financial obligation;
  - material costs associated with exit or disposal activities;
  - material impairments;
  - movement of the Company's securities from one exchange to another, delisting of the Company's securities from an exchange, or a notice that the Company does not comply with a listing standard;
  - conclusion or notice that security holders no longer should rely on the Company's previously issued financial statements or a related audit report;
  - unregistered sales of equity securities by the Company; and
  - material modifications to rights of holders of the Company's securities.

## English Translation

- Press releases and all other communications that are required to be submitted on Form 6-K must be translated into English.

  $ There is no fee for filing a Form 6-K.

## SEC REVIEW

- The SEC must review each issuer's disclosure at least once every three years. The SEC completes many reviews without issuing comments.
- If the review results in comments, the SEC issues a comment letter that may cover both financial and non-financial disclosures, typically in the Form 20-F, but potentially also in information submitted on Form 6-K.
- An issuer is typically given 10 business days to respond to the first comment letter, but extensions can be requested.
- An issuer's responses are submitted as correspondence on EDGAR. The SEC's questions and the issuer's responses will become publicly available no earlier than 20 business days after the close of the comment process.

## ELECTRONIC FILINGS THROUGH EDGAR

- Non-US companies are required to file almost all of their disclosure documents with the SEC through the SEC's electronic system, known as "EDGAR." Among other documents, EDGAR filing is required for annual reports on Form 20-F and periodic reports on Form 6-K (except as described below). This requirement does not change the substance of the disclosure required or the forms used. The SEC will make exceptions for the following documents, which may be filed in paper format:
  - glossy annual reports to shareholders, filed under the cover of a Form 6-K if the sole purpose of the Form 6-K is to furnish a copy to the SEC; and
  - materials other than press releases that are being furnished to the SEC under a Form 6-K and (i) are not required to be, and have not been, distributed to security holders and (ii) if material events are discussed, including annual or interim consolidated financial results, have already been the subject of a Form 6-K submission or other filing on EDGAR.
- Non-US companies that prepare their financial statements in accordance with US GAAP must submit specified financial information within such statements in an interactive data format known as XBRL. XBRL consists of unique, computer-readable tags which are appended to a user's financial data by software programs or third-party providers with the goal of enabling more efficient retrieval and analysis of the information.
  - Non-US companies that prepare their financial statements under IFRS as issued by the IASB are not required to submit their financial statements in XBRL format, unless and until the SEC specifies a format for IFRS users in later rulemaking.

☞ A list of SEC-approved data formats can be located on the SEC's website at http://www.sec.gov/info/edgar/edgartaxonomies.shtml.

### Timing

- EDGAR filings are accepted by the SEC between 8 a.m. and 10 p.m. Eastern Standard US time, except on weekends and US federal holidays. Filings received after 5:30 p.m. Eastern Standard Time will receive the next business day's date as the official filing date.

## LIABILITY AND INCORPORATION BY REFERENCE INTO PROSPECTUSES OF FORMS 20-F AND 6-K

- Information filed in the Form 20-F and material furnished to the SEC under Form 6-K will be subject to liability if they contain incomplete or misleading disclosure (see "Chapter 3: Disclosure").

- Once the Company is eligible to use the short-form Form F-3 registration statement/prospectus for issuances of securities in the US public market, such form incorporates by reference the Form 20-F and specified Form 6-Ks. Because the risk of liability increases as reports on Forms 20-F and 6-K are incorporated by reference into offering documents, as they are deemed part of the relevant prospectus, any such incorporated reports, such as interim financial reports and press releases announcing material corporate developments, should be reviewed by US counsel before filing (see "Chapter 6: Offers and Purchases of Securities" for Form F-3 eligibility requirements).

### Credit Ratings

- The Dodd-Frank Act repealed Rule 436(g) under the Securities Act so that non-US companies are now required to obtain and file consents from rating agencies when they include or incorporate by reference credit ratings in their registration statement or prospectuses (for example, by incorporating the information by reference to their Form 20-F).

- Rating agencies that consent to the inclusion of a rating in a registration statement/prospectus will be exposed to liability as experts under Section 11 of the Securities Act for any material misstatements or omissions with respect to the included ratings.

- ☞ As a result, currently rating agencies do not provide this consent, so we recommend that references to the Company's credit ratings not be included in the Form 20-F. There are some specific circumstances that would permit credit ratings to be included without such consent, which should be discussed with your counsel.

- If the Company discloses the ratings in a Form 6-K, no consent by the rating agency is required unless the Form 6-K is incorporated by reference into a registration statement.

## NASDAQ REPORTING REQUIREMENTS

### General Reporting Requirement

- NASDAQ requires listed companies to disclose to the public through any Regulation FD-compliant method (or combination of methods) any material information that would reasonably be expected to affect the value of their securities or influence investors' decisions. Typically, such information involves events of an unusual or non-recurring nature. It may also be appropriate for the Company, in certain circumstances, to publicly deny false or inaccurate rumors which are likely to have, or have had, an effect on the trading in its securities or would likely have an influence on investment decisions.

## Timing

- NASDAQ's MarketWatch Department must be notified of material disclosures at least 10 minutes prior to the release to the public when such release is made during NASDAQ market hours (7:00 a.m. to 8:00 p.m. Eastern Standard Time) ("NASDAQ market hours").

- If the public release of the information is made outside of NASDAQ market hours, NASDAQ's MarketWatch Department must be notified prior to 6:50 a.m. Eastern Standard Time the following day or the same day, as the case may be.

- If practicable and consistent with home country disclosure requirements, the Company should provide the information prior to the opening of NASDAQ.

- Except in emergency circumstances, NASDAQ requires that the Company submit this information using the electronic disclosure submission system available at http://www.nasdaq.net.

- Regulation FD-compliant methods consist of furnishing a press release on Form 6-K to the SEC or any other method of disclosure (or combination of methods of disclosure) that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public (which, depending on the circumstances, could include holding conference calls, press conferences or webcasts, or posting information on a company website). See "Chapter 3: Disclosure – No Selective Disclosure" for further discussion of Regulation FD.

- In certain circumstances, NASDAQ may delay trading (in the case of an alert before NASDAQ market hours) or call a trading halt (in the case of an alert during NASDAQ market hours) to permit the information to be disseminated to the public. Typically, such a halt lasts one half-hour after the appearance of the news on the wire services.

- In the event that the Company becomes the subject of rumors, you should exercise extreme care and contact counsel immediately. Public response to such rumors must be carefully crafted to avoid adverse effects on trading in the Company's securities and possible litigation.

## Form 20-F

- NASDAQ requires the Company to make a copy of its Form 20-F available to its shareholders by physically posting it to shareholders, by complying with the US rules regarding Internet availability of proxy materials or by posting the Form 20-F on the Company's website.

  - If the Form 20-F is posted on the Company's website, the Company must also display on the website a prominent undertaking to provide shareholders, upon request, with a hard copy free of charge. Simultaneous with the website posting, the Company must issue a press release stating that its Form 20-F has been filed with the SEC, where to find it online and that shareholders may receive a hard copy free of charge on request.

## Interim Financial Reports

- NASDAQ imposes on non-US listed companies its own requirement for publication of interim financial statements even though the SEC does not impose such a requirement on foreign private issuers outside the context of a registered offering.
  - The Company is required to publish, on a Form 6-K, an interim balance sheet and income statement as of the end of its second quarter. This information, which must be presented in English but does not have to be reconciled to US GAAP, must be provided not later than six months following the end of the Company's second quarter.

## SEC Filings

- The Company is not required to file a document with NASDAQ if it has filed such document through EDGAR with the SEC. However, documents that are not filed through EDGAR must be filed with NASDAQ.

## Other Notices to NASDAQ

- The Company must notify NASDAQ no later than:
  - 10 calendar days prior to the record date involved in a dividend or other distribution (other than an ordinary interest payment on a debt security), a stock split, or a rights or other subscription offering that results in the potential issuance of shares representing less than 10% of either the total shares or voting power outstanding prior to the offering; and
  - 15 calendar days prior to the record date involved in a reverse stock split or a rights or other subscription offering that results in the potential issuance of shares representing greater than 10% of either the total shares or voting power outstanding prior to the offering.
- The Company will also be required to give prompt written notice to NASDAQ regarding certain actions and events, including changes in the Company name or jurisdiction of organization, its trading symbol, the title of Company securities or their par value, the depositary or registrar, or the aggregate number of shares outstanding by five percent or more.
- *Notification of Noncompliance.* The Company must provide NASDAQ with prompt notification after an executive officer becomes aware of any noncompliance by the Company with NASDAQ's corporate governance requirements.

## Shareholder Approval

- NASDAQ requires US companies to obtain shareholder approval prior to undertaking certain corporate actions that could have a dilutive effect on their shareholdings or otherwise have corporate governance implications, such as certain issuances of shares representing more than 20% of a company's outstanding share capital, acquisitions of businesses by insiders of a company if the shares issued as consideration are above a certain threshold, or a change of control of the company.

- NASDAQ defers to different home country practice in the case of non-US companies provided that the Company submits a written statement from an independent counsel in its home country certifying that the home country practices are not prohibited by home country law. This letter is required only once, at the time of initial listing or before the Company first adopts a non-conforming practice.

### Direct Registration Program

- The Company is required to ensure that its listed securities are "eligible" for a Direct Registration Program operated by a clearing agency registered under Section 17A of the Exchange Act, such as the one offered by DTC. A Direct Registration Program permits an investor's ownership to be recorded and maintained on the books of the issuer or the transfer agent without the issuance of physical stock certificates. A foreign private issuer is not subject to this requirement if it submits to NASDAQ a written statement from an independent counsel in its home country certifying that a law or regulation in the home country prohibits compliance.
    - To be eligible, the Company is required to use a transfer agent that meets DTC's requirements for direct registered securities. The transfer agent must also instruct DTC to designate the company's securities as "direct registered eligible securities."

### General Communications with NASDAQ

- General communications with NASDAQ, as well as questions regarding NASDAQ disclosure requirements, should be directed to NASDAQ's Listing Qualifications desk at + 1-301-978-8008 or + 1-877-536-2737.

- The Listing Center at https://listingcenter.nasdaqomx.com/ is NASDAQ's online document portal, which supports the secure electronic submission of listing applications and forms. It streamlines the preparation of applications and forms by pre-populating the form with much of the required information. Companies can also take advantage of this online portal to submit supplemental documentation. NASDAQ stores completed forms and supporting documents so they will be readily accessible for future reference.

## DEPOSITARY REPORTING REQUIREMENTS

- The Company must provide the Depositary with all the materials that are generally made available to shareholders of the Company in its home country (*e.g.*, the annual reports, the quarterly reports and notices of meetings). The Depositary will distribute such materials to the holders of ADSs. If they are not in English, the Company must translate these materials into English prior to delivery of these materials to the Depositary.

SHEARMAN & STERLING LLP

# Chapter 3: Disclosure

## GENERAL

This chapter provides an overview of disclosure principles and recommended best practice for disclosures to the various stakeholders that the company communicates with and the methods of those communications. The Company should consult with its US counsel for guidance on compliance with the detailed disclosure obligations of the annual report on Form 20-F.

### Prompt Public Disclosure

- Good corporate practice calls for prompt public disclosure of material events affecting a company. There is no mechanical standard for determining what information is “material.” A good guideline is whether or not a reasonable investor would attach significance to the information in making an investment decision.

### SEC’s Materiality Guidelines

- The SEC has a definition of materiality similar to the notion discussed above. The SEC, in the context of the requirement for furnishing information as to any subject, requires disclosure of those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security or which would significantly alter the total mix of available information. The SEC has directed companies to consider the following in determining whether a piece of information is material:
    - size in numerical or percentage terms of the impact of the event (the “quantitative factor”);
    - factual context in which an investor would view the event (the “qualitative factor”); and
    - the “total mix” of both quantitative and qualitative factors.
- While the SEC has proffered this definition and these factors, it has consistently advocated that they should not be applied rigidly or as a substitute for a full analysis of all relevant considerations. For instance, many companies abide by a “rule of thumb” materiality threshold of a reasonably likely impact of 5% or more on an item of their financial statements. The SEC has indicated that it has no objection to such a threshold, but only insofar as it serves as the beginning of the materiality analysis.

### Duty to Disclose

- A duty to speak generally arises when:
    - there is a specific SEC requirement to speak; *e.g.*, the annual report on Form 20-F;
    - the Company is effecting transactions in its securities;
    - material non-public information about the Company has leaked into the market place;
    - the Company has chosen to make public comments and such comments would be misleading without additional information;

- ➢ the Company discovers that information it has previously disclosed is materially incorrect ("duty to correct"); or

- ➢ information previously published by the Company that continues to be alive in the marketplace has become misleading because of events subsequent to its publication ("duty to update").

☞ These situations need to be considered on a case-by-case basis and should involve consultation with in-house counsel and US counsel.

## Anti-fraud Rules

- The anti-fraud rules of the US securities laws lead to the conclusion that there may be times when the Company would not wish to issue a prospectus because, in order not to contain misleading information or material omissions, the prospectus would need to include information which the Company may not wish to disclose for commercial reasons.

☞ Any issuance of disclosure, such as interim or annual reports, requires careful examination of whether any material information is being omitted.

LIABILITY FOR INADEQUATE OR MISLEADING DISCLOSURE

## Exchange Act

### *Section 18*

- The Exchange Act imposes liability on any person who makes a statement with respect to a material fact, in any report filed under the Exchange Act, that was false or misleading at the time and in light of the circumstances under which it was made. Such person is liable for damages caused by any person's reliance upon the misleading statement in purchasing or selling a security at a price affected by the statement.

- This statutory liability does not apply to material furnished to the SEC under cover of Form 6-K, but would apply to annual reports on Form 20-F.

- A defense against such liability is that the person who made the statement acted in good faith and had no knowledge that the statement was false or misleading.

### *Rule 10b-5*

- The Exchange Act also contains a broad "catch-all" liability provision—Rule 10b-5. Rule 10b-5 states that, in connection with the purchase or sale of any security "it shall be unlawful for any person, directly or indirectly . . . to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."

- Liability under Rule 10b-5 requires some element of "scienter" or knowledge of the statement's falsity on the part of the person making it.

- Information submitted under Form 6-K as well as any other information given to the market is subject to Rule 10b-5. In addition, a person who "willfully and knowingly" makes a false or misleading statement with respect to a material fact is subject to a significant fine and criminal penalties.

## SEC Action

- The SEC is empowered by Congress to enforce the US securities laws and over the years the SEC's enforcement powers have been significantly expanded. The SEC has the ability to seek treble damage penalties for insider trading violations and it can impose civil penalties in administrative proceedings for non-compliance with disclosure regulations. In addition, the SEC has "cease and desist" power, which allows it to order companies accused of violating any US securities law to stop committing such violation immediately and vow never to commit such violation again.

## Private Litigation

- Reporting companies also face the risk of private civil securities litigation in the United States. Such litigation, even if ultimately successful for the Company, can be costly both financially and in terms of public perception and business development. For many companies, an important part of the litigation risk is simply having to incur the expense and loss of management time involved in being sued, together with the practical consideration that the cost of settlement may be less expensive than mounting a successful defense.

☞ The best defense against securities law liability in the United States is disclosure. Therefore, we encourage the Company to commit itself to a policy of full and frank disclosure so as to protect itself from the possibility of securities litigation in the United States.

## Sarbanes-Oxley Act

### *Personal Liability of CEOs and CFOs Providing Certification*

- The Sarbanes-Oxley Act provides that CEOs and CFOs who knowingly provide false certification under sections 302 and 906 (see "CEO/CFO Certifications" below) face personal civil and criminal liability. Sarbanes-Oxley does **not** create new substantive liability for material misstatements and omissions in disclosure. Nonetheless, the addition of the certification process is intended to make more transparent any involvement of CEOs and CFOs in disclosure creating liability.

- Section 906 is a criminal statute, and CEOs and CFOs who knowingly provide a false certification are liable for a fine up to $1 million and/or a prison term of up to 10 years. The penalty is increased to $5 million and/or 20 years if the violation is "willful."

### *Statute of Limitations*

- The Sarbanes-Oxley Act extends the statute of limitations for private rights of action involving fraud, deceit, manipulation or other contrivance in violation of federal securities laws (i) to two years after it is discovered or (ii) to five years after it occurs, whichever is earlier.

### *Criminal Anti-fraud Liability*

- Section 807 of the Sarbanes-Oxley Act provides for fines and/or a prison term of up to 25 years for **any person** who knowingly executes, or attempts to execute, a scheme to defraud any person in connection with any security of a registered reporting issuer or to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any such security.

### *Destroying Audit Records*

- The Sarbanes-Oxley Act requires independent auditors of the Company to maintain all audit or review work papers for five years from the end of the fiscal period in which the audit or review was concluded. Failure to do so carries criminal penalties, including fines and/or a prison term of up to 10 years.

### *Whistleblower Protection*

- The Company and its officers, employees, contractors and agents are prohibited from taking retaliatory action against any employee who provides information or assists in investigations regarding any alleged securities fraud or securities violations. If the Company were to take retaliatory action, it would be forced to pay the employee a comprehensive list of compensatory damages, including litigation costs. Individuals that intentionally take such retaliatory action are subject to fines and up to 10 years imprisonment.

- A whistleblower program adopted by the SEC pursuant to the Dodd-Frank Act in August 2011 significantly strengthened the whistleblower protection provisions of the Sarbanes-Oxley Act.

  - A whistleblower who voluntarily provides the SEC with “original information” about a violation of US federal securities laws that leads to a successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions greater than $1 million is eligible to obtain between 10 and 30% of the monetary sanctions imposed in the SEC enforcement as well as in any related actions. This includes matters brought against non-US companies or matters brought under the US Foreign Corrupt Practices Act (see “Chapter 5: Anti-Corruption; Compliance Programs”).

  - The rule includes provisions to encourage internal reporting, including making the amount of the financial award dependent on the timeliness and quality of the information and the extent to which the whistleblower helped or hindered internal compliance mechanisms.

  - The rule also includes provisions to safeguard the anonymity of the whistleblowers and to protect them from retaliation.

  - With some exceptions, certain categories of persons would not be considered for the whistleblower award, including those with a pre-existing duty to report such violations, those who obtain the knowledge through client engagement, such as attorneys and independent public accountants, internal compliance and internal audit personnel and officers, directors, trustees or partners of a company who learn of the alleged misconduct from reports of another person or by means of the company’s internal compliance system.

### *Directors and Officers Bars*

- If an employee of the Company is found guilty of violating certain provisions of the federal securities laws, the SEC may issue an order prohibiting this person from acting as an officer or director of the Company if his or her conduct demonstrates unfitness to serve.

### *Disgorgement of Bonuses and Profits*

- If the Company has to prepare an accounting restatement due to its material noncompliance, as a result of misconduct, with any financial reporting requirements, the CEO and the CFO must disgorge:
  - any bonus or other equity, or incentive-based compensation paid to him or her during the 12-month period following the first public issuance or filing of the noncompliant financial document; and
  - any profits realized from sale of the Company's securities during the same 12-month period.

## DISCLOSURE CONTROLS AND PROCEDURES

### General Requirement

- Each issuer filing reports under the Exchange Act must maintain and periodically evaluate a system of disclosure controls and procedures. Non-US companies such as the Company must disclose in their Form 20-F:
  - the conclusions of the Company's principal executive officers and principal financial officers about the effectiveness of the Company's disclosure controls and procedures as of the end of the fiscal year covered by the Form 20-F; and
  - whether there were any significant changes to the Company's internal controls or other factors that could significantly affect these controls after the date of this evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

### Definition of "Disclosure Controls and Procedures"

- Disclosure controls and procedures are defined as "controls and other procedures designed to ensure that information required to be disclosed in Exchange Act reports is recorded, processed, summarized and reported within the time periods specified in the SEC rules and forms." This includes an obligation on companies to maintain controls and procedures designed to ensure that information required to be disclosed is "accumulated and communicated to the issuer's management, including the certifying officers, as appropriate to allow timely decisions regarding required disclosure."

☞ What all this essentially means is that the Company's controls and procedures must create reporting that is "timely, accurate and reliable."

### Broader than Internal Controls for Financial Reporting

- The SEC has not specified what are adequate disclosure controls and procedures. It has emphasized that disclosure controls and procedures are meant to cover a broader range of information than covered by a company's traditional internal controls related to financial reporting (see the next section for a discussion of internal controls for financial reporting). Disclosure controls and procedures are intended to ensure compliance with disclosure requirements generally, including both financial and non-financial information.

### No “One-Size-Fits-All” Set of Procedures

- The Company must design and maintain a system of disclosure controls and procedures that is appropriate for its own size, organization, industry and culture. The first step is to review existing procedures for producing disclosure: do formal procedures, committees and process documentation already exist or are the processes operating more informally or even on a somewhat ad hoc basis?

☞ Each company’s situation is unique and no single set of recommended procedures will be appropriate for every company. In other words, there is no one-size-fits-all set of procedures.

### Integral Part of Reporting Process Throughout the Year

- Disclosure controls and procedures should not be viewed in isolation from the preparation of home country documents, but should be an integral part of the Company’s overall disclosure process. This is true whether or not the Form 20-F is integrated with the home country annual report.

- In the case of home country periodic reports, such as interim financial reports, the SEC expects a foreign issuer to have in place disclosure controls and procedures to ensure full and timely disclosure to the US markets, usually done by submission of such information on a Form 6-K to the SEC. Accordingly, disclosure controls and procedures are intended to be an integral and ongoing process throughout the year, even though the certification about the adequacy of such controls and procedures occurs only in the context of the annual Form 20-F.

☞ Appendix B to this manual contains practical considerations for the Company’s implementation of disclosure controls and procedures.

## INTERNAL CONTROL OVER FINANCIAL REPORTING

### General Requirement

- As discussed under “Disclosure Controls and Procedures” above, the Company must disclose whether significant changes have occurred to its internal controls after the date of their evaluation. In addition, the CEO and CFO each must make certifications with respect to the design, effectiveness and deficiencies, if any, in the Company’s internal financial controls (see “CEO/CFO Certifications” below).

- In addition, the SEC generally requires the Company’s Form 20-F to separately contain a report of management on the Company’s internal control over financial reporting and an external auditor’s attestation report.

- The JOBS Act, which became law in the US in April 2012, created a new class of issuer known as an Emerging Growth Company (“EGC”). A company with $1 billion or less in annual revenue generally qualifies as an EGC for a period of 5 years from the date of its US IPO.[2] Under the changes implemented by the JOBS Act, an EGC is not required to include in its annual report on Form 20-F an external auditor's attestation report for so long as it remains an EGC.

## Content of Management's Report

- Management's report on the Company's internal control must include:
  - A statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the Company.
  - Management's assessment of the effectiveness of the Company's internal control over financial reporting as of the end of the Company's most recent fiscal year, including a statement as to its effectiveness and disclosure of any "material weaknesses" identified by management.
    - Management is precluded from determining that the Company's internal control over financial reporting is effective if there are any "material weaknesses."
    - "Material weakness" means a deficiency in the design or operation of internal control that could adversely affect the Company's ability to record, process, summarize and report financial data consistent with management's assertions in the financial statements.
  - A statement identifying the framework used by management to evaluate the effectiveness of the Company's internal control over financial reporting.
    - This framework must be suitable and recognized. While no particular framework is required, the SEC explicitly recognizes the following frameworks as satisfying this criteria:
      - the framework developed by the Committee of Sponsoring Organizations of the Treadway Commission, or COSO;
      - The Turnbull Report, published by the Institute of Chartered Accountants in England and Wales; and
      - the Guidance on Assessing Control, published by the Canadian Institute of Chartered Accountants.
  - In the case of companies that do not qualify as EGCs, a statement that the Company's external auditors have issued an attestation report on management's assessment of the Company's internal control over financial reporting.

2 A company that has annual gross revenues of less than $1 billion that qualifies as an EGC will retain its status until the earliest of: (i) the last day of the fiscal year following the fifth anniversary of its IPO; (ii) the last day of the fiscal year during which it has gross revenues of $1 billion or more; (iii) the date on which it has issued more than $1 billion in non-convertible debt during the previous three years; and (iv) when it becomes a "large accelerated filer," generally meaning that its public float is $700 million or more.

## Auditor's Attestation Standards

### *Timing*

- Even though the audit of internal controls permitting the auditor to give its attestation report will likely occur after fiscal year-end, the evaluation must be as of year-end; hence, any weaknesses should be addressed **prior to fiscal year-end** and not prior to the end of the audit.

## Compliance Procedures

- The PCAOB (Public Company Accounting Oversight Board) has issued auditing standards for internal controls to assist companies and their auditors with their compliance procedures. See http://www.sec.gov/rules/pcaob.shtml.

CEO/CFO CERTIFICATIONS

## General Requirement

- As part of its Form 20-F, the Company must file two forms containing the certifications of the CEO and CFO: (1) a "section 906" certification and (2) a "section 302" certification. The section numbers refer to sections of the Sarbanes-Oxley Act. The section 906 and 302 certifications are separate from the regular signing of the Form 20-F by an authorized officer. If the certifications are knowingly false, the CEO and CFO may face criminal liability (see "Liability for Inadequate or Misleading Disclosure" above).

## Section 906 Certification

- The CEO and CFO each must certify that the Form 20-F:
  - meets all applicable requirements under the Exchange Act; and
  - fairly presents, in all material respects, the financial condition and results of operations of the Company.
- There is no prescribed form for this certification.
- **Appendix C** to this manual contains a sample section 906 certification (Annex A).

## Section 302 Certification

- The CEO and CFO each must make a number of certifications in the Form 20-F regarding:
  - material correctness and completeness of the report;
  - fair presentation of the financial statements/information;
  - design and effectiveness of the Company's disclosure controls and procedures;
  - design and effectiveness of the Company's internal financial controls;

- ➢ changes in internal financial controls; and
- ➢ disclosure of significant deficiencies and material weaknesses in internal financial controls.

- The SEC has made clear that this certification must be in the exact form set forth in the applicable rules. The language of the required certification may not be changed in any respect even if the change would appear to be inconsequential in nature.

☞ Appendix C to this manual contains a sample section 302 certification as is currently in effect (Annex B).

## NO SELECTIVE DISCLOSURE

### General

- Most disclosure to the public is channeled through press releases or contacts with the financial community. In particular, with respect to contacts with the financial community, it is considered permissible for the Company to have individual discussions with analysts to give background information, but not "selective disclosure" (*i.e.*, disclosure to some but not to the public generally) of material information.

- For example, selective communication that the Company's anticipated earnings will be higher than, lower than, or even the same as what analysts have been forecasting, will likely constitute prohibited "selective disclosure" if not disclosed to the public generally.

☞ Accordingly, material information should not be disclosed to one person without being simultaneously released to the market as a whole.

### Regulation FD

- Regulation FD requires all US reporting companies to make a public announcement or filing with the SEC of any material non-public information they disclose on a non-confidential basis to certain persons outside the company, including securities market professionals and large money managers as well as investors, where it is reasonably foreseeable that the investor would trade on the basis of the information.

- Although the SEC exempted non-US companies from Regulation FD, the SEC expects such issuers to conduct themselves in accordance with the basic principles underlying Regulation FD and has stated that it may extend the same or similar obligations to such issuers in the future. Non-US companies should also be aware that their disclosures remain subject to antifraud provisions, including insider trading prohibitions. In addition, non-US companies should be aware of their obligation under NASDAQ standards to make timely reports of material information.

☞ We strongly suggest that the Company adopt a disclosure policy that complies with the basic requirements of Regulation FD.

## Remedying a Selective Disclosure

- If the Company makes selective disclosures, either intentionally or unintentionally, it can respond in the following ways:

  - *Intentional Disclosures* — For intentional disclosures, a public announcement containing the material information should be made prior to or contemporaneously with the communication of the information to the outside party.

    - Disclosure is intentional if the person making it knows, or is reckless in not knowing, that the information is both "material" and "non-public." The "person" here is the Company and knowledge or recklessness of responsible individuals within the Company will be attributed to it, even if an individual speaking is not aware that the disclosure he or she is making is both material and non-public.

  - *Inadvertent Disclosures* — For inadvertent disclosures, a public announcement should be made "promptly" after the disclosure; *i.e.*, within 24 hours, or before the start of the next trading day, after such inadvertent disclosure becomes known to a senior official.

  - *How Public Disclosure May be Made Following an Intentional or Inadvertent Disclosure* — Public disclosure may be made by any method, or combination of methods, reasonably calculated to provide broad, non-exclusionary distribution. Filing or furnishing information with the SEC will always constitute public disclosure but, depending on the circumstances, other forms of communication, whether alone or in combination with each other, could also meet this requirement.

### *Websites*

- Although a company's website is often an effective method for the company to communicate with its investors and the public, website posting alone of material information may not constitute adequate public distribution under Regulation FD.

- In its guidance on the use of electronic media, the SEC has clarified that, for a company to make information "public" through its website, the company must consider whether and when:

  - its website is a "recognized channel of distribution;"
  - posting of information on the website "disseminates" the information in a manner making it available to the securities marketplace in general; and
  - there has been a "reasonable waiting period" for investors and the market to react to the posted information.

- Some non-exclusive factors for companies to consider in evaluating whether their website is a "recognized channel of distribution" and whether the company information on the website is posted and accessible and therefore "disseminated," include:

  - whether and how a company lets investors and the markets know that the company has a website and that they should look at the company's website for information;
  - whether the company has made investors and the markets aware that it will post important information on its website and whether it has a pattern or practice of posting information on its website;

- whether the company's website is designed to lead investors and the market efficiently to information about the company, including information specifically addressed to investors, whether the information is prominently disclosed on the website in the location known and routinely used for such disclosures, and whether the information is presented in a format readily accessible to the general public;
- the extent to which information posted on the website is regularly picked up by the market and readily available media, and reported in, such media or the extent to which the company has advised newswires or the media about such information and the size and market following of the company involved;
- the steps the company has taken to make its website and the information accessible, including the use of "push" technology, such as RSS feeds, or releases through other distribution channels either to widely distribute such information or advise the market of its availability;
- whether the company keeps its website current and accurate;
- whether the company uses other methods in addition to its website posting to disseminate the information and whether and to what extent those other methods are the predominant methods the company uses to disseminate information; and
- the nature of the information.

➢ Some non-exclusive factors for companies to consider in evaluating whether a "**reasonable waiting period**" has elapsed include:

- the size and market following of the company;
- the extent to which investor-oriented information on the company website is regularly accessed;
- the steps the company has taken to make investors and the market aware that it uses its company website as a key source of important information about the company, including the location of the posted information;
- whether the company has taken steps to actively disseminate the information or the availability of the information posted on the website, including using other channels for distribution of information; and
- the nature and complexity of the information.

☞ As a general matter, the Company should not exclusively rely on its website to disclose material information.

### *Social Media Networks*

➢ In a release issued in April 2013, the SEC made clear that its guidance on the use of company websites is equally applicable to current and evolving social media channels of corporate communication. Accordingly, the Company should consider the same factors as discussed above in the context of websites in evaluating whether it can use social media networks, such as Facebook or Twitter, to make information public. The SEC emphasized that for social media channels to be "recognized channels of distribution," it is critical that companies alert the markets in advance of the specific channels to be used and the information that may be disclosed through these channels.

☞ As a general matter, the Company should not exclusively rely on social media networks to disclose material information.

## Avoiding Selective Disclosure

- The individuals who should take the greatest care to avoid violating the requirements of Regulation FD are the Company's directors, executive officers, investor or public relations officers and any other individuals who regularly communicate with the Company's shareholders and who may unintentionally make selective disclosures.

- Regulation FD does, however, permit disclosure of material non-public information where there is a duty of trust or confidence owed to the Company. For example, "temporary insiders" such as investment bankers, lawyers or accountants owe such a duty of trust or confidence in many circumstances. In addition, material non-public information can be disclosed to individuals with whom the Company enters into an express confidentiality agreement.

- Often, certain forums may generate unintentional selective disclosure. Accordingly, the Company should monitor the following activities to ensure that material non-public information is not disclosed selectively:

  - one-on-one sessions with analysts or institutional investors;

  - "breakout" sessions at industry conferences; and

  - follow-up calls after public earnings conference calls.

- If selective disclosure of material information occurs, the Company should publicly disseminate such information promptly after the event.

☞ In general, the Company should consider the following steps to prevent the dissemination of selective disclosure:

  - adopt a written policy identifying who is permitted to communicate with analysts, shareholders and the media;

  - ensure that Company spokespersons know what constitutes material information to sophisticated analysts;

  - adopt a policy on whether and when to respond to discussion drafts of reports proffered by analysts;

  - consider adopting a policy of open access for analyst and investor conference calls and webcasts, and establish procedures for adequate notice of such calls;

  - adopt a policy regarding private discussions and one-on-one meetings with market professionals and investors, as well as presentations in other non-public forums;

  - monitor the market for the Company's securities to assess the materiality of particular information; and

  - for the purposes of contractual non-disclosure by third parties of selective disclosure, draft and use a standard confidentiality agreement.

## "FORWARD-LOOKING" INFORMATION: KNOWN TRENDS AND PROJECTIONS

- The SEC draws a distinction between statements concerning facts known to management, such as currently known trends that are reasonably expected to have material effects on future operations, or known future events, such as scheduled future cost or price changes, on the one hand, and other forward-looking statements that involve anticipating a future trend or event or anticipating a less predictable impact of a future trend or event, on the other hand.

- In general, the first type of information, if material, is required to be disclosed, while the second need not be disclosed. Disclosure of the latter type of forward-looking information, particularly of financial projections, obviously involves risk that the failure to meet such projections could result in litigation for misleading disclosure.

### Disclosure of Known Trends and Uncertainties

- In its Form 20-F, the Company is required to disclose, 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 Company's net sales or revenues, income from continuing operations, profitability, liquidity or capital resources, or that would cause reported financial information to not necessarily be indicative of its future results of operations or financial condition.

- SEC guidance on this requirement provides a two-pronged test for determining whether disclosure is required:

  - If the Company determines that the known trend, uncertainty, demand, commitment or event is not reasonably likely to occur, disclosure is not required.

  - If the Company cannot make that determination, it must objectively evaluate the consequences of the known trend, uncertainty, demand, commitment or event on the assumption that it will come to fruition. If the Company determines that a material effect on its results of operations or financial condition is reasonably likely to occur, disclosure is required.

- The Company should also focus on matters that have had an impact on operations but are not expected to have an impact upon future operations.

### Safe Harbor for Forward-Looking Statements

- In 1995, the Private Securities Litigation Reform Act of 1995 (the "Reform Act") became law. The Reform Act contains a "safe harbor" provision providing that a forward-looking statement (including a statement about a known trend or uncertainty) will not give rise to liability if:

  - the statement is identified as such and accompanied by meaningful cautionary statements identifying important risks and other factors that could cause actual results to differ materially from those in the statement;

  - the complaining party cannot prove that the author of the statement had actual knowledge that the statement was false or misleading; or

  - the statement is immaterial.

- Some important qualifications about the Reform Act's safe harbor are:
  - the safe harbor applies **only** to private actions and **not** to enforcement actions brought by the SEC directly;
  - the kind of information that could be protected, if properly presented, includes financial projections, statements of management's plans and objectives pertaining to the Company's future economic performance, as well as discussions of the possible outcome of contingencies, such as lawsuits and government investigations;
  - the safe harbor is available to an issuer subject to the reporting requirements of section 13(a) or 15(d) of the Exchange Act (such as the Company), and is also available (with respect to certain specific information) to officers, directors, or employees of the issuer, and underwriters undertaking securities offerings for the Company;
  - significantly, among other exceptions, the safe harbor **will not apply** to any forward-looking statement (a) included in a financial statement prepared in accordance with US GAAP, or (b) made in connection with an initial public offering; and
  - boilerplate warnings will not suffice as "meaningful cautionary statements." Rather, company-specific disclosure which conveys substantive information about relevant factors should be provided to come within the scope of protection of the Reform Act.
- The safe harbor applies to oral as well as written forward-looking statements. In order to qualify for safe harbor protection, oral statements must:
  - be identified as forward-looking and caution must be given that the actual results could differ materially; and
  - identify the document that contains the risks and other factors relating to the forward-looking statement. Such document must be "readily available." The Reform Act provides that all documents filed with the SEC "or generally disseminated" (such as annual reports and press releases) are deemed to be "readily available."

☞ It is important that the Company adopt a consistent practice of providing an **oral** safe harbor warning covering these two elements before any oral presentation, whether by conference call, such as interim results investor calls, or in person, that contains projections and forward-looking statements; merely including a power-point slide or other written form of a cautionary statement in the presentation is not sufficient.

## Disclaimers

- It is the total mix of information, not the mere cautionary language, that is important to the use of the Reform Act's safe harbor. Forward-looking statements must be based on reasonable factors, made with reasonable care and in good faith. Disclosure of the relevant assumptions and risk factors should help reduce the risks of liability. Boilerplate disclosure that does not effectively disclose key risk factors that could affect whether particular forward-looking information proves correct would not achieve the protection from liability under the Reform Act.

- A disclaimer is only part of the disclosure used to help protect against liability, and the adequacy of the disclaimer will generally depend on whether the company has, either in the document itself or in other documents that are referred to, provided a substantive, particularized discussion of the risks that will affect the forward-looking information.

- *Where should disclaimers go?* The Company should, at a minimum, include a disclaimer regarding forward-looking information in its Form 20-F and in all public disclosures containing financial results or significant financial information. Some companies also include their standard disclaimer, or a shorter version of it, in all of their public disclosures regardless of subject matter. Many companies also refer in their disclaimer to the risk factors included in their Form 20-F.

- The disclaimer used by the Company in press releases should initially be based on the disclaimer used in its Form 20-F. It should refer the reader to the Form 20-F and any Form 6-K filings for additional information. The use of a disclaimer cannot, however, become boilerplate. Each decision to invoke the safe harbor should include a review of the Company's filings to ensure that all factors are adequately disclosed. For example, if a press release contains forward-looking information the actual results of which may depend on factors that are not yet disclosed in the Company's SEC filings, the Company should file additional information (for instance, on Form 6-K) or include the discussion of such factors with the disclaimer.

### Projections

- Rule 175 under the Securities Act attempts to shield projections from liability under the federal securities laws if the information is included in certain SEC filings (*e.g.*, Form 20-F) and if certain guidelines are followed, including that the projection is made in good faith and on a reasonable basis. However, if projections are made and are not met, a substantial litigation risk still exists in that a claim may be made that the basis for the projections was not reasonable when they were made. Even if the Company were to prevail in such a lawsuit, expenses and management time involved in defending it could be considerable. For these reasons, most companies subject to US reporting obligations choose not to disclose financial projections.

### Duty to Update

- Disclosure of forward-looking information has also been held to create a duty to correct and, in certain circumstances, to update the information over time. The duty to update may also be driven by market/investor relations considerations rather than a strictly legal obligation.

☞ Whether legally or market driven, management should monitor the status of disclosed projections to determine whether and when updated information should be disclosed. In practice, it may be difficult to determine when circumstances have changed sufficiently that a given forward-looking statement should be amended to update the prior projections. These situations need to be considered on a case-by-case basis and should involve consultation with in-house counsel and US counsel.

## COMMUNICATIONS WITH THE PRESS

- Communications with the press are subject to the same general principles as communications to security holders, analysts and other interested parties, namely that such communications **must not contain false or misleading statements**. The Company is free to communicate with the US press on the same basis as other

US and international companies whose securities are listed and traded in the United States. It should be noted, however, that the Company's communications with the US press will be restricted in connection with future offerings by the Company of its securities in the United States (see "Chapter 6: Offers and Purchases of Securities").

### "No Comment" Policy

- Where there are facts related to the Company in development that may not be ripe for disclosure—a good example is acquisition negotiations with another party that are confidential, but which at some point may render the acquisition of sufficient probability and magnitude to require disclosure—it is usually appropriate for the Company to respond to press or public queries on the subject with "no comment" until the point in time when the Company either wishes or is legally required to disclose the relevant facts.

  - The importance of a "no comment" response is illustrated by the legal principle that, while the Company does not have the duty to comment on market speculation that is not attributable to the Company itself, if the Company does comment it must be truthful and not misleading (see "Communications with Securities Analysts" below). Consequently, the Company could be held liable for affirmatively refuting the existence of facts that are in development in response to speculation about such facts. The SEC has sought enforcement against a non-US company for its active public denial of negotiations that it was conducting.

- A response of "no comment" is legally valuable in the US disclosure context only if it is applied consistently up until the point of disclosure. For instance, a company's response of "no comment" to queries about a potential acquisition can be considered untruthful or misleading if such a company usually does comment on acquisitions in their embryonic stage, and long before their probability or magnitude is established.

☞ Thus, it is important for the Company to adopt an internal policy that the Company will consistently respond with "no comment" to all press queries speculating about possible facts related to developments such as acquisitions or dispositions until the Company wishes or is legally required to make a disclosure.

## COMMUNICATIONS WITH SECURITIES ANALYSTS

- Communications with securities analysts which are false or misleading can also give rise to liability under the Exchange Act. In addition, some courts have concluded that where a company has become sufficiently entangled in reports written by securities analysts (*i.e.*, from a course of conduct, it can be concluded that the company adopted the statements in such reports as its own), liability may be imposed on the company for any false statements in such reports. These courts have noted that a company may be responsible for reports written by securities analysts by providing basic information, reviewing drafts and providing comments or guidance on the forecasts included therein, holding conferences with analysts and providing significant information and distributing favorable analyst reports to shareholders and others.

- Although companies can be held liable for false and misleading statements provided to analysts, it has been recognized that it is critical for a company to keep the financial markets informed of its performance, in part, through communications with analysts. From a legal point of view, it would be prudent for the Company to advise analysts of the market forces impacting its business and operating results so that such analysts can regularly update their estimates of Company financial results. However, the Company should not provide analysts with material non-public information, such as projections. Such information should either be disclosed publicly at once or kept confidential for business reasons. It is permissible for senior executives at the Company to engage in individual discussions with analysts to provide background information of a factual nature.

- As discussed above, the introduction of Regulation FD represents an attempt by the SEC to halt selective disclosure practices in which companies advise analysts, journalists or others of material developments before announcing the news to the entire market by press release.

☞ It is difficult to provide comprehensive guidelines on how to minimize the risk of liability in connection with communications to analysts because court decisions in this area are made on a "case-by-case" basis. However, certain principles are clear:

  - the Company must not selectively disclose material non-public information to an analyst, a select group of analysts or a third party. Such selective disclosure is viewed by the SEC as "tipping" and could lead to charges of insider trading law violations;

  - the Company should refrain from commenting privately on analysts' projections, as such comments could constitute selective disclosure of inside information. In any event, such comments could create a duty for the Company to update or correct such projections;

  - the Company should not distribute analysts' reports, post them on its website or create hyperlinks from the Company's website to them; and

  - although the Company has no obligation to comment on market rumors connected with analyst reports (unless such rumors are attributable to the Company), if the Company does comment on such rumors, such comments must be truthful and should be communicated to the general public by a press release or a press statement. Generally, the Company should refrain from commenting on rumors, and should only do so with the advice of US counsel.

## MAINTENANCE OF WEBSITE AND SOCIAL MEDIA NETWORKS

### General Use for Disclosure

- The SEC recognizes the vital role of the internet and electronic communications in modernizing the system of disclosure by companies under the US federal securities laws and in promoting transparency, liquidity and efficiency in trading markets. Moreover, from the SEC's perspective, a company's website is an obvious place for investors to find information on the company, and it is beneficial to investors to allow companies to present data and information in formats different from those dictated by SEC forms or more technologically advanced than those dictated by EDGAR. In April 2013, the SEC clarified that its policy in respect of the use of social media networks, such as Facebook and Twitter, to disclose information is the same as with respect to websites.

☞ As a general matter, the Company should use its website and social media networks to the extent it otherwise deems appropriate to convey information about itself to investors and the public. However, for the reasons discussed above in "No Selective Disclosure," these methods should be considered additional to SEC filings and should not be the exclusive method by which the Company conveys material information. Moreover, it is critical that material information disclosed by or on behalf of the Company on its website or social media networks be consistent with that in its SEC filings.

- ☞ The Company should monitor and analyze the extent to which investors and the marketplace in general are using such forums to obtain information about the Company relative to other channels. Depending on the technology employed, actual usage statistics can be obtained through a variety of methods, including total click statistics and click-through rates between the relevant channel and another (for example, between a Twitter message and the Company's website). It can also be helpful to use a web analytics or other specialized program to determine the extent to which the information is being picked up and further disseminated by users of the website or social media network.

## Liability for the Company's Own Statements

- The Company should be aware that any information it posts on its own website or on any social media network or in internet blogs, communities or discussion forums, including on Facebook and Twitter feeds, whether in the context of an offering or otherwise, may be construed as a corporate communication upon which investment decisions may be made and, therefore, as to which it may have potential liability. This could potentially include information posted on social media networks by company employees. Website or social media communications will be evaluated in this context whether or not they are intended for this purpose and whether they are related to product, marketing, business or financial information.

- In its guidance on the use of electronic media, the SEC reminded issuers that they are responsible for the accuracy of their statements that reasonably can be expected to reach investors or the securities markets, regardless of the medium used. Inaccurate content placed by or on behalf of the Company on its website or on social media networks, for example, could expose the Company to liability under Rule 10b-5 of the Exchange Act which states that it is illegal for a person to, among other things, ". . . make any untrue statement of a material fact or to omit to state a material fact necessary in order to make [the] statements made, in light of the circumstances under which they were made, not misleading . . ." It could also lead to a website or a social media network being considered a "manipulative or deceptive device" under Section 10(b) of the Exchange Act, which prohibits the use of any such device in connection with the purchase or sale of any security.

- The SEC has indicated that the anti-fraud and anti-manipulative provisions of the US securities laws will reach all internet activities that satisfy the relevant jurisdictional tests. The SEC may take appropriate enforcement action whenever it is of the view that fraudulent or manipulative internet activities have originated in the United States or have placed US investors at risk.

- All website or social media communications by or on behalf of the Company should be dated, reviewed regularly, evaluated for continued accuracy and relevance, and removed as they become stale or irrelevant. Accordingly, procedures should be implemented to review information before a Company posts the information on its website or to a social media network and to monitor the contents of its website or the relevant social media network on a routine basis for any items that should be deleted in order to keep all posted information current. Unrevised pages of an issuer's website should be reviewed regularly (monthly, for example) for outdated information that should be deleted.

    - ➢ The procedures can include designating one or two individuals at the Company as responsible for clearing and coordinating all such communications, and also conducting a legal review to address any compliance issues.

- In general, the Company should:

  - review press releases posted on the Company's website and to other social media networks regularly for continued accuracy and relevance in light of the total mix of information available on the website or social media network;

  - avoid posting documents containing overly enthusiastic statements, or hype, regarding the current or anticipated performance of the Company;

  - avoid posting or hyperlinking to consensus earnings estimates, since by doing so the Company may be deemed to have adopted them; and

  - to the extent possible, use the disclaimers set forth in **Appendix D** when posting information on its website or on social media networks. These disclaimers may generally be passive—*i.e.,* the Company need not require the users to, for example, click on an icon making clear that such user has accepted the terms of the disclaimer. Having said this, requiring users to affirmatively acknowledge that they have accepted the terms of the disclaimer may enhance the disclaimer's effectiveness.

- Furthermore, when a company is offering securities or conducting a proxy solicitation or tender offer, care must be taken that any information that it posts on its website or social media networks during that period, particularly information commenting on that offer, proxy solicitation or tender offer, is consistent with regulatory requirements.

- The Company should adopt procedures and policies that are reasonably designed to ensure that communications made by its employees through social media networks do not increase its liability exposure, including review by a senior dedicated employee of "static" information provided by or on behalf of the Company before use, regular review post-use, and appropriate training and background for any employees who may use social media networks on an "interactive" basis related to the Company.

## Liability for Third-Party Statements

- In addition to responsibility for its own statements, the Company may have responsibility for statements on its website or on social network forums made by third parties, including journalists and analysts, if it has adopted or implicitly endorsed such statements. By republishing third-party statements on its website or on social network forums, or "hyperlinking" to them, the Company may be found to have adopted or implicitly endorsed such statements and may be liable for any such statement that is false or misleading.

### *Statements by Analysts*

- Although the SEC and the courts have not articulated a clear standard of attribution, the Company risks the type of entanglement with a third-party statement that is described above by doing any of the following:

  - making a statement to the analyst that is directly quoted in the report;

  - providing information to the analyst that the analyst uses in the report;

  - distributing the report;

- ➢ commenting on, editing or approving the final version of the report; or
- ➢ confirming, non-committally commenting on or "guiding" an earnings estimate in the report.

☞ Due to the high-risk nature of the information—it is inherently market conditioning and forward-looking—the Company should avoid posting, or hyperlinking to, analyst reports.

### *Statements by Other Third Parties*

- The Company should also exercise caution in posting articles that refer to analysts' reports or analysts' estimates or conclusions. Posting only those articles that **reference** favorable outlooks could be considered misleading. In addition, the Company may be deemed to have adopted such forecasts as its own. Forecasts in the posted articles may give rise to securities liability if they later turn out to have been overly optimistic.

☞ The Company should include Disclaimer No. 1 (see "Appendix D – Website and Social Media Network Disclaimers") on any page of its website or any posting of its own on a social media network that contains articles. If the Company wishes to provide a hyperlink to any web page containing such articles, we suggest that the "click-through" hyperlink disclaimer set forth in Disclaimer No. 2 be used as well.

☞ Many companies include as part of their investor relations page stock price information by providing a hyperlink to a third-party data provider. If the Company wishes to do so, it should include Disclaimer No. 3.

### Duty to Update or Correct

- Continued publication on the Company's website or in any posting of its own on a social media network could, in some instances, constitute republication and imply continued accuracy or relevance. This means that the Company may be liable for factual information that was correct when posted, but that later turns out to be out of date or inaccurate, depending on the total mix of information available.

☞ To limit its exposure, the Company should indicate the date on which articles are posted and disclaim any duty to update or correct (see Disclaimer No. 1).

☞ The Company should also establish a policy of posting the articles for a specified duration, after which such articles should be removed entirely from the site. This is especially important in the case of earnings news releases that contain guidance or other forward-looking information.

### Liability for Forward-Looking Statements

- The Company may be exposed to liability for any forward-looking statements on its website or in any posting by it on a social media network that later prove to be inaccurate. The Reform Act created a "safe harbor" for forward-looking statements that (i) are identified as such and (ii) are accompanied by meaningful cautionary statements identifying risks and other important factors that could cause actual results to differ materially. The safe harbor is intended to encourage voluntary disclosure of forward-looking information by insulating issuers from liability for such statements.

☞ The Company should include a forward-looking statement disclaimer on its website or in any posting by it on a social media network. The language should be discussed with US counsel; in short, to be effective, it cannot be boilerplate. A detailed discussion of forward-looking statements and the appropriate disclaimers for such statements is contained above in this "Chapter 3: Disclosure – Forward-Looking Information and Projections."

☞ Disclosure of forward-looking information has been held to create a duty to correct and update the information over time. To maintain credibility in the marketplace and to avoid the possibility of potential litigation, the Company should take care to update any forward-looking statement that could reasonably be viewed as "continuing," or speaking at the time it is viewed. As a further precautionary measure, the Company should also expressly disclaim any duty to update forward-looking statements.

## Hyperlinks

- While hyperlinks provide convenient access from one website to another, companies using hyperlinks to third-party websites may become liable for the hyperlinked information. The SEC has addressed the issue of "adoption" of information (*i.e.*, explicit or implicit endorsement or approval of the information) in the context of hyperlinks. Generally, the attribution of third-party information to a company depends upon whether the company has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. In considering a company's responsibility for hyperlinked information, the SEC has suggested that the following factors are relevant:

  - *Context of the Hyperlink*—what a company says about the hyperlink or what is implied by the context in which the company places the hyperlink; *i.e.*, explicit endorsement: "XYZ's website contains the best description of our business that is currently available;" or incorporated into a statement: "As reported in Today's Standard, our company is the leading producer of widgets worldwide." If a company remains silent about the hyperlink, the context may nevertheless imply that the hyperlinked information is attributable to the company.

  - *Risk of Confusion*—the presence or absence of precautions against investor confusion about the source of the information. For example:

    - intermediate screen entrance: "the hyperlinked information becomes available only after a visitor to the website has been presented with a screen that clearly and prominently indicates that the visitor is leaving the issuer's website and that the information subsequently viewed is not the issuer's;" or
    - disclaimer: "the hyperlinked information is preceded or accompanied by a clear and prominent statement from the issuer disclaiming responsibility for, or endorsement of, the information."

- The SEC noted that framing and inlining techniques that allow investors to view both the issuer site and hyperlinked site contemporaneously are likely to cause investor confusion as to the source of the information. If relevant facts and circumstances indicate that the issuer has adopted the hyperlinked information, disclaimers will not insulate the issuer from liability.

  - *Presentation of the Hyperlinked Information*—the presentation of the hyperlinked information and the layout of the screen containing the hyperlinked information. For example:

    - non-representative hyperlinked information: "in situations where there is a wealth of information about a particular matter available, selectively providing hyperlinks that are not representative of the available information may suggest that the hyperlinked information has been adopted by the issuer;"

- **controlling the flow of information**: “an issuer that selectively establishes and terminates hyperlinks to third-party websites depending upon the nature of the information about the issuer on a particular site or sites;” or
- **differentiating particular hyperlinks**: “any action to differentiate a particular hyperlink from other hyperlinks on an issuer’s website, through its prominence, size or location, or to draw an investor’s attention to the hyperlink may suggest that the issuer favors this hyperlinked information over other hyperlinked information.”

☞ One question often raised in the context of third-party information is hyperlinks to analyst reports. Because doing so can result in adoption of the report, we would advise, as explained above, that the Company not quote, cite or hyperlink to any analyst’s statements about the Company, as such adoption could result in the Company having responsibility for the accuracy of the information and projections and impose a duty on them to update the projections. If the Company decides to include lists of analysts that cover their securities, these lists should be accompanied by disclaimers clarifying that they in no way endorse or incorporate by reference any statements by the analysts.

☞ In view of this SEC guidance, we would suggest the Company qualify any hyperlinked documents with a disclaimer of responsibility for their contents in the form of Disclaimer No. 3 (see “Appendix D – Website and Social Media Network Disclaimers”). Please also refer above to “Liability for Third-Party Statements” for further precautionary measures applicable to specific hyperlinks.

## USE OF NON-GAAP FINANCIAL MEASURES

### Regulation G: Requirements for All Public Disclosures

#### *General Requirement*

- If the Company releases any non-GAAP financial measures in *any public disclosure*, including earnings releases, analysts’ presentations and SEC filings, the Company must:
  - include a presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP;
  - include a reconciliation of the differences between the non-GAAP financial measure and the most directly comparable GAAP financial measure; and
  - ensure that the disclosure of the non-GAAP financial measure, taken together with the information accompanying the measure, does not contain a material misstatement or omission.
- For a non-US company, “GAAP” refers to the principles under which a non-US company prepares its primary financial statements.
- The Company should consult with its auditors regarding whether a financial measure is or is not recognized under GAAP. EBITDA is probably the most common non-GAAP measure.

- If the Company releases the non-GAAP measure orally, by telephone or in a webcast or similar broadcast, it can provide the GAAP comparable and reconciliation by posting them on the Company website and disclosing during the presentation the location and availability of this information.

*Exemptions*

- The Company will not be required to comply with this requirement in public disclosures of non-GAAP financial measures if:
  - its securities are listed or quoted on a non-US exchange;
  - the financial measure it presents is based on non-US GAAP financial data; and
  - the disclosure is made outside the United States.
- Within this context, the following are acceptable and will not void the exemption:
  - Releasing a written communication into the US, as long as the release is issued contemporaneously with or after release outside the US and is not otherwise targeted at persons in the US. A common scenario would be a global earnings release to shareholders, including US shareholders.
  - Foreign or US journalists or other third parties having access to the information.
  - The information appearing on the Company's websites as long as the websites, taken together, are not available exclusively to or targeted at persons in the United States.
  - The Company submitting the released information to the SEC on Form 6-K after the release.
- Non-US companies that disclose non-GAAP financial measures in press releases or similar public disclosures that are exempt from Regulation G need to identify and consider aligning non-GAAP financial measures included in such documents and Form 20-F.

## Requirements for Form 20-F

*General Requirement*

- The requirements for presentation of non-GAAP financial measures in the Form 20-F add additional criteria, and there is no exception for non-US companies based on disclosure outside the United States or globally.
- In its Form 20-F, the Company must provide the following if non-GAAP financial measures, including EBIT and EBITDA, are included:
  - a presentation, with equal or greater prominence, of the most directly comparable GAAP financial measures;
  - a reconciliation by schedule or other clearly understandable method of the non-GAAP and GAAP measures;

- a statement describing the reasons why the Company's management believes the non-GAAP financial measures provide useful information to investors; and
- if material, a statement disclosing any additional purpose for which the Company's management uses the non-GAAP financial measures presented.

### *Prohibited Non-GAAP Financial Measures*

- Five specified categories of non-GAAP financial measures are prohibited in the Form 20-F unless, in each case, the measure is required or **expressly permitted** (as opposed to merely not prohibited) by the regulator that sets the GAAP used in the Company's primary financial statements:
  - excluding from liquidity measures, charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, other than EBIT and EBITDA;
  - adjusting a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years, or there was a similar charge or gain within the prior two years;
  - presenting non-GAAP financial measures on the face of the Company's financial statements prepared in accordance with GAAP or in the accompanying notes;
  - presenting non-GAAP financial measures on the face of any pro forma financial information required to be disclosed; and
  - using titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

## SHARE REPURCHASES BY THE COMPANY

### Form 20-F Disclosure Requirements

- The Company is required to disclose in its Form 20-F repurchases of all its equity securities registered under Section 12 of the Exchange Act, regardless of whether the repurchases are:
  - made in the United States or on a non-US exchange;
  - of the shares themselves or of ADSs; or
  - in accordance with the Rule 10b-18 safe harbor discussed below.

### *Details of the Disclosure*

- The Company is required to disclose the following in tabular format:
  - the total number of equity securities repurchased (reported on a monthly basis);

  - the average price paid per equity security;
  - the total number of equity securities that were repurchased as part of a publicly announced purchase plan or program; and
  - the maximum number (or approximate dollar value) of equity securities that may yet be purchased under the plans or programs.

- The Company will also be required to disclose in a footnote the principal terms of publicly announced repurchase plans or programs, including:
  - the date of announcement;
  - the share or dollar amount approved;
  - the expiration date (if any) of the plans or programs;
  - each plan or program that has expired during the period covered by the table; and
  - each plan or program that the Company has determined to terminate prior to expiration or under which the Company does not intend to make further repurchases.

- The disclosure table also must include footnotes disclosing the nature of the transaction for purchases made other than through a publicly announced plan or program. These include, for example, open-market and privately negotiated transactions, tender offers, and repurchases made by the Company upon another person's exercise of outstanding put rights.

- The price data and other data are required to be stated in the same currency as is used in the Company's primary financial statements.

## ACTIVITIES IN US SANCTIONED COUNTRIES

### General

- Since 2005, the SEC has sharply increased its scrutiny of disclosures by companies of their business activities with governments, entities and individuals sanctioned by the US government. Both US and non-US companies are subject to this enhanced scrutiny.

- Most US sanctions regimes do not prohibit non-US persons from conducting business with sanctioned countries, persons or entities (sanctioned persons or entities are referred to as "Specially Designated Persons" or "SDNs"). Exceptions to this general rule are provisions of the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 ("CISADA") and the National Defense Authorization Act for Fiscal Year 2012 ("NDAA 2012"), pursuant to which foreign financial institutions which participate in certain restricted activities with Iran or Iranian persons or entities are restricted from opening or maintaining a US payable-through account or correspondent account. Non-compliance with the US securities regulations requirement may affect a non-US company's ability to undertake certain activities, including raising capital, in the United States. Irrespective of whether a non-US company is subject to a US sanctions program, any non-US issuer that has registered securities under Section 12 of the Exchange Act must disclose any dealings with State Sponsors of Terrorism.

- In order to remain compliant with the disclosure rules, foreign issuers must monitor their dealings with State Sponsors of Terrorism and SDNs. The disclosure standard applicable to a company's activities in sanctioned countries is not clear. On the one hand, the SEC has clearly stated that "the materiality standard applicable to a company's activities in or with State Sponsors of Terrorism is the same materiality standard applicable to all other corporate activities;" namely, whether there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision. However, in practice, this materiality standard seemingly is reversed with respect to reviews conducted by the Office of Global Security Risk ("OGSR") of the SEC; namely, any business activity in or with a sanctioned country is material to a company with the burden then on the company to refute that presumption by clear evidence.

- Currently, the countries designated by the US Secretary of State as "State Sponsors of Terrorism" are Cuba, Iran, Sudan and Syria. The list of countries changes from time to time, so reference should be made to the list maintained on the Office of Foreign Assets Control's website: http://www.ustreas.gov/ofac. A current list of SDNs is also available on the Office of Foreign Assets Control website.

- The OGSR regularly monitors Forms 20-F and 6-K, press releases, websites and other social media networks, such as Facebook and Twitter, for references to a company's activities in sanctioned countries. Companies that disclose activities in sanctioned countries through any of these means can expect to receive a comment letter from the OGSR asking various questions about those business activities, which may lead to enhanced disclosure.

## Additional Disclosures relating to Iran

- Section 219 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (the "Threat Reduction Act") mandates additional disclosure requirements for all SEC reporting companies, including non-US reporting companies, concerning certain Iran-related activities and, under a plain reading of the statute, certain activities with non-Iran-related persons or entities listed on the US Department of the Treasury's Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List (SDNs). For non-US companies, the additional disclosures, if any, should be contained in the annual report on Form 20-F.

- The Threat Reduction Act requires SEC reporting companies to report to the SEC business activities, including those of affiliates, in several mandated categories—generally relating to Iran's energy and financial sectors and Iran's suppression of human rights, but also relating to transactions with the Government of Iran, global terrorists and weapons proliferators—for further investigation by the US Government.

- Although most SEC reporting companies likely already report Iran-related activities in their SEC-filed reports or have provided detailed information about such activities to the OGSR, Section 219 requires the following additional information:

  - the nature and extent of the activity;

  - gross revenues and net profits, if any, attributable to the activity; and

  - whether the company, or its affiliate, intends to continue the activity.

- Section 219 also covers some activities, such as activities with certain SDNs, which might not otherwise be reported under current SEC rules and guidance or through inquiries from OGSR.

- There is no materiality threshold for reporting under Section 219. Under a plain reading of the statute and absent further guidance from the SEC, any activities that fall within one of the mandated categories, regardless of scope and breadth, must be reported under Section 219.

- In addition, Section 219 mandates that companies file a separate concurrent notice with the SEC explaining that a disclosure under Section 219 has been included in the annual report on Form 20-F and including the information described above.

- Upon receipt of such notice, the SEC is required to alert the US Congress and President of the disclosure. The President must then initiate an investigation into the activity disclosed in the notice and make a determination as to whether sanctions should be imposed with respect to the company or affiliate. The SEC is also required to make the information contained in the notice available to the public on its website.

☞ In light of these requirements, SEC reporting companies should carefully review their business activities, in consultation with specialist US counsel, to determine whether such activities are reportable under Section 219, and consider implementing screening procedures to ensure that they are not engaged in reportable activities with SDNs.

## CORPORATE SOCIAL RESPONSIBILITY

### General Trends

- Public company reporting on corporate social responsibility policies and practices has seen a radical shift within the last 10 years, going from being a non-existent practice to virtually a standard one with detailed disclosure for large enterprises. It is increasingly common for large multi-national companies annually to publish a stand-alone report on their corporate social responsibility initiatives and practices.

- While there is no single definition of corporate social responsibility, it is conventionally thought of as policies and practices that a company establishes in order to actively monitor and improve its compliance with ethical standards, as well as the impacts of its business on the environment, consumers, employees, communities, stakeholders and the public.

  - The concepts that usually fall under the rubric of corporate social responsibility are: corporate governance, environmental protection, public health and safety, employee working conditions, human rights, energy efficiency/sustainable use of natural resources, climate change mitigation, economic development and more generally, ethical, non-corrupt behavior.

## Voluntary Disclosure Frameworks

- Thus far, corporate social responsibility reporting has largely been a voluntary initiative, initially driven by stakeholder demands and subsequently by market/peer company practice. Voluntary disclosure frameworks have evolved, the most notable of which are:

    - *Global Reporting Initiative or GRI*. The GRI framework is the most recognized global standard with its framework for sustainability reporting. It sets out the principles and indicators that organizations can use to measure and report their economic, environmental and social performance. The cornerstone of the framework is the Sustainability Reporting Guidelines.

    - *AA1000 Series*. The AA1000 series is a set of standards issued by the UK-based AccountAbility and used by companies to develop an accountable and strategic response to sustainability, including reporting. It includes a set of principles and an assurance standard that evaluates a company's adherence to those principles.

    - *OECD Guidelines for Multinational Enterprises*. These guidelines include a section on "disclosure," which encourages timely, regular, reliable and relevant disclosure on financial and non-financial performance, including environmental and social issues.

    - *ISO 26000*. Over the years, the International Organization for Standardization, or ISO, has developed many standards across a multitude of sectors addressing issues related to sound practice management, such as the ISO 14000 series on environmental management systems and ISO 31000 on risk management. In 2010, ISO concluded 26000, a new standard that defines seven core subjects of social responsibility and guides companies to implement socially responsible behavior throughout organizational policies and practices.

## Emerging Legal Requirements

- While corporate social responsibility reporting remains broadly voluntary, mandatory requirements and guidance from the SEC are emerging that signal a convergence of this reporting with the reporting of business and financial information in the Form 20-F.

    - *Climate Change Guidance*. In 2010, the SEC issued interpretive guidance concerning climate change-related disclosure by SEC reporting companies, laying out the principal areas that companies will need to consider when evaluating whether business or legal developments related to climate change could have a material impact on their business. In the guidance, the SEC stressed that its climate change disclosure guidance does not change existing SEC disclosure requirements, nor is it intended to change long-standing interpretations of materiality. Nonetheless, the mere fact that the SEC issued the guidance signals that climate change disclosure is a growing area of focus for the SEC and an area where many companies may need to expand their disclosure.

        - The SEC highlighted four areas where climate change may trigger disclosure requirements under the existing framework for evaluating materiality for purposes of disclosures related to the company's business, risk factors, legal proceedings and management's discussion and analysis:

            - The impact of any existing or pending climate change legislation or regulation.

- The risks or effects of climate change-related international accords or treaties.
- The actual and potential indirect consequences of climate change-related regulation or business trends. As an illustration, the SEC indicated that legal, technical, political and scientific developments may create new risks or opportunities for a company, such as decreased demand for goods that produce, or whose production requires, significant greenhouse gas emissions or increased demand for goods that produce low emissions.
- The actual and potential physical impacts of climate change, such as increased droughts or storms, other changes in weather or rising sea levels.

➢ *Conflict Minerals*. In August 2012, the SEC adopted final conflict mineral disclosure rules which require companies to disclose via a new Form SD to be filed on an annual basis whether the "conflict minerals" used in, or in the manufacturing of, their products originated in the Democratic Republic of Congo or in an adjoining country. Potential conflict minerals include gold, tin, tantalum, tungsten and their derivatives.

- Specifically, pursuant to the new rules, if conflict minerals are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by a reporting company, such company is now required to submit to the SEC an annual report on Form SD describing the due diligence it has undertaken on the source and chain of custody of the potential conflict minerals in order to determine their origin.
- In addition, if a company determines that its products indeed contain a conflict mineral that originated in the Democratic Republic of Congo or in an adjoining country and that such conflict mineral did not come from a recycled or scrap source, it must also prepare and file a conflict minerals report as an exhibit to its Form SD containing further details about its due diligence and chain of custody determination process. A company that cannot certify via an audit process that conflict minerals used in the manufacture of its products are "DRC conflict free" (that is, did not help finance armed conflict) must also provide other specified disclosures within the conflict minerals report.
- In April 2014, the United States Court of Appeals for the District of Columbia Circuit decided that the conflict mineral rules violate the First Amendment to the US Constitution to the extent they require companies to state that any of their products have not been found to be "DRC conflict free." The SEC subsequently stayed the effectiveness of the portions of the conflict mineral rules that the court held to violate the First Amendment pending the completion of judicial review. Companies are expected to comply with those portions of the rule that the court upheld.
- Once filed, the Form SD, together with any required attachment such as a conflict minerals report, must then be made publicly available on the company's website.

🕐 Companies must comply with the SEC's final conflict mineral rules for the calendar year beginning January 1, 2013, with the first Form SD required to be filed by no later than May 31, 2014 and then annually on May 31 of every year thereafter.

☞ Given that it may take a certain period of time for the structures necessary for verifying the sources of conflict minerals to be put in place and mature, we recommend that companies begin reviewing the verification process for their supply chains and how they and their supplier trace the source of conflict minerals.

- *Mine Health and Safety*. Pursuant to Section 1503 of the Dodd-Frank Act, non-US companies that, directly or indirectly, operate a coal or other mine in the United States are required to disclose in their Form 20-F specified information about mine health and safety for the period covered by the Form 20-F. Companies that operate, directly or indirectly, mines outside the United States do not have to disclose information about such mines under these rules. However, to the extent mine safety issues relating to non-US mines are material, disclosure may already be required under other SEC rules.

- *California Transparency in Supply Chains Act of 2010*. This law requires every retail seller and manufacturer having more than $100 million in annual worldwide gross receipts and doing business in California to disclose via a "conspicuous link" on its main website its efforts (if any) to address risks related to slavery and human trafficking in its supply chains.

  - The law is designed to address the difficulty of policing slavery and human trafficking crimes by requiring companies to provide consumers with information that can be used to influence corporate policy by means of purchasing power.

- This law went into effect on January 1, 2012.

## Practical Tip

- As a general matter, corporate social responsibility reporting is encouraged and should be considered beneficial to investors even if all of its elements do not fall within the scope of SEC reporting requirements. However, many companies draft their corporate social responsibility reports with more of a "free self-promotional hand" than they do their mandatory business and financial disclosure (including their SEC reports), and this approach carries liability risks. A company can be liable under US federal securities law for any of its disclosure outside its SEC reports and, further, a company's disclosure outside its SEC reports can be used as evidence of the misleading nature of its SEC disclosure. Therefore, it is important that companies align the material information conveyed in their corporate social responsibility and SEC reporting.

SHEARMAN & STERLING LLP

# Chapter 4: Corporate Governance

## GENERAL

### Sarbanes-Oxley Act and Dodd-Frank Act

- All SEC reporting companies must meet a set of corporate governance requirements that were adopted as part of or pursuant to the Sarbanes-Oxley Act and the Dodd-Frank Act. Many of the requirements under the Sarbanes-Oxley Act are in the form of disclosure requirements in SEC-filed documents, but these disclosures in effect impose corporate governance requirements for SEC reporting companies. Most of the Sarbanes-Oxley corporate governance rules apply to non-US companies such as the Company, although the rules provide some accommodation to reflect home country laws or listing provisions. By contrast, only a few of the Dodd-Frank corporate governance requirements apply to non-US companies.

☞ All of the Sarbanes-Oxley rules discussed in this chapter are mandatory for non-US companies.

### NASDAQ Corporate Governance Standards

- NASDAQ also has corporate governance standards relating primarily to:
  - the independence of the majority of a company's board of directors;
  - the adoption of corporate governance guidelines;
  - the adoption of a code of business conduct and ethics;
  - the composition, duties and responsibilities of a company's audit committee, compensation committee and nominations committee;
  - shareholder approval of equity compensation plans; and
  - shareholder approval of change of control.

#### *Applicability to Non-US Companies*

- The NASDAQ standards defer to home country practice in the case of non-US companies, except for the NASDAQ standards relating to:
  - the requirement to provide NASDAQ with prompt notification after an executive officer becomes aware of any noncompliance by the Company with NASDAQ's corporate governance requirements;
  - the responsibilities and authority of an audit committee;
  - the independence of an audit committee; and
  - the Company's eligibility to participate in a Direct Registration Program (unless prohibited from complying with this rule by a law or regulation in the Company's home country).
- In instances where home country practices differ from the NASDAQ standards, the Company is required to submit to NASDAQ a written statement from an independent counsel in its home country certifying that the

home country practices are not prohibited by home country law. This letter is required only once, either at the time of initial listing or before the Company first adopts a non-conforming practice.

- In addition, the Company must disclose each NASDAQ requirement that it does not follow, and the home country practice that the Company follows in lieu of the requirement, in its Form 20-F. The Company is also encouraged, but not required, to provide such disclosures on its website.

  - Under rules adopted by NASDAQ to implement the Dodd-Frank Act, a company that follows a home country practice in lieu of the requirement to have an independent compensation committee must disclose in its Form 20-F the reasons why it does not have an independent compensation committee.

- A number of non-US companies have taken affirmative steps to comply with all the NASDAQ standards except in instances where a home country rule expressly regulates a subject differently from a NASDAQ standard.

- The Company should compare its corporate governance practices, and home country requirements, to the NASDAQ standards to identify differences for disclosure purposes and to assess if any changes should be made to existing practices. The NASDAQ standards are described in more detail below to assist the Company with that assessment.

☞ We distinguish below between those NASDAQ standards that are mandatory for non-US companies and those that are discretionary.

### Corporate Governance Practices and Trends

- Our Annual Surveys of Selected Corporate Governance Practices provide information on the general governance and director and executive compensation practices of the 100 largest US companies. For non-US companies, the practices and trends of the largest US companies provide instructive information in an increasingly convergent global corporate governance environment where the pressure for change has intensified.

☞ Our surveys, as well as other information on corporate governance, are available at http://corpgov.shearman.com.

## CODE OF ETHICS AND BUSINESS CONDUCT

### Sarbanes-Oxley

#### *General Requirement*

- The Company is required to state in its Form 20-F whether or not, and if not, why not, it has a code of ethics that applies to its principal executive officer, principal financial officer, principle accounting officer or controller, or persons performing similar functions. The Company also is required to disclose any change to, or waiver from, its code of ethics obligations for these senior officers that has occurred during the past fiscal year.

## Contents

- The SEC has defined "code of ethics" to mean written standards that are reasonably designed to deter wrongdoing and promote:

  - honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

  - full, fair, accurate, timely and understandable disclosure in reports and documents that a company files with, or submits to, the SEC and in other public communications made by such company;

  - compliance with applicable governmental laws, rules and regulations;

  - the prompt internal reporting of violations of the code to an appropriate person or to persons identified in the code; and

  - accountability for adherence to the code.

## Separate Codes of Ethics

- The Company can choose to have separate codes of ethics for its senior officers (as required by the SEC) and the remainder of its employees, or may include the SEC provisions required with respect to the specified officers as part of a single broader code that addresses additional issues.

## Waivers and Amendments

- "Waiver" means approval by the Company of a material departure from a provision of the code of ethics and includes an "implicit waiver," which means the Company's failure to take action within a reasonable period of time regarding a material departure from the code that has been made known to an executive officer.

- To alleviate concerns about retaining broad-based codes of ethics, the SEC has clarified that only amendments or waivers relating to the elements of the code of ethics required by the SEC, and for the officers specified by the SEC, must be disclosed.

  - *Current Disclosure of Waivers and Amendments*. As indicated above, disclosure of waivers and amendments is required in the Form 20-F. Disclosure in the Form 20-F is not required if it is made on the Company's website, as long as the Form 20-F discloses that waivers and amendments will be disclosed on the Company's website and provides the website address, and the disclosure is made within five business days after the date of the waiver or amendment and remains posted for at least one year.

## Publication of the Code of Ethics

- The Company is required to make available to the public a copy of its code of ethics in one of three ways:

  - filing it as an exhibit to its Form 20-F;

  - posting it on the Company's website and disclosing in its Form 20-F that it has done so; or

  - undertaking in its Form 20-F to provide a copy without charge upon request.

## NASDAQ

### *General Requirement (discretionary for non-US companies)*

- The NASDAQ rule expands on the Sarbanes-Oxley Act to require companies to adopt a code of business conduct and ethics applicable to all of its directors, officers and employees.

### *Contents*

- To comply with the NASDAQ standards, the code of business conduct and ethics should additionally contain an enforcement mechanism that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance and a fair process by which to determine violations.

### *Waivers*

- The NASDAQ rule is more expansive than Sarbanes-Oxley with regards to waivers: it requires waivers of the code for directors and executive officers to be made only by a company's board and to be disclosed in the company's next Form 20-F or via a press release and on Form 6-K.

### *Publication*

- The NASDAQ rule requires companies to make the code of conduct publicly available.

# BOARD OF DIRECTORS

## Dodd-Frank Act

### *Board Leadership Structure (discretionary for non-US companies)*

- US companies are required to disclose in their annual proxy statements their board leadership structure and the reasons why they believe that particular structure is appropriate. US companies that combine the roles of the board chair and CEO positions are required to disclose whether and why they have a lead independent director and that person's specific role.

- While this requirement does not apply to non-US companies, some non-US companies do disclose their board leadership structure, either because of home country requirements (such as in the UK) or increased shareholder interest in this area.

## NASDAQ

### *General Independence Requirement (discretionary for non-US companies)*

- The NASDAQ standards require that "independent directors" comprise a majority of the board, as affirmatively determined by the board. Companies are required to disclose in their Form 20-F the names of those directors that the board has determined are independent.

- A company that is "controlled" (which means more than 50% of the voting power for the election of directors is held by an individual, a group or another company) does not need to have a majority of independent directors on its board provided that it annually discloses the basis for its determination that it is a "controlled" company in its Form 20-F.

### *Timing*

- Companies listing in conjunction with their IPO will be required to meet the majority independent board requirement within one year of listing.

- If a company is unable to comply because of a vacancy or a director ceases to be independent due to circumstances beyond the director's reasonable control, a company must regain compliance by the earlier of its next annual shareholders' meeting or one year from the occurrence of the event that caused the failure to comply with the requirement; provided, however, that if the annual shareholders' meeting occurs within 180 days of the event that caused the failure to comply with the requirement, the Company shall instead have 180 days from such event to regain compliance. A company relying on this provision must provide notice to NASDAQ immediately upon learning of the occurrence of the event.

### *What Constitutes Independence?*

- "Independent director" means any non-employee or non-officer of a company or its parents or subsidiaries that has no relationship with the company that would, in the opinion of the board, interfere with the exercise of independent judgment in carrying out the responsibilities of a director.

- Ownership of company stock, by itself, would not preclude a board finding of independence.

- *Three-year cooling-off period.* Persons falling into the following categories would not be independent until a three-year cooling-off period has been satisfied:

  - Former employees of the company or any parent or subsidiary of the company.

  - A director who is a family member (which means a person's spouse, parents, children and siblings, whether by blood, marriage or adoption or anyone residing in the same home) of an individual who was employed by the company or any of its parents or subsidiaries as an executive officer.

  - A director who accepts, or who has a family member who accepts, any compensation (including political contributions) from the company or any of its parent or subsidiaries in excess of $120,000 during any 12 consecutive months, other than the following:

    - compensation for board or board committee service;
    - compensation paid to a family member who is a non-executive employee of the company or a parent or subsidiary; or
    - benefits under a tax-qualified retirement plan or non-discretionary compensation.

  - A director who is, or has a family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services that in any relevant fiscal year exceeded 5% of the recipient's consolidated gross revenues for that year or $200,000, whichever is greater, other than the following:

    - payments arising solely from investments in the company's securities; or
    - payments under non-discretionary charitable contribution matching programs.

- A director who is, or has a family member who is, employed as an executive officer of another entity where any of the company's executive officers serve on the compensation committee of the other entity.

- A director who is, or has a family member who is, a current partner of the company's external auditor, or who was a partner or employee of the auditor and worked on the company's audit.

### *Executive Sessions for Independent Directors (discretionary for non-US companies)*

- *General requirement.* The NASDAQ standards require that a company's independent directors meet in regularly scheduled executive sessions at which only independent directors are present. NASDAQ encourages such executive sessions to be scheduled at least twice a year in conjunction with regularly scheduled board meetings.

## AUDIT COMMITTEE

### Sarbanes-Oxley and NASDAQ

### *General Requirements (mandatory for non-US companies)*

- The Company must have an audit committee or equivalent body, comprised entirely of independent board members and at least three members, responsible for the appointment, compensation, retention and oversight of the Company's external auditors.

- If the Company fails to form a separate committee, the full board (or supervisory board if the Company has a two-tier board structure) would constitute the audit committee, in which case the independence requirements, among others, would apply to the full board (or supervisory board, as the case may be).

### *Definition of Independence*

- To be independent, a candidate for the audit committee must meet all of the following requirements:

  - *Compensation.* The candidate must not, other than in his or her capacity as a director, either directly or indirectly accept any consulting, advisory or other compensatory fee from the Company.

    - Compensatory fees do not include fixed amounts of compensation under a retirement plan, including deferred compensation, for prior service with the Company, provided such compensation is not contingent in any way on continued service.
    - "Indirect" acceptance includes acceptance of compensation:
      - by a spouse, a minor child or stepchild, or a child or stepchild sharing a home with the candidate; or
      - by an entity in which the candidate is a partner, member, managing director, executive officer or occupies a similar position and which provides accounting, consulting, legal, investment banking or financial advisory services to the Company or any Company subsidiary.
    - The candidate's holding of a position at an entity that provides non-advisory financial services to the Company (*e.g.*, lending, check clearing, maintaining customer accounts, stock brokerage services or custodial and cash management services) would not impair independence.

    - Ordinary course commercial business relationships between the Company and an entity with which the candidate has a relationship would not impair independence.
    - Non-executive officer employee. A non-executive officer employee of the Company may sit on the audit committee if such an appointment is pursuant to the Company's governing law or documents, an employee collective bargaining or similar agreement or other home country legal or listing requirements (*e.g.*, under co-determination laws).

- *Affiliation.* The candidate must not be an "affiliated person" of the Company or any Company subsidiary.
    - "Affiliated person" means a person that, directly or indirectly, controls, or is controlled by, or is under common control with, the Company. "Control" is the possession, either direct or indirect, of the power to cause the direction of management and policies of the Company.
    - The following will be deemed affiliates of the Company:
        - an executive officer of an affiliate;
        - a director who is also an employee of an affiliate;
        - a general partner of an affiliate; and
        - a managing member of an affiliate.
    - Safe harbor. A person is deemed not to control the Company if the person is not an executive officer or beneficial owner of more than 10% of any class of the Company's equity securities.
    - Other specific exceptions from "affiliation":
        - *Affiliate board membership*. An audit committee member may sit on the board of both the Company and its affiliate if the member otherwise meets the independence requirements and receives only ordinary-course compensation for such service.
        - *Controlling shareholder*. An affiliate of the Company, or the affiliate's representative, may sit on the audit committee as long as:
            - the affiliate or representative has only observer status on, and is not a voting member or the chair of, the audit committee; and
            - neither the affiliate nor the representative is an executive officer of the Company.
        - *Home country government representative*. A home country government representative may sit on the audit committee even if the home country government is an affiliate of the Company, as long as the representative is not an executive officer of the Company.
- *Grace period after IPO.* At least one member of the audit committee must be independent at the time of listing, and a majority must be independent within 90 days thereafter. The full audit committee must be independent within one year of listing.

### *Exemption for Non-US Companies with a Board of Auditors*

- As a non-US company, the Company will not be subject to the independence and oversight requirements if:
    - the Company has a board of auditors (or statutory auditors) that is established pursuant to home country legal or listing provisions expressly requiring or permitting such a board;

- the board of auditors is either separate from the board of directors, or composed of at least one member and one non-member of the board of directors;
- home country legal or listing provisions set forth standards for the independence of such board;
- the board of auditors is not elected by management and no executive officer of the Company is a member of such board;
- such board is responsible, to the extent permitted by law, for the appointment, retention and oversight of the external auditor's work (including, to the extent permitted by law, resolution of disagreements with management and the auditor regarding financial reporting); and
- such board remains subject to the other Sarbanes-Oxley audit committee requirements regarding establishment of complaints procedures, authority to engage advisors and funding (described further below).

*Form 20-F Disclosure Requirements (mandatory for non-US companies)*

- *General requirement.* In its Form 20-F, the Company must:
  - *Disclose whether it has availed itself of any exemption from the audit committee rules.* If the Company avails itself of any exemption, it must disclose its assessment of whether and, if so, how such reliance will materially adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of the audit committee rules.
  - *Identify its audit committee.* If the Company does not separately designate an audit committee, it must disclose that its entire board (or supervisory board, if the Company has a two-tier board structure) is acting as the audit committee.

*Duties and Responsibilities (mandatory for non-US companies)*

- The Company's audit committee must have the following duties and responsibilities:
  - direct responsibility for the appointment, compensation, retention, termination and oversight of the work of the Company's external auditors (including resolution of disagreements between management and the auditor regarding financial reporting);
  - establishment of procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters;
  - obtaining advice and assistance from outside independent legal, accounting or other advisors as the audit committee deems necessary to carry out its duties (with no obligation to first obtain board approval); and
  - the audit firm must report directly to the audit committee.
- The Company must provide appropriate funding for the audit committee's administration of its duties.

### *Deference to Home Country Practice*

- The audit committee duties and responsibilities outlined above do not override home country legal or other requirements:
  - for shareholders to ultimately vote on, approve or ratify the audit committee requirements, such as appointment, compensation and retention of the external auditors (although if the Company recommends or nominates an external auditor to its shareholders, the audit committee must make the recommendation or nomination);
  - prohibiting or limiting the delegation of responsibilities for certain requirements from the full board of directors to the audit committee; or
  - the vesting of such responsibilities in a governmental entity or tribunal;

  *provided* that the audit committee must be granted responsibilities, which can include advisory powers, to the extent permitted by law.

### *Ongoing Auditor Reporting to the Audit Committee (mandatory for non-US companies)*

- The Company's external auditors must report to the audit committee prior to the filing of any audit report with the SEC, such as in the Form 20-F:
  - critical accounting policies and practices to be used;
  - alternative treatments of financial information within GAAP that were discussed with management, ramifications of the use thereof and such auditor's preferred treatment; and
  - material written communications between management and such auditors.

## Additional NASDAQ Requirements (discretionary for non-US companies)

### *Minimum Number*

- NASDAQ requires a company's audit committee to have at least three members.

### *Additional Independence Criteria*

- All of the company's audit committee members must:
  - be independent under the NASDAQ criteria for director independence (see "Board of Directors – NASDAQ – What Constitutes Independence?" above) and the Sarbanes-Oxley rules (see "Audit Committee – Sarbanes-Oxley and NASDAQ – Definition of Independence" above);
  - not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years; and
  - be able to read and understand fundamental financial statements, including a company's balance sheet, income statement and cash flow statement.

- *Exception.* If the board, under exceptional and limited circumstances, determines that membership on the audit committee by such director is required by the shareholders' and the company's best interests, and disclosure is made in the Form 20-F regarding the nature of the director's relationship and the reasons for this determination, one director may be appointed:

  - who is not independent under the NASDAQ criteria for director independence;
  - who is independent under Sarbanes-Oxley; and
  - who is not a current officer, employee or family member of such officer or employee,

  *provided* such director serves not more than two years and not as the chair of the audit committee.

- *Cure Period.* Provided a company notifies NASDAQ immediately upon learning of the non-compliance, NASDAQ will allow a cure period until the earlier of the next annual shareholders' meeting or one year from occurrence of either of the following:

  - one audit committee member ceases to be independent for reasons outside the member's reasonable control; or
  - there are insufficient audit committee members due to a vacancy on the audit committee, and a non-independent member is not already relying on the cure period, provided, however, that if the annual shareholders' meeting occurs within 180 days of the event that caused the vacancy, a company shall instead have 180 days from such event to regain compliance.

*Written Charter*

- *General requirement.* The NASDAQ standards require companies to certify that they have adopted a formal written audit committee charter and that the audit committee has reviewed and reassessed the adequacy of this charter annually.

- *Duties and Responsibilities.* In addition to the duties and responsibilities required by Sarbanes-Oxley, the audit committee charter required by NASDAQ should provide for the following duties and responsibilities:

  - the scope of the committee's responsibilities, and how it carries out those responsibilities, including structure, processes and membership requirements;
  - ensuring receipt from outside auditors of a formal written statement delineating all relationships between the auditor and the company and the audit committee's responsibility for actively engaging in a dialogue with the auditor about services or relationships that may impact the auditor's objectivity and independence and for recommending appropriate actions to the full board to oversee the auditor's independence; and
  - overseeing the company's accounting and financial reporting processes and the audits of the company's financial statements.

### *Related Party Transactions*

- *General requirement.* The audit committee or an independent body of the board of directors must conduct an appropriate review of related party transactions for all potential conflict of interest situations on an ongoing basis.

## FINANCIAL EXPERT

### Sarbanes-Oxley

### *General Requirement*

- Under Sarbanes-Oxley, the Company is required to state in its Form 20-F whether its board of directors has determined that either:
  - it has at least one "audit committee financial expert" on its audit committee (or on its board of auditors or statutory auditors, as the case may be); or
  - it does not have an audit committee financial expert member serving on its audit committee and the reasons why it does not have such an expert.
- The Company must name the designated financial expert in the Form 20-F and whether he or she is independent. The names of additional experts are encouraged but not required to be disclosed. However, simply disclosing the qualifications of all audit committee (or board) members will not satisfy the rule.
- *Qualifications.* Under Sarbanes-Oxley, the designated "audit committee financial expert" must have each of the following attributes:
  - an understanding of financial statements and of the GAAP used by the Company to prepare its primary financial statements (need not be US GAAP);
  - the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;
  - experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues generally comparable to what can reasonably be expected to be raised by the Company's financial statements, or experience actively supervising one or more persons engaged in such activities;
  - an understanding of internal controls and procedures for financial reporting; and
  - an understanding of audit committee functions.
- The designated financial expert must have acquired these attributes through one or more of the following:
  - education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor, or experience in one or more positions that involve the performance of similar

functions, although such experience need not have been in the same industry as the Company, or necessarily with an SEC reporting company;

- experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions. While "active supervision" does not mean direct experience in preparing or auditing financial statements, it means more than seniority in a traditional reporting hierarchy and should involve active participation at a supervisory level. The supervisor's experience should be at least comparable to the general expertise of those supervised. Thus, for instance, a CEO with considerable operations involvement but little financial or accounting involvement would not qualify under this experience requirement;

- experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

- other relevant experience, which must be disclosed in the Form 20-F.

- The important thing to take from this list of qualifications is that prior service as an accountant, auditor or financial officer is **not essential** for the designation. Thus, for instance, people such as investment bankers, venture capitalists, professional financial analysts, lawyers, fund managers or academics can serve as designated financial experts, as long as they have held positions requiring them to scrutinize financial statements and diligently question management and auditors.

- *Designation process*. The Company's full board (or full supervisory or non-management board, as the case may be) is required to make the determination that someone qualifies as an "audit committee financial expert." The determination should be made based on all the facts and circumstances and, in particular, should ensure that the designated expert embodies the highest standards of personal and professional integrity (*e.g.*, candidates that have been the subject of disciplinary proceedings should be strictly scrutinized). The Company should begin the process by assessing the qualifications of current board members and by revising its directors and officers questionnaire to address these considerations.

- *Safe harbor*. The SEC has clarified the following in response to concerns that mere designation as an audit committee financial expert might be viewed as imposing a higher degree of individual responsibility on that person, or as decreasing the duties and obligations of other audit committee members:

  - an audit committee financial expert will not be deemed an "expert" for purposes of liability under the Securities Act;

  - the designation of a person as an audit committee financial expert does not impose any duties, obligations or liabilities greater than those imposed on an audit committee member in the absence of such designation; and

  - the designation of a person as an audit committee financial expert does not affect the duties, obligations or liability of any other audit committee or board member.

### NASDAQ (discretionary for non-US companies)

- The NASDAQ standards require all audit committee members, at the time of their appointment, to be able to read and understand fundamental financial statements, including a company's balance sheet, income statement and cash flow statement.

- A company must certify that it has and will continue to have at least one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual being financially sophisticated, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

## INDEPENDENT AUDITORS

- The requirements set forth under this topic stem entirely from Sarbanes-Oxley and, hence, the Company must comply with them.

### Audit Committee Pre-Approval of Services Provided by Auditor

#### *General Requirement*

- The Company's audit committee or equivalent body must pre-approve all services that are to be provided by the auditor of the Company's financial statements. This includes all audit, review and attest services as well as all permissible non-audit services, including tax services, provided by the auditor.

#### *Methods of Pre-Approval*

- The auditor services can be:
  - pre-approved by the audit committee itself;
  - pre-approved pursuant to delegated authority by one or more independent audit committee member(s) if the audit committee is informed of each decision; or
  - entered into pursuant to pre-approved policies and procedures established by the audit committee, provided the policies and procedures are detailed as to the particular service, the audit committee is informed of each service and there is no delegation of responsibilities to management.

#### *De Minimis Exception for Non-Audit Services*

- The audit committee's pre-approval for non-audit services is not required if the services:
  - do not aggregate to more than 5% of total revenues paid by the Company to its external auditors during the same fiscal year;
  - were not recognized as non-audit services at the time of the engagement; and
  - are promptly brought to the attention of the audit committee and approved prior to completion of the audit by the audit committee.

### *Prohibited Non-Audit Services*

- In making its pre-approval decision, the following ten services by the auditor are prohibited:
  - bookkeeping or other services related to the audit client's accounting records or financial statements;
  - financial information systems design and implementation;
  - appraisal or valuation services, fairness opinions or contribution-in-kind reports;
  - actuarial services;
  - internal audit outsourcing;
  - management functions;
  - human resources;
  - broker-dealer, investment adviser or investment banking services;
  - legal services; and
  - expert services unrelated to the audit.

### *Practical Considerations*

☞ In retaining an audit firm for non-audit work, the Company's audit committee should consider the following factors, which represent the principles behind the SEC's prohibition of the non-audit services above:

  - whether the auditors would be auditing their own work;
  - whether the auditors would be performing management functions;
  - whether the auditors would be acting as an advocate for the Company;
  - whether the auditors would be promoting the Company's stock or other financial interest;
  - whether the audit firm has unique expertise in the service;
  - the effects of the service on audit effectiveness or on the quality and timeliness of the Company's financial reporting process; and
  - the size of the fee(s) for non-audit services.

### *Tax Services*

- The Company's audit committee should note that the audit firm may continue to provide tax services such as tax compliance, tax planning and tax advice if these services have been pre-approved by the audit committee and are not, in effect, prohibited legal or expert services.

- Tax services that might be regarded as prohibited legal or expert services include representing the Company before a tax court, which would involve an accountant's serving as an advocate for his or her client, and formulating tax shelters, which may require the accountant to audit his or her own work, assume a management function or become an advocate for the Company in seeking to minimize tax obligations or defend novel tax issues.

## Disclosure of Auditor Fees and Pre-approved Policies and Procedures

### *General Requirement*

- The Company is required to disclose in its Form 20-F the following:
  - The aggregate fees billed for each of the following services rendered by its external auditor for each of the two most recent fiscal years:
    - Audit services.
    - Audit-related services.
      - Audit-related fees include fees for employee benefit plan audits, M&A due diligence, accounting assistance and audits in connection with proposed or consummated acquisitions, internal control reviews, and consultations concerning financial accounting and reporting standards.
    - Tax services.
      - Tax fees include (i) tax compliance, including the preparation of tax returns, refund claims and tax payment planning services, and (ii) tax consultation and planning, including assistance and representation in connection with tax audits and appeal, M&A and employee benefit plan tax advice, and requests for rulings or tax advice from taxing authorities.
    - Any other services.
  - A description, in qualitative terms, of the types of services provided in the above categories except as related to audit fees.
  - Any pre-approval policies and procedures developed by the audit committee.
  - The percentage of fees paid to the independent accountant where the *de minimis* exception has been invoked.
  - The percentage of hours spent on the most recent fiscal year audit by persons other than audit firm employees, if the percentage is more than 50%.

## Policies on Hiring Former Accounting Advisors

### *General Requirement*

- The Company may not hire a person in an accounting role or financial reporting oversight role (including as director, president, CEO, CFO, COO, general counsel, chief accounting officer, controller, head of internal audit or financial reporting, or treasurer):
  - <u>If</u>: that person performed audit, review or attest services at any time during an audit year; and

- Until: one full audit year has passed after the audit year in which the person performed these services.

### *Timing*

- The Company has been required to comply with this rule in respect of employment relationships that began after May 6, 2003.

- The one full audit year begins the day after the prior year's annual report is filed with the SEC, and ends the day the current year's annual report is filed.

### *Exemption*

- This restriction does not apply to members of the audit engagement team who provide less than 10 hours of service, except for the "lead" and "concurring" partners of the team.

### *Practical Considerations*

- The Company may wish to consider the following:

  - imposing a cooling-off period (possibly in excess of the one-year period mandated) following work performed by an individual on the Company's audit team (including tax partners), during which such individual may not be hired by the Company;

  - reviewing any proposed Company hires of members or former members of the audit team to determine whether the independence of the audit may be impaired;

  - reviewing any proposed hires of senior employees or former employees of the Company's accounting firm for senior positions at the Company, regardless of whether such employees were members of the audit engagement team;

  - monitoring the aggregate number of employees that the Company hires from its auditing firm for positions in the Company's finance or accounting functions.

## Compensation of Audit Partner for Procuring Non-Audit Services

- The Company should seek assurance from the auditors that, during the audit engagement period, no audit partners on the audit engagement team are receiving compensation for procuring non-audit work from the Company.

## Rotation of Audit Partners

### *General Requirement*

- *Lead and concurring partners*. The lead and concurring partners on the Company's external audit engagement team must be rotated every five years and five consecutive years must elapse before these partners may perform audit review or attestation services for the Company again.

- *Other audit partners*. The other audit partners on the Company's external audit engagement team must rotate off the engagement after seven consecutive years and then are subject to a two-year time-out period.

- "Audit partners" are defined in a particular way. Tax partners would not be considered to be an audit partner unless they were also the relationship partner.

### *Timing*

- The rules became effective with the Company's first fiscal year beginning after May 6, 2003. Time served before this fiscal year does **not** count toward the rotation period.

COMPENSATION COMMITTEE

### Dodd-Frank Act

- The SEC has adopted rules directing national securities exchanges such as NASDAQ to prohibit the listing of the securities of any company whose compensation committee is not comprised exclusively of independent directors. Non-US companies are exempt from this requirement if they disclose in their Form 20-F the reasons why they do not have an independent compensation committee.
  - The criteria necessary to establish independence are set by the exchanges themselves based on SEC guidance as to "relevant factors," which, at a minimum, include taking into account the source of compensation of the committee member and whether such member is affiliated with the company, similar to those criteria for the audit committee.
- In addition, the compensation committee must have sole discretion to obtain the advice of compensation advisors and be directly responsible for the appointment, payment and oversight of compensation advisors. A compensation committee may select compensation consultants only after considering specified factors related to the consultants' independence, including:
  - whether the consultant provides any other services to the company;
  - what percentage of the consultant's total revenues are comprised of fees received from the company;
  - what policies and procedures the company has in place to identify and prevent conflicts of interest;
  - any business or personal relationship of the consultant with any member of the compensation committee;
  - the consultant's share ownership in the company; and
  - any business or personal relationship of the consultant or such consultant's employer with any executive officer of the company.
- Companies must provide their compensation committees with appropriate funding for payment of reasonable compensation to advisors.
- US companies are also required to disclose in their annual proxy statements certain additional information related to the above requirements, including whether the work of any compensation consultant that has played any role in determining or recommending the form or amount of executive and director compensation has raised a conflict of interest and, if so, the nature of the conflict and how it is being addressed. However, this

requirement does not apply to non-US companies since they are otherwise exempt from the SEC's rules relating to proxy statements.

## NASDAQ

### *General Requirement (discretionary for non-US companies)*

- NASDAQ has adopted rules, in response to the above SEC rules implementing the Dodd-Frank Act, which require companies to have a compensation committee consisting of at least two "independent" directors.

- A company that is "controlled" (more than 50% of the voting power for the election of directors is held by an individual, a group or another company) is exempt from these requirements, provided it annually discloses the basis for its exemption in the Form 20-F.

### *Independence Criteria*

- Compensation committee members must meet the same independence criteria as the majority of the full board (see the discussion under "Board of Directors – NASDAQ – What Constitutes Independence?" above). In addition, in response to SEC rules implementing the Dodd-Frank Act, NASDAQ has adopted an additional independence test for compensation committee members, requiring the board to consider (i) whether the director receives compensation from any person or entity that would impair his or her ability to make independent judgments about the Company's executive compensation and (ii) whether any affiliate relationship that the director has with the Company, a subsidiary or an affiliate places the director under the direct or indirect control of the Company or its senior management in a manner that would impair the director's ability to make independent judgments about the Company's executive compensation.

- If the compensation committee is comprised of at least three members, it may include one non-independent director if:

  - such director is not a current officer or employee, or family member of an officer or employee;

  - such director's membership on the committee, as determined by the board under exceptional and limited circumstances, is required by the shareholders' and the company's best interests;

  - disclosure is made either on the company's website or in its next Form 20-F of the nature of the director's relationship with the company and the reasons for the board's determination; and

  - service as a compensation committee member is limited to two years.

- The NASDAQ rules regarding the compensation committee's (i) authority to retain advisors, (ii) funding to retain advisors, and (iii) requirement to analyze advisor independence according to specified criteria, went into effect on July 1, 2013.

- Companies must certify compliance with the applicable requirements no later than 30 days after the applicable implementation deadline.

### *Written Charter*

- *General requirement.* NASDAQ requires companies to certify that they have adopted a formal written compensation committee charter and that the committee will review and reassess the charter's adequacy annually.
- *Purpose.* The charter must specify:
  - the compensation committee's authority relating to its advisors;
  - the scope of the compensation committee's responsibilities and how it carries them out, including structure, processes and membership requirements;
  - the compensation committee's responsibility for determining, or recommending to the board for determination, the compensation of the CEO and other executive officers; and
  - that the CEO may not be present during voting or deliberations on his or her compensation.

Companies must comply with the rule requiring adoption of a written charter by the earlier of their first annual meeting following after January 15, 2014 or October 31, 2014, and must certify their compliance with the rule no later than 30 days following the applicable implementation deadline.

## NOMINATIONS COMMITTEE

- Sarbanes-Oxley is silent on the requirements of a nominations committee.

## NASDAQ

### *General Requirement (discretionary for non-US companies)*

- The nomination of company directors must be determined or recommended to the full board either by:
  - a majority of the independent directors, or
  - a nominations committee comprised solely of independent directors.
- A company that is "controlled" (more than 50% of the voting power for the election of directors is held by an individual, a group or another company) is exempt provided it annually discloses the basis for the exemption in its Form 20-F.

### *Independence Criteria*

- The independence criteria for nominations committee members are the same as those for the majority of the full board (see the discussion under "Board of Directors – General Independence Requirements" above), except that if the nominations committee is comprised of at least three members, it may include one non-independent director if:
  - such director is not a current officer or employee, or family member of an officer or employee;

- such director's membership on the committee, as determined by the board under exceptional and limited circumstances, is required by the shareholders' and the company's best interests;
- disclosure is made either on the company's website or in its next Form 20-F of the nature of the director's relationship with the company and the reasons for the board's determination; and
- service as a nominations committee member is limited to two years.

- Independent director oversight of director nominations will not apply where:
  - the right to nominate a director legally belongs to a third party; or
  - the company is subject to a binding obligation that requires a director nomination structure inconsistent with these requirements, and the obligation pre-dates this NASDAQ rule.
- To underscore the nominations committee's independence, a company's board may want to consider requiring:
  - that the independent directors of the full board nominate the nominations committee members; and/or
  - that the independent directors, or the nominations committee itself, appoint the nominations committee's chairperson.

### *Written Charter*

- *General requirement.* Each company must certify that it has adopted a formal written charter or board resolution addressing the nominations process.

## RISK MANAGEMENT AND THE BOARD OF DIRECTORS

### General Rule and Trends

- US companies are required to disclose in their SEC annual reports the extent of the board's role in the risk oversight of a company, such as how the board administers its oversight function, and the effect this has on the board's leadership structure. Issues to be addressed in the disclosure include:
  - the way in which the company perceives the role of its board in overseeing risk;
  - the relationship between the board and senior management in overseeing risk;
  - the way in which the board implements and manages its risk oversight function (*i.e.*, through the board as a whole or through a committee, such as a specially designated risk committee or the audit committee with added responsibilities);
  - whether those responsible for overseeing risk report directly to the board as a whole or to a committee; and
  - whether and how the board or committee monitors risk.

- Although this requirement does not apply to non-US companies, shareholders increasingly want to understand how public companies identify and manage risk and the risk oversight function of the board. There is therefore a market-driven trend for companies to have oversight controls and procedures in place and to report on them in their annual disclosure.

☞ Key Risk Oversight Priorities

- The role of the board of directors is to oversee the company's risk management process, not to manage it. The overarching goal for the board is to establish alertness to risk as part of the "culture" of the company by addressing the following key priorities:
  - To enforce the "tone at the top" alertness to risk, devoting at least one board meeting each year to an assessment of the company's current risks and risk management program, as well as internal controls.
  - Ensuring that risk management (both understanding and mitigating risk) becomes part of how employees conduct their day-to-day business activities. The board of directors, along with senior management, should send a message to all employees that risk management is neither an impediment to the conduct of business nor a "check the box" item, but rather should be seen as an integral part of the corporate strategy and values of the company.
  - Ensuring there is a robust process in place for identifying and prioritizing the company's risks. The board needs to have a thorough understanding of the company's strategic plan so that it develops a consensus around the company's overall risk appetite—the amount of risk the company is willing to assume—and risk tolerance—the degree of variance from the assumed level of risk that the business is willing to accept, and can assess whether management has adequately addressed the risks that could impact the company's strategic plan.
  - Clearly communicating to management the board's comfort levels around risk appetite and risk tolerance.
  - Because practically everything involves some risk, ensuring that, at a minimum, the board and management regularly focus on the company's most material and probable risks, and jointly evaluate and understand how those risks interrelate and could impact the company.
  - Confirming that management has developed an adequate program to address risk and that there are adequate systems in place to identify risks, to monitor the implementation of the company's risk programs and to mitigate risks.
    - This should include establishing company-wide and business unit risk limits, and developing a clear escalation path if those pre-approved risk limits are likely to be exceeded, either purposefully or as a result of events beyond the company's control.
    - Being alert to "red flags" such as the following should be one of the critical aspects of effective risk management:
      - having a restatement of earnings;
      - missing strategic performance goals;
      - having multiple whistleblower incidents;

  - o experiencing a poor customer service record; or
  - o undergoing liquidity challenges.

- ➢ Ensuring that the company's risk personnel are appropriately compensated and have appropriate stature and authority within the company and adequate access to the "risk-takers" at the company, including its senior management, and the board.

- ➢ Ensuring that risks are understood at the board level and throughout the company.

  - Does the company have the right people to identify and understand risk—both at the management and the board levels? The board should consider whether it needs to include directors whose backgrounds are such that they understand the particular company's most significant risks.
  - Ensuring that directors are regularly and adequately informed of the company's risks, and given an opportunity to advise as to how best to address them—both in general terms and specifically, when appropriate.

- ➢ Cultivating a risk dialogue with management, and being comfortable asking tough questions and challenging existing assumptions.

- ➢ Setting aside time at each board meeting to discuss any current risk issues, and any particular actions that should be taken to address them.

- ➢ Periodically having management present "what if" risk scenarios to the board for discussion, ranging from the most material and probable to the less likely/low probability, but nonetheless high cost, risks, as part of a structured risk mapping matrix process.

## SHAREHOLDER ENGAGEMENT AND THE ROLE OF THE BOARD OF DIRECTORS

### Current Environment

- ▪ Increased shareholder activism and the need to develop and maintain a stable core of long-term committed shareholders is prompting companies to take a more proactive and organized approach to shareholder communication and engagement.

- ▪ In the United States, the primary catalyst for increased communication and engagement with shareholders has been the focus on governance and leadership, with shareholders endeavoring to shape the debate and policies relating to such issues as majority voting, say-on-pay and other executive compensation matters, proxy access, independent board leadership, CEO evaluation and succession and takeover defenses, evidenced by the increasing volume of shareholder proposals.

- ▪ For non-US companies listed on NASDAQ with active, and perhaps substantial, US institutional shareholders, issues and concerns related to shareholder activism and engagement are equally relevant.

- ▪ Organizations such as Institutional Shareholder Services Inc. (ISS) and Glass, Lewis & Co. publish their proxy voting guidelines and advice, not only for US companies, but also for non-US companies. These organizations update their guidelines and advice each year, taking into account emerging issues and trends, the evaluation of market standards, regulatory changes and, importantly, feedback provided by institutional investors.

- The current challenge for boards in this environment is to understand the key issues and concerns, particularly of significant shareholders, and to get ahead of them.

- The growing consensus in the current environment is that companies are well advised to move from an ad hoc, reactive approach mainly focused on buy-side investors to a more proactive and organized broader approach to communication and engagement with shareholders who are increasingly active in the governance and executive compensation areas.

### ☞ A Way Forward

- Two threshold issues emerge in this current environment:

  - The desirability of having a proactive shareholder communication and engagement program coordinated among investor relations, the senior executive (CEO/CFO) and board leadership.

  - The extent to which the board is involved in that program: who speaks for the board, on what topics and under what circumstances.

- A first step would be to discuss with the key constituencies the design of a proactive shareholder communication and engagement policy and program, taking into account the current shareholder profile (such as the top 10 – 20) and their range of potential issues and to determine who is best suited within the company to address those issues and how often.

- While there is no “one-size-fits-all” for such programs, in the normal course a general demarcation can be made between the senior executives speaking to shareholders on all matters relating to the operating performance and the running of the business and the board leadership focusing on those matters that are within the purview of the board, such as governance, broad policy and strategy issues, all with investor relations interacting with shareholders on an ongoing basis, but not being the gatekeeper/intermediary for shareholder access to the senior executives and the board on their key issues. The program should also address the respective roles of the various constituencies in extraordinary times as well, such as major transactions and events and crises.

- All constituencies engaging with shareholders must speak with one voice and clear messages, which in certain circumstances need to be carefully scripted. Care also needs to be taken to ensure that shareholders know what areas each of the respective constituencies speak to, that they do not unduly overlap and do not diminish the authority and standing of each other.

## RESTRICTIONS ON DIRECTORS AND OFFICERS

- The requirements set forth under this topic stem entirely from Sarbanes-Oxley and, hence, the Company must comply with them.

## Prohibition on Personal Loans to Directors and Executive Officers

### *General Requirement*

- The Company is prohibited from, directly or indirectly, including through any subsidiary, extending or maintaining credit, arranging for the extension of credit, or renewing an extension of credit, in the form of a personal loan to or for any director or executive officer. Violations of this provision are subject to criminal sanctions.

### *Timing*

- Loans that were in existence as of July 30, 2002 are "grandfathered" and not prohibited, provided that on or after this date there has been no material modification of any term of the loan and the loan has not been extended or renewed.

### *Broad Reach*

- While Congress appears to have been primarily concerned with the large loans to individual executives that have been the subject of recent criticism, the scope of this prohibition is far-reaching and may be read to cover arrangements other than traditional loans.

- The SEC has not provided guidance or adopted rules with respect to this prohibition. Consequently, the scope of this provision is likely to be clarified only with the testing of individual cases reviewed by the SEC or the courts.

- The Company should seek the advice of US counsel before making any new loans or modifying or extending existing loans and allowing or facilitating participation by its executive officers or directors in any of the following programs:

  - equity split-dollar life insurance where the premiums are paid by the Company;
  - cashless option exercise programs assisted by brokers used by the Company (as opposed to brokers independently retained by the executive officer or director without any involvement by the Company);
  - home mortgage loans made or arranged by the Company;
  - early option exercise loans made by the Company using the option stock as collateral;
  - advancement of funds by the Company necessary to satisfy tax obligations;
  - advancement of funds by the Company for travel or other expenses (as opposed to reimbursement afterwards);
  - loans from 401(k) plans sponsored by the Company;
  - leveraged investment programs, Company guarantees of third-party loans, leveraged ESOPs, certain relocation programs involving loans, and arm's-length third-party loans arranged by the Company; and
  - forgiveness by the Company of a loan outstanding as of July 30, 2002.

## Improper Influence on Conduct of Audits

### *General Requirement*

- The Company's officers and directors, as well as persons acting under their direction, are prohibited from taking any action to coerce, manipulate, mislead or fraudulently influence any auditors if they knew or should have known that the prohibited action could, if successful, render the financial statements materially misleading.

### *Particulars of the Rule*

- The terms "officer" and "director" are determined by local law and corporate governance practices in the Company's home jurisdiction.

- This rule prohibits conduct even if it does not succeed in actually rendering the Company's financial statements materially misleading.

- This rule may be violated by conduct that is merely negligent.

- The Company's audit committee should consider whether to inquire of the auditor whether the auditor is aware of any prohibited conduct.

## SHAREHOLDER APPROVAL OF EQUITY COMPENSATION PLANS

- Sarbanes-Oxley is silent on this subject.

## NASDAQ

### *General Requirement (discretionary for non-US companies)*

- NASDAQ's standards state that a company's shareholders must be given the opportunity to vote on all new stock option or other equity compensation plans and any material amendments to existing plans.

- A company is not permitted to use repurchased shares to fund option plans or grants without shareholder approval.

- The following are exempted:

  - plans made available to all of a company's shareholders generally (*e.g.*, a typical dividend reinvestment plan);

  - plans for certain tax-qualified, non-discriminatory plans (*e.g.*, employee stock ownership plans) or parallel nonqualified plans, provided such plans are approved by either the company's independent compensation committee or a majority of the company's independent directors, or plans that merely provide a convenient way to purchase shares on the open market or from the company at market value;

  - inducement grants to new employees if the grants are approved by either an independent compensation committee or a majority of the company's independent directors, provided a press release is promptly issued detailing the material terms of the grant, the recipients and the number of shares involved; and

- certain plans in the context of mergers and acquisitions.

SHAREHOLDER APPROVAL OF CHANGE OF CONTROL

- Sarbanes-Oxley is silent on this subject.

### NASDAQ (discretionary for non-US companies)

- NASDAQ currently requires shareholder approval when the issuance or potential issuance of securities would result in a change of control of a company.

STANDARDS OF CONDUCT FOR ATTORNEYS

- The requirements set forth under this topic stem entirely from Sarbanes-Oxley and, hence, the Company should be aware of their impact on its lawyers.

### General Requirement

- Attorneys "appearing and practicing before the SEC" must report "evidence of material violations" of US federal or state securities laws, a material breach of fiduciary duty, or similar material violations of US federal or state law "up the ladder" to the CEO or chief legal counsel of the Company. If the CEO or chief legal counsel fails to respond appropriately, the attorney must report such evidence to the audit committee, other independent committee or the full board of the Company.

### Definition of "Evidence of a Material Violation"

- "Evidence of a material violation" means **credible evidence**, based upon which it would be unreasonable under the circumstances for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing or is about to occur.

### Definition of "Appearing and Practicing Before the SEC"

- "Attorneys appearing and practicing before the SEC" are:
  - attorneys providing legal services to the Company;
  - where an attorney-client relationship with the Company exists; and
  - where the attorney has notice that documents he or she is preparing or assisting in preparing will be filed or submitted to the SEC.

#### *Non-US Attorneys*

- An attorney admitted in a jurisdiction outside the US who does not give advice on US law and whose "appearing and practicing" conduct is only incidental to the ordinary course practice of law outside the US or is in consultation with US counsel is not covered by this rule. However, a non-US lawyer who gives advice on US law without consulting a US lawyer would be covered by the rule.

### *Supervisory and Subordinate Attorneys*

- A "supervisory attorney" is responsible for complying with the reporting requirements discussed above when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

    - Only a senior attorney who actually directs or supervises the actions of a subordinate attorney "appearing and practicing before the SEC" is a "supervisory attorney." Therefore, a senior attorney who supervises or directs a subordinate on matters unrelated to the subordinate's "appearing and practicing before the SEC" is not a "supervisory attorney." Conversely, an attorney who typically does not exercise authority over a subordinate attorney but who does direct the subordinate attorney in the specific matter involving the subordinate attorney's "appearance and practice before the SEC" is a "supervisory attorney."

    - A subordinate attorney "appearing and practicing before the SEC" is subject to the attorney conduct rules even if he or she is acting at the direction of a supervisory attorney, but reporting evidence of a material violation to the supervisory attorney will satisfy the reporting requirements.

        - An attorney who appears and practices before the SEC under the supervision and direction of the Company's chief legal counsel is **not** considered a subordinate attorney and is not relieved of further reporting obligations by advising the chief legal counsel of evidence of a material violation.

### Qualified Legal Compliance Committee

- The Company may establish a qualified legal compliance committee, or QLCC, to provide an alternative process for the attorney to report violations to the Company. If it does, the QLCC must have the following authorities and responsibilities:

    - to notify the CEO or chief legal counsel upon receipt of a report of evidence of a material violation;

    - to determine if an investigation is warranted and, if so, conduct one;

    - at the conclusion of the investigation, to notify the board, the CEO and the chief legal counsel of the results of the investigation and recommend remedial measures, including appropriate disclosures, and/or impose appropriate sanctions to stop ongoing, prevent future, or correct past material violations; and

    - if the Company does not appropriately respond, to take other appropriate action, by majority vote, including notification to the SEC (unanimity is not required).

- The Company's QLCC must consist of at least one audit committee member and two or more independent directors. The Company may use another independent board committee as the QLCC.

# Chapter 5: Anti-Corruption; Compliance Programs

## FOREIGN CORRUPT PRACTICES ACT

- Non-US companies that have registered securities under Section 12 of the Exchange Act or that are required to file reports under Section 15(d) of the Exchange Act must comply with the provisions of the Foreign Corrupt Practices Act (the "FCPA"). The FCPA prohibits registrants and all officers, directors, employees and shareholders acting on behalf of such registrants from using any means of US interstate commerce or to do any act in the territory of the United States in furtherance of an offer or a promise of anything of value to a foreign official, foreign political party, party official or candidate for political office for the purpose of influencing any act or decision in order to obtain or retain business. The FCPA also prohibits payments through third parties (agents, consultants, suppliers, etc.) to make indirectly a prohibited payment.

- The FCPA also imposes accounting and record keeping standards, requiring registrants:

  - to make and keep books, records and accounts that accurately reflect transactions and dispositions of assets of the company; and

  - to maintain a system of internal accounting controls sufficient to provide reasonable assurance that transactions are executed, and that access to assets is permitted, only with management's authorization; that transactions are properly recorded so as to permit preparation of financial statements; and that comparisons are made with actual assets and appropriate action taken with respect to any difference discovered.

- There are now a number of multi-national treaties (notably the OECD) and related national legislation that impose similar restrictions and duties on companies even if they are not SEC registrants.

- FCPA enforcement activity has increased substantially in recent years. Five distinctive new trends can be seen:

  - There is a continuing trend toward more aggressive investigations and enforcement proceedings by the US Department of Justice ("DOJ") and the SEC, including a steady increase in proceedings brought against individuals. These proceedings are also resulting in more severe punishments in the form of fines for companies and jail time for individuals.

  - Although there has been an increase in multi-national cooperation in investigations, the US authorities have not been satisfied with the pace of investigations and prosecutions outside of the United States. As a result, the DOJ and the SEC have applied an expansive interpretation of the FCPA's jurisdiction over non-US companies to prosecute such companies and to impose significant fines and oversight.

  - The DOJ and SEC have frequently used more creative methods in the resolution of criminal cases, such as non-prosecution or deferred prosecution agreements, apparently to provide a reward to companies that voluntarily self-report potential FCPA violations and cooperate in investigations and, of course, to provide incentives for other companies to do likewise.

  - The DOJ and SEC appoint post-proceeding "monitors" of compliance conduct as part of the resolution of a proceeding in some cases and in others impose "self-monitoring" obligations on the companies accompanied by periodic reporting requirements.

- In recent years, more aggressive investigative techniques, such as wiretaps, use of informants, search warrants, undercover "sting" operations and cash rewards for "whistleblowers," have come into use.

COMPLIANCE PROGRAMS

- The US authorities have long fostered and supported a culture of "soft enforcement" whereby companies adopt rigorous internal compliance programs to detect and deter violations of law by their employees, partners and agents. Companies that do so are often rewarded by being permitted to conduct their own internal investigations rather than be subjected to an intrusive and disruptive public investigation and by more lenient punishment and penalties. Over time, non-US companies subject to enforcement in the United States for violations of US law, including the US securities, anti-trust, anti-corruption (*e.g.*, FCPA), anti-money laundering and other laws, have begun to adopt similar compliance structures.

- Partly as a result of increased cooperation among enforcement agencies of various nations, there is a developing consensus about the policies and procedures a company must adopt to prevent and detect violations of law by its employees, partners and agents. The elements of an effective compliance program were first set out in FCPA settlement agreements and in the US federal sentencing guidelines for organizations promulgated by the US Sentencing Commission (the "Commission"). These principles were largely adopted by the OECD in its 2010 Good Practice Guidance on Internal Controls, Ethics, and Compliance. Most recently, the UK Bribery Act's offense for failing to prevent corruption provides for an affirmative defense to companies that have "adequate procedures" designed to prevent bribery, and the official guidance, issued in March 2011, reflects many of the same principles as the OECD and US models. Establishing an effective compliance and ethics program is therefore essential for a company seeking to avoid or mitigate punishment (including fines and terms of probation) for a violation.

- In summary, companies must promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law. The consensus requires boards of directors and executives to assume responsibility for the oversight and management of compliance and ethics programs. Effective oversight and management presumes active leadership in defining the content and operation of the program. At a minimum, the consensus requires companies to identify areas of risk where violations may occur; train employees on relevant legal standards and obligations; and give their compliance and ethics officers sufficient authority and resources to carry out their responsibilities (*e.g.*, designate a compliance officer with sufficient authority and resources).

☞ A company should have an effective program to prevent and detect violations of law. For such a program to be considered effective, there are several key elements. The following elements have become a benchmark against which compliance programs are measured:

  - Strong explicit and visible support and commitment for ethics, compliance and internal controls from the highest levels of the company.

  - A clearly articulated and visible policy, applicable regardless of local customs or practices.

  - Individual accountability for compliance at all levels of the organization including directors, officers, employees, vendors and business partners.

- ➢ Clear policies on:
  - gifts;
  - hospitality and entertainment;
  - travel;
  - political contributions and lobbying;
  - charitable donations and sponsorships;
  - facilitation payments; and
  - solicitations and extortion.
- ➢ Risk-based procedures for vetting, due diligence (including periodic updating) and oversight of vendors and business partners.
- ➢ A system of internal controls and procedures to ensure fair and accurate books, records and accounts.
- ➢ Risk-based compliance monitoring to evaluate, in light of evolving standards, the program's effectiveness in preventing and detecting violations of policy and law.
- ➢ Guidance and training, both periodically and on demand, in local languages on a risk-based scale to all employees, vendors and business partners.
- ➢ A helpline and other channels for reporting compliance concerns outside of regular management channels.
- ➢ Appropriate and consistent incentives and disciplinary processes that investigate and address violations of policy and law.
- ➢ Periodic assessment and evaluation of the compliance program in light of previous events and new developments.

- Implemented correctly, the Sarbanes-Oxley Act certification procedures discussed under "Chapter 3: Disclosure" can serve as one part of such an assessment procedure. It is important to note that most violations of anti-corruption laws occur when immaterial amounts are paid to an official, so an assessment of any compliance program must look for transactions below the usual definition of "material."

- We suggest that your existing compliance procedures become part of a larger effort to meet the definition of an "effective" compliance program. Many of the key elements already may have been adopted by the Company so the effort to meet the requirements of an "effective" program need not be costly. Meeting these standards will provide the directors with the broadest protection from personal liability and may also affect an underwriter's terms for director and officer insurance coverage.

## Self-Audit Checklist

☞ The following is a self-audit checklist for the Company to use as a starting point to determine whether it has an effective compliance program:

- Comprehensive risk assessment in the last two years.
- A clear and concise policy.
- Visible senior sponsorship of ethics, compliance and controls.
- Policy and procedures in local business language.
- Chief compliance officer within three levels of, and with direct access to, the Board of Directors.
- Compliance officer known by name to top regulators.
- Key employees, vendors and partners vetted in writing for compliance conduct.
- Compliance training materials, policies and procedures in several media and in local languages.
- Compliance training in several levels of intensity based upon risk exposure.
- Compliance training and understanding tested and documented.
- An actively used compliance hot line.
- Risk-based compliance monitoring.
- Centralized monitoring of complaints and subpoenas.
- Internal audit work program developed with compliance function.
- Crisis team identified by name.
- Crisis plan in writing.
- Documented compliance lessons learned.
- Compliance program modified from lessons learned.

# Chapter 6: Offers and Purchases of Securities

US securities laws, particularly the registration provisions of the Securities Act and regulations covering exemption from registration, will apply to future offerings and other distributions of the Company's securities, as well as to purchases by the Company of its own securities.

## SEC REGISTERED OFFERINGS

### General

- The Company may offer any type of security in an SEC registered offering, be it equity, debt or a security convertible or exchangeable into another security, such as warrants, rights or convertible bonds. Any public offer and sale or issuance by the Company of securities into the United States will require SEC registration unless an exemption from registration is available. The Company also may choose to conduct an SEC registered offering, because in some circumstances such an offering may result in a better price for the offered security, or because SEC registered securities are freely tradable in the United States immediately after the offering.

- The registration statement that must be filed with the SEC to conduct a public offering contains the prospectus pursuant to which the securities are offered, plus certain additional information including exhibits. As a non-US company, there are several SEC registration forms the Company may use, depending on the Company's size and SEC reporting history and the type of offering being conducted.

  - In the case of a debt offering, the registration statement would require inclusion of a description of the debt securities to be offered and an indenture entered into by the issuer and the indenture trustee.

### Form F-1

- Form F-1 is a "long-form" registration statement to be used for the registration of non-US companies' securities when no other form, such as Form F-3, is authorized or prescribed. Much of the disclosure concerning the Company that is required by Form F-1 is derived by reference to Form 20-F.

### Form F-3

- Form F-3 is a "short-form" registration statement that allows an issuer to provide substantially less information than would be required by Form F-1, on the basis that Form F-3 allows information to be incorporated by reference to an issuer's Form 20-F and certain designated Forms 6-K.

- The Company will be eligible to register its securities on a Form F-3 if the following conditions are met:

  - the Company has a class of securities registered, or has reporting requirements, under the Exchange Act and has filed at least one annual report on Form 20-F with the SEC;

  - the Company has timely filed with the SEC all reports required to be filed under the Exchange Act during the 12 calendar months immediately preceding the filing of the Form F-3; and

- one of the following:
  - for an offering of any securities, the Company's worldwide public float, which means the aggregate market value worldwide of the Company's voting and non-voting common equity held by non-affiliates, is at least $75 million;
  - for an offering of any securities, the aggregate market value of securities sold by the Company pursuant to a Form F-3 during any 12 calendar months does not exceed one-third of the Company's worldwide public float, the Company's common equity is listed on a US national securities exchange (such as the NYSE or NASDAQ) and the Company is not a "shell company" within the SEC's definition of the term; or
  - for an offering of non-convertible debt securities,
    - the Company has issued in SEC registered offerings, within 60 days prior to the filing of the registration statement, at least $1 billion in non-convertible debt securities, over the prior three years;
    - the Company has outstanding, within 60 days prior to the filing of the registration statement, at least $750 million of non-convertible debt securities, issued in SEC registered offerings;
    - the Company is a wholly-owned subsidiary of a well-known seasoned issuer; or
    - the Company is a majority-owned operating partnership of a real estate investment trust that qualifies as a well-known seasoned issuer.
  - These additional eligibility criteria do not apply in the case of rights, dividend reinvestment plans, conversions or warrants, or in the case of a secondary offering.

## Shelf Registration

- Form F-3 also allows an issuer to utilize the so-called "shelf" registration procedures. The shelf procedures allow an issuer initially to register a specified aggregate dollar amount of securities for sale subsequently from time to time or continuously when market conditions warrant, without any need for additional SEC approval once the SEC has rendered the initial registration statement effective. The aggregate dollar amount may be unallocated among debt, equity or other securities, leaving the issuer with flexibility to determine the type of securities it wishes to offer at a subsequent time. Subsequent offerings off of an initial registration statement are known as "shelf takedowns."

- Issuers that are "well-known seasoned issuers," or WKSIs, may file an automatically effective shelf registration statement that requires no SEC review and on which the WKSI may register an indeterminate number of securities to be sold subsequently from time to time.
  - In the case of a non-US company, a WKSI is an SEC reporting issuer, eligible to use Form F-3, that has a worldwide public float of at least $700 million, or that has issued at least $1 billion in non-convertible securities for cash in the last three years.
  - US Counsel should be consulted regarding the procedures and advantages of shelf registration for issuers, particularly those that are WKSIs.

## Incorporation by Reference into Forms F-3 and Shelf Registration Statements

- As previously mentioned, Form F-3, including a shelf Form F-3, allows information concerning an issuer to be incorporated by reference to the issuer's Forms 20-F and 6-K. An issuer must incorporate its Form 20-F into a registration statement during the pendency of an offering, or in order to keep a shelf current for purposes of a takedown at any time. By contrast, the issuer is required to incorporate only those Forms 6-K that contain information required for Securities Act registration purposes. This is done by specifically designating incorporation on the cover of a Form 6-K. Typical Forms 6-K incorporated are those containing interim financial statements and press releases of material developments.

- The risk of disclosure liability is greater with incorporated Forms 6-K, as they are deemed to be part of the offering prospectus.

## Offerings to Employees

- Offerings of the Company's securities to employees may be registered on a special short-form registration statement, known as Form S-8.

# OFFERINGS EXEMPT FROM SEC REGISTRATION

## Rule 144A Offerings

- Under Rule 144A, issuers may sell certain eligible securities through initial purchasers to large institutional investors without registration under the Securities Act. Under Rule 144A, the securities must be sold to Qualified Institutional Buyers ("QIBs"), as defined in Rule 144A.

  - Generally, a QIB is an institution that holds over $100 million in marketable securities.

  - Securities sold in Rule 144A transactions are freely tradeable among QIBs, but generally may not be sold to other investors in the United States. These securities are "restricted securities" under Rule 144, as discussed below, and therefore may also be sold in the United States in accordance with the provisions of Rule 144. Resales may also be freely made outside the United States on the home country securities exchange provided that the exchange is on an SEC list of designated offshore securities markets.

  - To qualify for a Rule 144A offering, the securities must not, when issued, be either of the same class as securities listed on a US national securities exchange (such as the NYSE or NASDAQ) or be convertible into or exchangeable for such securities at an initial effective conversion premium of less than 10%. Accordingly, the Company may not use Rule 144A for an offering of newly issued ADSs or the underlying ordinary shares but could be eligible to use Rule 144A for an offering of securities of a different class, such as preferred shares or debt securities.

## Offerings outside the United States under Regulation S

- Regulation S under the Securities Act governs offers and sales of securities outside the United States. As a general rule, offers and sales made outside the United States do not trigger the registration requirements under the Securities Act, provided they comply with the conditions of the Regulation S safe harbor.

- These conditions require that the offer and sale be made in an "offshore transaction" and that no "directed selling efforts" be made in the United States.
  - Qualifying as an offshore transaction requires that the offer not be made to a person located in the United States and that, when a buy order is originated, the buyer is, or the seller reasonably believes that the buyer is, outside the United States. In addition, the ability to resell the securities so offered into the United States may be restricted for a period of time depending on the type of securities offered.
  - Directed selling efforts include activities, such as promotional seminars or advertisements in the United States, that are undertaken or reasonably could be expected to result in the conditioning of the US market for securities that are purported to be offered under Regulation S.
  - US Counsel should be consulted to determine which Regulation S conditions apply to a particular offer outside the United States.

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

- The private placement exemption under Section 4(a)(2) of the Securities Act allows issuers to avoid the requirements of registration in situations in which the benefits of registration are too remote. In general, Section 4(a)(2) permits an issuer to offer its securities in a private placement that complies with the following requirements:
  - *Sophisticated offerees.* The offerees must be sophisticated in financial matters and have the financial capability to bear the economic risk of the investment. Generally, private offerings should be made only to large institutional investors, although high net worth individuals may be included in certain circumstances. A minimum purchase amount is generally imposed.
  - *Limited number of offerees.* Generally, there should be no more offerees than needed to sell the amount of securities being placed.
  - *No general solicitation or advertising.* It is, however, permissible for the Company, or a firm acting on its behalf, to contact individuals known to meet the sophistication and financial capability requirements to participate in the private placement. In addition, pursuant to a rule adopted by the SEC as required by the JOBS Act, general solicitations are permitted in Rule 506(c) offerings, a new category of private placement in which all purchasers must be "accredited investors" and the issuer takes reasonable steps to verify that each purchaser is an accredited investor.
  - *Offerees must have access to information.* Offerees should have an opportunity to speak to management of the Company, even if they do not take up this opportunity. The type of disclosure that is prepared will depend largely on marketing considerations, the familiarity of investors with the Company and the sophistication of the investors.
  - *Resale restrictions.* Purchasers must agree not to resell the securities in the United States, with certain limited exceptions. However, purchasers can resell immediately over their home-country exchange if it is on an approved SEC list. Often the securities will have a legend relating to the resale restrictions.

- *Investor letters.* Typically, investors will sign letters agreeing to the resale restrictions and giving certain acknowledgements and representations regarding the other factors set forth above.

## Convertible and Related Issues

- An offering of convertible or exchangeable securities in a private placement or pursuant to Regulation S raises a number of complex issues under the US securities laws. In general, these issues relate to whether a registration statement (registering the underlying security) is required upon the conversion of the offered security and the period of time during which such a registration statement must remain effective.

## RIGHTS OFFERINGS

- The offering of shares purchased upon the exercise of rights must be registered just as other securities offerings in the United States. Again, because of the registration obligations under the US securities laws, many issuers elect to pay cash to US holders representing the value of their rights in lieu of granting them rights. The SEC has adopted rules that seek to encourage the inclusion of US security holders in rights offerings undertaken by non-US companies. Equity securities to be issued in rights offerings will be exempt from registration under the Securities Act if:

  - the company engaging in the rights offering is a non-US company and US residents hold 10% or less of the underlying securities;

  - the company provides to US security holders and furnishes to (rather than files with) the SEC an English translation of any informational materials sent by it to non-US security holders;

  - the company appoints an agent for service of process in the United States by filing a Form F-X with the SEC;

  - US security holders are generally permitted to participate in the transaction on terms at least as favorable as those offered to non-US security holders; and

  - the securities being offered are equity securities of the same class as those held by the offerees, and the terms of the rights prohibit transfer of the rights by US security holders except offshore in accordance with Regulation S.

## SALES OF “RESTRICTED SECURITIES” AND BY AFFILIATES

- Sales of the Company’s securities in the United States by affiliates of the Company or by certain other security holders that are made without complying with the restrictions imposed by Rule 144 under the Securities Act may be deemed to be an unlawful unregistered public offering in the United States.

- Rule 144 of the Securities Act defines “restricted securities” as “securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering.” Restricted securities may not be sold in the public markets in the United States except pursuant to an effective registration statement unless the requirements of Rule 144 are met. Securities of a non-US company acquired outside the United States under Regulation S would not be restricted.

- Rule 144 also governs sales by affiliates in the US public markets in the absence of SEC registration. Generally, "an affiliate" is any person who exerts a controlling influence over, is controlled by or is under common control with, the Company. As a general matter, a 10% shareholder may be considered an affiliate, especially if such person is represented on the Company's board of directors.
  - In the case of an entity that ceases to be an affiliate, Rule 144's affiliate restrictions continue to apply until three months after this change in status.
- The following table shows the specific restrictions imposed by Rule 144 upon affiliates for the sale of all securities, and on non-affiliates for the sale of restricted securities, in the case of an SEC reporting company such as the Company. Rule 144's restrictions are different (and greater) for companies that are not SEC reporting companies.

| Restricted Securities | | Unrestricted Securities |
|---|---|---|
| Non-Affiliate | Affiliate | Affiliate |
| First 6 Months –<br>No resales | First 6 Months –<br>No resales | Any Time –<br>Limited resales subject to:<br>(1) current public info<br>(2) volume limitation<br>(greater volume for debt)<br>(3) manner of sale<br>(inapplicable for debt)<br>(4) filing Form 144 |
| 6 Months to Year 1 –<br>Unlimited resales subject to current public info | After First 6 Months –<br>Limited resales subject to:<br>(1) current public info<br>(2) volume limitation<br>(greater volume for debt)<br>(3) manner of sale<br>(inapplicable for debt)<br>(4) filing Form 144 | |
| After Year 1 –<br>Unlimited resales | | |

- *Current Public Information.* The Company must have made available adequate current public information with respect to itself, which means, essentially, that the Company must be current in meeting its reporting obligations under the US securities laws.
- *Volume Limitation.* The amount of securities sold by an affiliate within any given three-month period may not exceed:
  - For equity securities: 1% of the shares outstanding worldwide or the average weekly trading volume in a US market during the prior four-week period.
  - For debt securities: 10% of a given tranche of debt securities (or 10% of the class in the case of non-participating preferred stock).
- *Manner of Sale.* Equity securities must be sold in ordinary brokerage transactions, to a market maker or in riskless principal transactions, subject to certain requirements.

- *Form 144*. Affiliates who sell their securities under Rule 144 must notify the SEC of such sales by filing a Form 144 concurrently with the placement or order to execute the sale, unless the amount of securities sold under Rule 144 is under a specified minimum threshold.

## ACQUISITIONS INVOLVING ANOTHER PUBLIC COMPANY WITH US SECURITY HOLDERS

- If the Company intends to bid for the securities of another public company with US security holders, US tender offer rules and securities and other laws may come into play, depending on the facts and circumstances. It is very important to analyze carefully any such transaction in advance with US counsel.
  - There is no hard-and-fast rule for when such an acquisition may be deemed a tender offer; rather, the total facts and circumstances surrounding the acquisition must be analyzed against a set of factors applied by US courts.
- A company deemed to have made a tender offer would have to comply with potentially cumbersome requirements in connection with the acquisition, which include, among other things, procedural, disclosure and filing obligations and the obligation to make the acquisition offer open to all of the company's shareholders at an identical price.
- Factors affecting the analysis include:
  - Is the target registered with the SEC and listed in the United States?
  - What percentage of the target's shares are held by US holders directly or through ADSs? There are particular rules relating to how this calculation is made, including looking through home country and US nominees and excluding from the calculation target securities held by the bidder.
  - Is it important to include US holders in the offer to meet the minimum share condition or for other reasons?
    - If US holders are to be excluded, care must be taken, and US counsel consulted, to ensure US rules regarding exclusionary offers are followed.
  - Is the bid cash only or does it include an exchange offer for securities?
- Depending on these factors, the bidder may deal with US holders differently. For instance, US rules and the nature of the bid may lead to one or more of the following results:
  - US holders being included in a cash bid or exchange offer in reliance on exemptions from US tender offer and registration requirements if persons in the United States hold 10% or less of the securities subject to the offer.
  - US holders being included in the bid with most or all of US tender offer rules being applicable.
  - Securities being offered on a registered basis.

# SHARE REPURCHASES BY THE COMPANY

## Repurchases Exclusively on a Non-US Exchange

- The Company's repurchases of its shares on a non-US exchange, even though occurring outside the United States, can, under certain circumstances, implicate US tender offer rules.
  - There is no hard-and-fast rule for when a repurchase may be deemed a tender offer; rather, the total facts and circumstances surrounding the repurchase must be analyzed against a set of factors applied by US courts.
- A company deemed to have made a tender offer would have to comply with potentially cumbersome requirements in connection with the repurchase, which include, among other things, procedural, disclosure and filing obligations and the obligation to make the repurchase offer open to all of the company's shareholders at an identical price.
- Provided the tender offer rules are not implicated and as long as the Company does not have material non-public information when making the repurchase, the Company's share repurchases on a non-US exchange (such as its home exchange) should not give rise to adverse consequences under US securities laws.

## Repurchases on NASDAQ

- The Company's repurchases of its shares on NASDAQ can, under certain circumstances, violate SEC rules designed to prevent market manipulation, in addition to potentially triggering US tender offer requirements. SEC's market manipulation rules are intended to minimize corporate abuses such as a company repurchasing shares for the purpose of attempting to raise the market price for its traded shares, dominating the market volume for such shares, or creating the appearance of widespread interest in the shares through the use of several brokers.
- SEC Rule 10b-18 is a safe harbor intended to protect companies from being deemed to violate market manipulation rules when engaged in certain share repurchases in the United States. Notably, the share repurchases allowed under Rule 10b-18 are very specific, and impose rather strict limitations on the manner, timing, price and volume of a company's share repurchases.

## Counsel Advice Essential on Repurchase Programs

- For these reasons, it is essential that the Company seek the advice of US counsel when establishing a share repurchase program, whether conducted in the United States or on an offshore exchange and whether in the open market or in a negotiated transaction.

## Material Non-Public Information

- Whether the Company plans to repurchase its shares on a US or non-US exchange, and regardless of the Company's ability to protect itself against application of the tender offer and market manipulation rules, the Company must not, under any circumstance, repurchase its shares while in possession of material non-public information. Otherwise, it will violate SEC Rule 10b-5, which is described in detail above in "Liability for

Inadequate or Misleading Disclosure – Exchange Act.” Violation of Rule 10b-5 could also expose the Company to significant shareholder suits. There is no safe harbor from violations of this rule.

### Disclosure Requirement

- The Company must disclose its ordinary share repurchases in its Form 20-F if its shares are registered with the SEC (see “Chapter 3: Disclosure – Share Repurchases by the Company”).

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# Chapter 7: Obligations Imposed on Third Parties

# BENEFICIAL OWNERSHIP REPORTS

## General Reporting Requirement

- Any person (including any natural person, company, government or political subdivision thereof) or any "Group" of persons within the meaning of the Exchange Act that, at the time an issuer registers under the Exchange Act, is, or that thereafter becomes, the beneficial owner of more than 5% of a class of equity securities that is registered under the Exchange Act, becomes subject to an obligation to file reports of beneficial ownership with the SEC on the prescribed form and to send copies to the issuer and NASDAQ. Generally, these reports are filed on a Schedule 13D. However, a shorter version of this form, Schedule 13G, may be filed in lieu of a Schedule 13D under the circumstances described below. The Company, as an issuer, is exempt from the requirement to file beneficial ownership reports as to the acquisition of its own equity securities.

  - *Beneficial Owner*. "Beneficial owner" is a technical term defined in Rule 13d-3 under the Exchange Act. This term encompasses not only securities that are owned of record, directly or indirectly, but also any securities with respect to which the person has the power to either direct the investment or disposition of, or exercise the power to vote, such securities.

## Schedule 13D

- Schedule 13D requires substantial information as to the identity and background of the acquirer, the purpose and funding of the acquisition and the acquirer's plans, agreements and understandings regarding securities of the issuer.

### *Timing*

- A Schedule 13D must be filed within 10 days after an acquisition of securities that brings the acquirer above the 5% level and must be amended promptly after any material change in the facts disclosed in the filing. The acquisition or disposition of 1% or more of the class of securities beneficially owned is deemed material, but sales or purchases of less than 1% may, under certain circumstances, be material as well.

## Schedule 13G

- Schedule 13G is a substantially shorter disclosure document than Schedule 13D, requiring disclosure only as to the number of shares owned and the nature of the relationship between the owner and the issuer.

- A Schedule 13G is available for filing or is required to be filed by three categories of shareholders:

  - "*Qualified Institutional Investors*": shareholders that would otherwise be required to file a Schedule 13D with respect to an issuer **may file** a Schedule 13G instead if (i) the securities of such issuer were acquired in the ordinary course of the shareholder's business and without the purpose or effect of changing or influencing control of such issuer, and (ii) the shareholder is among a specified class of US institutional investors or, subject to certain conditions, a non-US institutional investor that is the functional equivalent of one of the specified US institutions.

  - "*Exempt Investors*": shareholders that own more than 5% of a class of equity securities of an issuer at the time such securities become registered under the Exchange Act **shall file** a Schedule 13G. It is important to note, however, that if shareholders in this second category acquire additional shares of such issuer's securities, the shareholders may be required to report such acquisition on Schedule 13D, and Schedule 13G would no longer be available.

- Although the rules and regulations on beneficial ownership are somewhat ambiguous in this respect, the SEC staff takes the position that if such shareholder acquires additional shares that, together with all other acquisitions by such shareholder during the preceding 12 months from the issuer or from an affiliate of the issuer, exceeds 2% of that class, such shareholder would be required to report such acquisitions on Schedule 13D.

➢ *"Passive Investors"*: a shareholder otherwise required to file a Schedule 13D may file a Schedule 13G instead if (i) such shareholder can certify that securities of an issuer were not acquired or held for the purpose of and do not have the effect of changing or influencing control of such issuer; (ii) the shareholder is not reporting as an institutional investor; and (iii) the shareholder is not directly or indirectly the beneficial owner of 20% or more of the class of securities of such issuer.

### *Timing*

- Qualified Institutional Investors and Exempt Investors must generally file a Schedule 13G within 45 days of the end of the calendar year, and Passive Investors must file a Schedule 13G within 10 days after the acquisition of the securities of an issuer giving rise to such reporting obligation. All three categories of shareholders must file amendments to such schedule within 45 days of the end of each subsequent calendar year, provided there are changes in the previously reported information. In addition, Qualified Institutional Investors and Exempt Investors must file an amendment to Schedule 13G within 10 days after the end of the first month in which the shareholder's beneficial ownership exceeds 10% of a class of securities of such issuer, and Passive Shareholders must file an amendment "promptly" upon acquiring more than 10% of the class of securities of such issuer.

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# Chapter 8: Responsibilities of Persons with Access to Inside Information

## LEGAL OVERVIEW

- We understand that the Company already possesses a system of internal policies to be followed by all personnel in their use and protection of sensitive corporate information. To supplement these policies, set out below are two guidelines designed to assist in compliance with US securities laws in this area. Although these two guidelines may be regarded as almost self-evident, it is important that all relevant persons be aware of the potential liabilities under US law that would follow from any violation.

- The first fundamental guideline is that no individual, regardless of his or her position within the Company, should purchase or sell any shares or ADSs of the Company while in possession of material information that is not yet publicly disseminated. For this purpose, information that has been released to the public, but not yet absorbed by the financial community, should be regarded as non-public and an improper basis for securities trading. Similarly, where there is material information that is not yet ripe for public disclosure, as in the early stages of a significant acquisition, no insider with access to the information should trade in the Company's ordinary shares or ADSs without first obtaining approval through appropriate channels and, if appropriate, after legal counsel has been consulted. Likewise, if an employee obtains inside information from another public corporation, he or she should not trade in the securities of that other corporation.

- The second fundamental guideline is that each individual who has access to material information should exercise the utmost caution to keep that information confidential within the Company. If anyone becomes aware of a leak of material information, whether inadvertent or otherwise, he or she should report the leak immediately to the person or persons at the Company charged with responsibility for public disclosures. Any insider who "leaks" inside information to a "tippee" may be liable (along with the tippee) to third parties for the profit of the tippee.

- Although these guidelines are expressed in general terms, we must stress that the rules of US law with which they seek to ensure compliance are very wide-ranging and strict. Moreover, although the primary responsibility for compliance lies with the individuals concerned, the Company as a corporate entity may be subjected to adverse consequences under US law as a result of any violation. Quite apart from any legal liability that may ensue, any appearance of impropriety could severely damage investor confidence in the Company. In a similar fashion, violation of the corporate obligations discussed elsewhere in this memorandum could impose liability on individual members of management as the persons responsible for causing or permitting corporate misconduct.

## COMPLIANCE PROCEDURES

- The following discussion describes in more detail the procedures often used by issuers to help ensure compliance with the prohibition against securities trading on the basis of inside information. The first section discusses the types of individuals who should be subject to such procedures. The second section describes common compliance procedures.

### Individuals Subject to Compliance Procedures

- An issuer usually requires that directors, executive officers and other employees with access to monthly financial results and their immediate family members (collectively, "Insiders") be subject to procedures regulating all purchases, sales and other transactions (exercises of employee stock options, gifts, transfers to trusts, etc.) in the issuer's securities (each a "Transaction"). Some issuers do not include the exercise of stock options as a transaction subject to compliance procedures, but do include subsequent sales of such securities. Since employees who are not Insiders also have the potential, incidentally or in the course of their work, to gain access to confidential corporate information, they should be made familiar with the applicable legal principles relating to insider trading.

## Compliance Procedures

- Compliance procedures regulating Transactions often consist of a pre-clearance/approval procedure, together with (i) a period of time during which an approval may be given (a "window period") and/or (ii) a period of time during which an approval will not be considered (a "black-out period").

### *Pre-clearance Procedure*

- An issuer may require that all Transactions be pre-cleared through a particular committee or management office. An issuer may require that a written request for approval be submitted by an Insider prior to initiating a Transaction, with approval, if granted, remaining valid for 24 to 48 hours. This procedure helps an issuer prevent trading at times when there are material undisclosed developments, knowledge of which could be imputed to Insiders.

- In conjunction with a pre-clearance procedure, an issuer may consider approvals only during "window-periods" and/or establish "black-out periods" during which approvals would not be considered.

### *"Window Periods"*

- The most conservative issuers usually implement "window periods" during which approvals would be considered. Typically, trading would be appropriate under the following circumstances:

  - during a time period following release of quarterly or annual results beginning at least 24 hours after general publication of the public release in an approved manner, such as a general press release, and usually ending 14 to 20 business days later, assuming that there are no material developments that are pending but not yet disclosed to the marketplace during such period; and

  - at least 48 hours following wide dissemination of information on the status of the issuer and current results—for example, after the distribution of a proxy statement or prospectus that gives such information in connection with a significant transaction (such as an acquisition) or new financing.

- Such an issuer would inform Insiders of the "window periods" at the beginning of each year.

- An issuer should consider such a conservative approach if the nature of the markets for securities in its industry is volatile or if the nature of its industry is highly litigious.

### *“Black-out Periods”*

- An issuer may, in lieu of, or in addition to, establishing “window periods,” impose “black-out periods” during which approvals will not be considered. Typically, “black-out periods” apply:
  - for a period of time before and after release of quarterly or annual results (*i.e.*, two weeks before (or longer depending on the process for preparing and approving such results) and up to and including two days after such release); and
  - for a short period of time before anticipated dissemination of information on the status of the issuer and current results.
- An issuer may also extend such “black-out” periods to other employees who are not Insiders. Such employees would not be subject to the pre-clearance procedure but would be restricted in their ability to transact in the issuer’s securities during such periods.

### *Trading through Designated Third Parties*

- *10b5-1 Programs*. The SEC has created a safe harbor for sales of an issuer’s securities by Insiders under carefully regulated circumstances. Under a 10b5-1 program, the Insider designates a broker-dealer as his or her agent and grants discretion to such agent to make trades without consultation. Trading under such programs is expected to be made in accordance with pre-arranged guidelines and not subject to discretion based upon developments in the Company’s business and the industries in which it competes.
- 10b5-1 programs require careful design and implementation. Please contact US counsel before proceeding with such a program.

## REGULATION BTR

- Under Sarbanes-Oxley, the concept of a black-out period has been extended to apply to pension plans, during which directors and officers are forbidden from trading in the issuer’s equity securities in certain limited circumstances (“Regulation BTR”).
- As a non-US company, Regulation BTR only applies to the Company if the number of US participants in its pension plan either (i) represents more than 15% of its worldwide workforce (including its consolidated subsidiaries) or (ii) exceeds 50,000. If the Company has either of these levels of US pension plan participation, please contact US counsel so that they can give detailed advice regarding compliance with Regulation BTR.

## SUMMARY FILING GUIDE

| Report | Form | When | Where |
|---|---|---|---|
| Annual report on Form 20-F | Form 20-F | Four months after the end of the fiscal year | SEC* and made available to shareholders via website or hard copy |
| Annual report to shareholders, if separate from Form 20-F | N/A | | Paper filing with SEC and NASDAQ; Depositary for distribution to ADS holders |
| Interim balance sheet and income statement | Form 6-K | Within 6 months after the end of the second quarter | SEC* |
| Report of material events and other public disclosures | Form 6-K | Same day as publication if material, or monthly if not material | SEC* and in certain circumstances NASDAQ's MarketWatch department |
| Notice to shareholders and other shareholder communications | N/A | In accordance with home country law and Company charter documents | Depositary for distribution to ADS holders |
| Change in number of shares outstanding | NASDAQ Form | No later than 10 days after the effectiveness of the change in the number of shares | NASDAQ† |
| Cash dividends and other cash distributions | NASDAQ Form | No later than 10 days before the record date | NASDAQ† |

* Not necessary to file additionally with NASDAQ because the documents will be filed electronically through the EDGAR system.

† In the event the Company is furnishing a press announcement of any of these changes to the SEC on a Form 6-K, the Company should consult with NASDAQ as to whether a separate NASDAQ notice is required.

## IMPLEMENTATION OF DISCLOSURE CONTROLS AND PROCEDURES: PRACTICAL CONSIDERATIONS

### ➢ Review Existing Procedures

- The Company should conduct an internal review and evaluate its existing procedures for gathering, analyzing and disclosing all information that is required to be disclosed pursuant to its home country rules and in its SEC Exchange Act reports.
- In analyzing existing disclosure procedures, it is important to look beyond internal controls and procedures for reporting financial information. However, the Company should look to the principles and systems of its internal financial controls as a basis for its broader disclosure controls and procedures.
- The review should cover items such as the following in order to assess what changes, if any, need to be made to ensure adequate disclosure controls and procedures are in place, which may range from simply formalizing processes that already exist to augmenting or revising certain of them.
  - Preparation of internal management reports: frequency; process; content; personnel involved; recipients; review.
  - Preparation of quarterly/semi-annual financial reports: process; personnel involved; review by senior management (CEO/CFO); verification; sign-off procedures.
  - Preparation of annual report: process; personnel involved; review by senior management (CEO/CFO); verification; sign-off procedures.
  - Any other formal or informal processes that ensure operational/line information is collected and sent on a frequent and regular basis to designated personnel for assessment of disclosure issues; are responsible senior managers identified at the business unit level?
  - Is there a disclosure committee/team? If not, are responsible finance, legal, risk management, investor relations personnel identified to assess information for materiality and timely disclosure? What is the coordination among these groups and what is the decision-making process?
  - Meetings of the executive or similar committee or the full board relating to disclosure reports: frequency; type of information prepared and reviewed; personnel involved.
  - Meetings of the CEO/CFO with the audit committee, internal/external auditors, senior managers, legal, risk management, investor relations: frequency; forum; agenda.

### ➢ Formalize a Disclosure Committee/Team

## REQUIREMENT FOR A DISCLOSURE COMMITTEE/TEAM

- The SEC has stated that it does not require any particular disclosure controls and procedures and that it expects each company to develop a process that is consistent with its business and internal management and supervisory practices.
- The SEC has recommended that each issuer “create a committee with responsibility for considering the materiality of information and determining disclosure obligations on a timely basis. As is implicit in section 302(a)(4) of the Sarbanes-Oxley Act, such a committee would report to senior management, including the principal executive and financial officers, who bear express responsibility for designing, establishing, maintaining, reviewing and evaluating the issuer’s disclosure controls and procedures.”

- The Company should formalize into an identifiable disclosure committee/team those designated personnel responsible for various disclosure functions to a variety of external constituencies—regulatory bodies, shareholders, investors, media, analysts, rating agencies, etc.

## Composition of a Disclosure Committee/Team

- Industry, size and culture will determine the most appropriate structure of such a committee/team.
- The CEO/CFO should select or approve the members of the disclosure committee/team and communicate its existence, purpose and importance throughout the organization.
- The key constituencies in the Company involved in disclosure decision-making should be represented at a senior level on the disclosure committee/team in order to efficiently coordinate the external reporting and communication of information. The SEC has suggested that companies consider the following persons for such a committee:
  - the principal accounting officer or controller;
  - the general counsel or other senior legal official with responsibility for disclosure matters who reports to the general counsel;
  - the principal risk management officer;
  - the chief investor relations officer (and anyone responsible for preparing third-party presentations or talking to third parties such as rating agencies and analysts); and
  - other such persons (including individuals associated with business units) as the Company deems appropriate.

## RESPONSIBILITIES OF A DISCLOSURE COMMITTEE/TEAM

- The disclosure committee/team would be responsible for considering the materiality of information and determining disclosure obligations on a timely basis. It would coordinate and review the disclosure of all such information to external parties—regulatory bodies, shareholders, investors, media, analysts, rating agencies, etc.
- The disclosure committee/team would be responsible for establishing the standing procedures for the Company's disclosure controls and procedures, as well as the detailed procedures for preparing specific disclosure reports as discussed below.
- The disclosure committee/team would be responsible for the ongoing monitoring of the effectiveness of the disclosure controls and procedures and for designing and implementing the annual and periodic evaluation of their effectiveness.
- The disclosure committee/team would report to senior management, including the CEO and CFO, who bear express responsibility for designing, establishing, maintaining, reviewing and evaluating the Company's disclosure controls and procedures.
- The disclosure committee/team should consider regular training sessions in SEC reporting requirements, including GAAP requirements, and best practices and communicate these requirements to those responsible for preparing draft disclosure.
- The Company should consider whether it should designate a "super" disclosure officer or disclosure monitor, who will sit on the disclosure committee/team and be ultimately responsible for integrating all

of the information that is being generated by the process. Many companies already have a person who is primarily responsible for periodic reporting, either in the general counsel's office or reporting to the controller.

- Review Role of the CEO and CFO

  - The CEO and CFO must certify in each Form 20-F that they are responsible for establishing and maintaining disclosure controls and procedures to ensure that material information is made known to them and that they have evaluated the effectiveness of the disclosure controls and procedures within 90 days prior to the filing date of the Form 20-F and presented their conclusions of such effectiveness in the Form 20-F.
  - The CEO and CFO are responsible for establishing the disclosure culture/tone for the Company. They should communicate the critical nature of the disclosure process to all staff and validate the importance of the disclosure committee/team within the Company.
  - The SEC guidance emphasizes the importance of the CEO and CFO being actively and critically involved in the disclosure and reporting process. In particular, they should be involved in the substantive review of information and the reports and in decisions regarding disclosure, as well as the periodic review of the disclosure procedures themselves.
  - The CEO and CFO should be proactive and not passive recipients of information provided by the various participants in the disclosure process. In particular, they should meet with the following key constituencies on a pre-set schedule and with sufficient time to adequately review the information, issues involved, disclosures to be made and the procedures followed:
    - senior managers;
    - disclosure committee/team;
    - external auditors; and
    - audit committee or the functional equivalent.

- Review Role of the Audit Committee and External Auditors

  - The section 302 certification requires the CEO and CFO to certify that they have disclosed to the Company's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function) deficiencies in the design or operation of the Company's internal controls, and identified for the external auditors any material weaknesses in internal controls and any fraud, whether or not material, that involved management or other employees who have a significant role in the Company's internal controls.

AUDIT COMMITTEE

- The audit committee (or persons fulfilling the equivalent function) is a key participant in the Company's disclosure process. While not the topic of this memorandum, the responsibilities and procedures of the audit committee, including frequency of meetings, should be reviewed and its charter should reflect the important gatekeeping role it performs as part of the Company's overall disclosure controls and procedures.

- The CEO and CFO should meet regularly with the audit committee and in particular as part of the review and sign-off process of the annual report and the interim financial reports and related earnings releases, as well as other material periodic reports and releases containing financial information.

EXTERNAL AUDITORS

- If the Company does not currently involve the external auditors in the preparation of interim financial reports, consideration should be given to their participation in the process, not necessarily to perform a formal review, but sufficient involvement to permit a meaningful discussion with the CEO and CFO and the audit committee of the disclosures.
- Practice may evolve for the external auditors to deliver an interim agreed upon procedures memo with respect to the interim financial information, as well as providing an interim update of their annual management letter. However, we do not believe that a formal comfort letter is necessary.

➢ Review Role of External Counsel

- External counsel should be consulted to help evaluate current disclosure procedures and to advise on their adequacy and redesign.
- The ongoing role of external counsel should be specified in the Company's standing procedures, both as an advisor on disclosure and in connection with form compliance of Exchange Act reports.
- We do not recommend that a full letter opinion be given by external counsel as we do not believe it provides the appropriate back-up for the internal disclosure controls and procedures required by the rules.

➢ Prepare a "Standing Procedures" Memo

- The Company should prepare a procedures memo for its disclosure controls and procedures. The composition and role of the disclosure committee/team and the Company's disclosure controls and procedures should be widely disseminated and transparent to all personnel involved in the disclosure process.
- The standing procedures, which are the general principles, should include the following:
  - Disclosure committee/team composition, purpose and responsibilities and, if appropriate, designation of a senior officer to act as disclosure monitor.
  - Designation of personnel and responsibilities at each level within the Company for gathering and reporting information to the designated collection points for analysis. The goal is to ensure adequate channeling of information to the disclosure committee/team on a regular and frequent basis. This is particularly important in large, multi-national companies.
  - Setting of disclosure timelines: critical dates and deadlines during the disclosure process. These dates and deadlines should include reporting that is required under home market rules, in addition to the annual report.
  - Responsibility for preparing drafts of disclosure documents.
  - Distribution, review and sign-off process for disclosure documents, including sufficient time for review and comment by senior management and meetings for the CEO and CFO to discuss the

disclosures with senior management, the disclosure committee/team, the audit committee, external auditors and the general counsel.

  - Whether mirror certifications will be required from line officers/business unit heads, financial personnel and the disclosure committee/team to back up the CEO and CFO certifications under sections 302 and 906 of the Sarbanes-Oxley Act.
  - What form of factual back-up documentation will be retained?
  - Who is responsible for conducting the form check?
  - Involvement of outside counsel and outside auditors and schedule for their review and comment on disclosure documents.
  - Incorporation of review of peer group and competitor filings and analyst reports into overall disclosure process.

➢ Document the Specific Procedures with Respect to the Preparation of Annual and Interim Financial Reports

- The Company should document the specific procedures used for each Exchange Act report by creating a corresponding procedures report. This would serve as one of the back-ups for the CEO/CFO certifications as to the adequacy of the disclosure controls and procedures that are required for the annual report on Form 20-F.
- Although CEO/CFO certification is not required for interim financial reports submitted on Form 6-K, the Company should consider documenting the procedures used for the preparation of those reports given that disclosure controls and procedures apply to those reports as well.
- When preparing a procedures report, the Company should make clear that the report is being prepared to evidence compliance with its disclosure controls and procedures.
- Each procedures report should contain the following:
  - Detailed time line;
  - Date, place and attendance for each meeting held to implement the procedures;
  - General topics that were discussed; for example, risk factors, management's discussion and analysis, and strategy, but not the details of what was discussed; and
  - Distribution, review and sign-off process.

➢ Consider Mirror Certifications

- The Company may wish to consider mirror certifications from line officers, business unit heads, financial personnel and the disclosure committee/team to back up the CEO and CFO certifications under sections 302 and 906 of the Sarbanes-Oxley Act.
- Mirror certificates should be customized to the areas of responsibility of the individual providing the certificate and information that the individual is providing in the disclosure process.
- Mirror certifications are not a substitute for disclosure controls and procedures but may help back-up the procedures in place.

- Evaluate Periodically the Disclosure Controls and Procedures

  - Section 302 of Sarbanes-Oxley requires periodic evaluation of the disclosure controls and procedures. In particular, the CEO and CFO must certify as to the effectiveness of the design and operation of the Company's disclosure controls and procedures.
  - In addition, the SEC adopted new disclosure requirements in Item 15 of Form 20-F requiring the Company to disclose the conclusions of the CEO/CFO about the effectiveness of the Company's disclosure controls and procedures based on their evaluation of these controls and procedures as of a date within 90 days of the filing date of the annual report.
  - The Company should document separately the analysis that went into reaching its conclusions about the effectiveness of its disclosure controls and procedures.
  - At a minimum, an annual evaluation of the effectiveness and appropriateness of the Company's disclosure controls and procedures should be done in connection with the annual report. The evaluation should be planned in advance by the disclosure committee/team and include discussions with all the key participants in the disclosure process.
  - The Company will be required to certify the effectiveness of its disclosure controls and procedures and make the corresponding disclosures annually. Nevertheless, the Company should consider periodic compliance reviews in connection with releasing interim financial and operating information in order to ensure compliance with its home country reporting obligations that in turn might generate a Form 6-K requirement.

- Review Document Retention Policy

  - The Company should review its document retention policy and the document retention policy should be part of the standing procedures memorandum. If the Company does not have such a policy, it should adopt one.
  - The Company should keep the procedures report for each annual report on Form 20-F and interim financial report filed or submitted to the SEC under the Exchange Act.
  - Drafts and notes should not be retained because they will not represent the final product and, furthermore, will seldom accurately reflect the full range and breadth of discussions that led to the final disclosure document and the procedures used to back it up. For the same reason, minutes of the disclosure committee or similar meetings should not be made or retained.
  - The general counsel's office or the disclosure monitor should be responsible for maintaining the back-up reports. Nevertheless, factual back-up for financial and statistical data in disclosure documents is appropriately retained in the ordinary course.

- Annex A illustrates an overview of the above disclosure controls and procedures.

Appendix B

ANNEX A

## DISCLOSURE CONTROLS AND PROCEDURES

*Internal communications and other procedures must operate so that important information flows to the appropriate collection and disclosure points in a timely manner.*

- Principal Accounting Officer/ Controller
- General Counsel/Senior Legal Officer
- Senior Risk Management Officer
- Chief Investor Relations Officer
- Others (*e.g.*, business unit heads)

- Audit Committee
- External Auditors
- External Counsel
- Review and comment on disclosure reports
- Proactive interaction with Senior Management, including CEO and CFO, as well as Disclosure Committee/Team (as appropriate)

**Responsible "Line" Personnel**

- Collect and record information
- Regularize timely process

**Disclosure Committee/Team**

- Coordinate overall disclosure process
- Process, analyze and summarize information
- Consider materiality of information
- Determine disclosure obligations on a timely basis
- Document disclosure procedures

**Senior Management, including CEO and CFO**

- Substantive review of information and reports
- Finalize timely decisions regarding required disclosure
- Evaluate effectiveness of procedures

**Investors and the Market**

- Timely, accurate and reliable disclosure in Exchange Act reports and to all market participants

# CEO/CFO CERTIFICATIONS

ANNEX A

## SECTION 906 CERTIFICATION

In connection with the Annual Report of [Name of Company] (the "Company") on Form 20-F for the period ending [December 31], 201[•], as filed with the Securities and Exchange Commission on the date hereof (the "Report"), the undersigned hereby certify that to the best of our knowledge:

- the Report fully complies with the requirements of Section 13(a) of the Securities Exchange Act of 1934; and
- the information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Date: [•], 201[•]

By: ___________________________
[Name of Chief Executive Officer]
Chief Executive Officer

Date: [•], 201[•]

By: ___________________________
[Name of Chief Financial Officer]
Chief Financial Officer

A signed original of this written statement required by Section 906 has been provided to [Name of Company] and will be retained by [Name of Company] and furnished to the Securities and Exchange Commission or its staff upon request.

This certification will not be deemed "filed" for purposes of Section 18 of the Securities Exchange Act of 1934, or otherwise subject to the liability of that section. This certification will not be deemed to be incorporated by reference into any filing under the Securities Act of 1933 or the Securities Exchange Act of 1934 even if the document with which it is submitted to the Securities and Exchange Commission is so incorporated by reference.

ANNEX B

SECTION 302 CERTIFICATION

I, [identify the certifying individual], certify that:

1. I have reviewed this annual report on Form 20-F of [identify company];

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;

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;

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:

   (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;

   (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;

   (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

   (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; and

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):

   (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

(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.

Date: …………………………………………….

__________________________________
[Signature]
[Title]

Note: Provide a separate certification for each principal executive officer and principal financial officer of the registrant. The required certification must be in the exact form set forth above.

## WEBSITE AND SOCIAL MEDIA NETWORK DISCLAIMERS

### DISCLAIMER NO. 1

### Disclaimer for Posted Articles

These articles were prepared by [*insert name*], an independent third party, and we are not responsible for their content. We are providing these articles to you as a convenience. We did not investigate or verify the information in any such articles and the inclusion of any article does not imply that we endorse it. [*Name of Company*] makes no representation as to the accuracy of the information in the articles. [*Name of Company*] does not, does not intend to, and expressly disclaims any duty to, update or correct such information.

### DISCLAIMER NO. 2

### "Click-Through" Hyperlink to Third-Party Sites[1]

NOTICE:
You are now leaving the [Name of Company] website
to go to an independent third-party website

[*Name of Company*] has no control over information at hyperlinked sites. [*Name of Company*] makes no representation as to, and is not responsible for, the quality, content, nature or reliability of any hyperlinked site or of any other website. [*Name of Company*] is providing this hyperlink to you only as a convenience, and the inclusion of any hyperlink does not imply any endorsement, investigation, verification or monitoring by [*Name of Company*] of any information contained in any hyperlinked site. In no event shall [*Name of Company*] be responsible for your use of a hyperlinked site.

### DISCLAIMER NO. 3

### Stock Price Hyperlink Disclaimer

The following hyperlink is provided for informational purposes only, and is not intended for trading purposes. If you are contemplating trading in the securities of [*Name of Company*], we strongly advise you to seek independent professional advice before making any investment decision.

[*Name of Company*] does not warrant or guarantee, and has not taken any steps to verify, the adequacy, accuracy or completeness of the information provided herein and, under no circumstances, will be liable for any inaccuracies or omissions in any such information or data, any delays or errors in the transmission thereof, or any loss or direct, indirect, incidental, special or consequential damages caused by reliance on this information or the risks arising from the stock market.

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1 To be discussed with counsel.

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