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**U.S. SECURITIES OFFERINGS AND EXCHANGE LISTING**

**BY FOREIGN PRIVATE ISSUERS**

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For the current version of *The Acquisition of Control of a United States Public Company*, [click here](#).  
For the current version of *Checkpoints: The Consequences of Crossing Various Ownership Thresholds When Investing*, [click here](#).

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## INTRODUCTION

Foreign companies frequently seek to raise capital in the U.S. and/or become listed for trading on a U.S. securities exchange. Beyond access to the U.S. capital markets, a foreign issuer can gain publicity and prestige by becoming a public company in the U.S. Doing so requires complying with U.S. securities laws and exchange rules, but a number of exemptions exist that make such compliance significantly easier for companies that qualify as a “foreign private issuer.”

The two primary sources of U.S. securities law are the Securities Act of 1933, as amended (the “Securities Act”), and the Securities Exchange Act of 1934, as amended (the “Exchange Act”), together with the regulations promulgated under each by the Securities and Exchange Commission (the “SEC”). In general terms, the Securities Act governs the offer and sale of securities in the U.S. and the Exchange Act regulates the trading of securities on securities exchanges and ongoing periodic reporting.

This memo outlines the principal U.S. securities laws and exchange rules that apply to foreign private issuers offering securities for sale in the U.S. or listing their securities on a U.S. securities exchange. Part I of this memo outlines the framework applicable to issuances under the Securities Act. Part II discusses the Exchange Act registration and reporting requirements applicable to foreign private issuers. Part III discusses the qualification for, and benefits of, foreign private issuer status. Part IV describes the requirements for listing on the New York Stock Exchange (“NYSE”) and the NASDAQ Stock Market (“NASDAQ”), the two principal U.S. securities exchanges, and American Depositary Receipt (“ADR”) programs, which are a common way in which foreign private issuers list securities on U.S. exchanges.

## I. SECURITIES ACT

### A. Registration Requirement and Exemptions

The Securities Act requires any transaction involving the offer or sale of a security<sup>1</sup> to be registered with the SEC, unless the security is a type that is exempt from registration<sup>2</sup> or the transaction is exempt from registration.<sup>3</sup>

#### 1. Exempt Issuance Transactions

The most common transactions that are exempt from registration are:

- Offshore Transactions. Regulation S promulgated under the Securities Act exempts from registration transactions involving an offer and sale of securities that occurs outside of the U.S. Under this regulation, an offer and sale of securities is deemed to occur outside of the U.S. if it is made in an “offshore transaction”<sup>4</sup> in which no “directed selling efforts”<sup>5</sup> are made in the U.S. by the issuer, a distributor, any of their respective affiliates, or any person acting on their behalf, and certain other restrictions are imposed on the offering to prevent “flowback” of the securities into the U.S.<sup>6</sup>
- Private Placements. Section 4(a)(2) of the Securities Act exempts from registration offers and sales by an issuer that do not involve a public offering. As a general matter, issuers may make such sales to sophisticated investors who have not been solicited as part of a general solicitation or advertising effort and who have been provided with information relevant to their investment decision. Section 4(a)(2) itself does not set forth clear rules that an issuer may follow to ensure the sale is exempt from registration. As a result, many sales under this provision are conducted pursuant to Regulation D promulgated under the Securities Act (“Regulation D”), which sets forth certain safe-harbor criteria by which a sale of securities is deemed to qualify as a private placement.

To be eligible for the Regulation D safe harbor, an issuance of securities must comply with a number of restrictions. First, the issuer must exercise reasonable care to ensure that the purchasers are not underwriters under the Securities Act (i.e., not acquiring the securities with a view to the distribution thereof).<sup>7</sup> Second, the issuer must ensure that the securities are issued only to specified categories of purchasers. If the issuer offers or sells securities through general solicitation or general advertising,<sup>8</sup> Regulation D permits private placements<sup>9</sup> only to purchasers who are “accredited investors.”<sup>10, 11</sup> If the issuer offers or sells securities without undertaking any general solicitation or general advertising, it may sell securities to accredited investors and to up to 35 non-accredited investors who have such knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the prospective investment.<sup>12</sup>

- Conditional Small Issues Exemption. Section 3(b) of the Securities Act exempts from registration smaller offerings by non-reporting private companies. The securities sold in such smaller offerings under Section 3(b) are freely transferable, as they are not deemed restricted securities. However, similarly to the case of private placements, Section 3(b) itself does not set forth a set of clear rules. Therefore, sales under this provision have been conducted pursuant to Regulation A promulgated under the Securities Act (“Regulation A”), which sets forth certain safe-harbor criteria which issuers may rely on to satisfy the requirements for a conditional small issues exemption.

Until recent years, Regulation A was not a widely used source of exemption, as the maximum amount of offering allowed was limited to USD 5 million. On March 25, 2015, the SEC adopted amendments to Regulation A by implementing Section 401 of the Jumpstart Our Business Startups Act to add the new Section 3(b)(2) of the Securities Act. This amended framework, widely referred to as “Regulation A+,” provides exemption from registration for two tiers of offerings. Pursuant to “Regulation A+,” an issuer may elect either a Tier 1 or a Tier 2 offering. Tier 1 is characterized by being subject to a lower dollar limit for the offering (up to USD 20 million) and to state securities laws (“blue sky laws”). In contrast, under Tier 2 an issuer may conduct a larger offering (up to USD 50 million) and is exempt from blue sky laws, but is also subject to ongoing reporting obligations after the completion of the offering.

- Rule 144A Transactions. Rule 144A promulgated under the Securities Act exempts transactions in which securities are sold to an investment bank, as initial purchaser,<sup>13</sup> and then resold to “Qualified Institutional Buyers.”<sup>14</sup> A valid Rule 144A transaction must meet certain requirements, including (a) the issuer must give notice to the buyers that it is relying on Rule 144A; (b) the securities must not be, when issued, of the same class as securities listed on a U.S. securities exchange (or, in the case of convertible or exchangeable securities, have an effective conversion premium of 10% or more); and (c) if the issuer is not a reporting company (or exempt under Rule 12g3-2(b) (discussed below in Section II.B)), a holder of the securities must have the right to obtain from the issuer upon request certain minimal “reasonably current” information concerning the business of the issuer and its financial statements.

## 2. Resale Restrictions

Securities acquired from an issuer in any of the exempt transactions described above are “restricted securities,” which may not be resold without registration or an exemption from the registration requirement. Two common exemptions from the registration requirement for resale transactions are (a) Rule 144<sup>15</sup> under the Securities Act and, if the transaction does not meet the requirements of Rule 144, (b) the so-called “Section 4(1½)” exemption, which has been codified in the form of a non-exclusive safe harbor under Section 4(a)(7) of the Securities Act.<sup>16</sup>

However, while exempt issuances can be completed more quickly than registered transactions, the reduced liquidity of the securities issued can be a significant drawback for investors. Securities issued in exempt transactions command lower prices than the same securities in a registered transaction, and it is common for investors (even non-U.S. investors) to demand “registration rights,” whereby the issuer is required to register their resale of the securities in the future. In addition, any securities held by an affiliate<sup>17</sup> of an issuer (i.e., whether or not issued in a registered transaction) are “control securities” and may not be resold unless the resale is registered or subject to an exemption from the registration requirement.<sup>18</sup>

## **B. Registration Forms**

In a registered transaction, before an issuer can offer to sell securities to investors, it must first file a registration statement with the SEC that meets detailed disclosure requirements.<sup>19</sup> The SEC has specified particular forms for the registration of securities that require certain information about the offering and the issuer. Registration forms designed for use by foreign private issuers frequently cross-reference Form 20-F, which sets out the information that must be disclosed in annual reports by foreign private issuers. The information required by Form 20-F is discussed in Exhibit A.

Foreign private issuers registering sales of securities in the U.S. will use one of the following forms:<sup>20</sup>

- Form F-1. A form used by foreign private issuers that are publicly selling securities in the U.S. for the first time and for all others who are not eligible to use any other registration form. Form F-1 requires the most extensive disclosure of all of the registration forms for foreign private issuers.
- Form F-3. A short form available for certain offerings<sup>21</sup> by “seasoned”<sup>22</sup> foreign private issuers that have previously completed registered offerings in the U.S. Issuers may incorporate by reference into Form F-3 information contained in their periodic reports under the Exchange Act, such as the annual report on Form 20-F and current reports on Form 6-K.<sup>23</sup> Eligible foreign private issuers may also use this form to register “shelf offerings” of securities to be sold on a delayed or continuous basis.<sup>24</sup>
- Form F-4. A form used to register securities issued in connection with business combinations and exchange offers. Form F-4 requires information concerning the relevant transaction, including pro forma financial information for an acquisition, the risks associated with the relevant investment and the company being acquired (including most of the same business and financial information that is required for a similarly situated issuer).<sup>25, 26</sup>
- Form F-6. A form used to register depository shares evidenced by ADRs. ADRs are described in further detail in Section IV.A below. Form F-6 requires a description of the securities to be registered<sup>27</sup> and a statement regarding the information that the issuer publicly discloses.<sup>28</sup>

- Form S-8. A form used to register securities issued to employees pursuant to an employee benefit plan.

Except in the case of “well known seasoned issuers”<sup>29</sup> (“WKSIs”), which are permitted to file certain immediately effective registration statements, when the issuer submits a registration statement to the SEC it will be assigned to a member of the SEC’s staff. If the examiner elects to review the registration statement, the SEC will provide comments to the issuer, typically within 30 days of submission. The length of time of the registration process depends on the nature of the SEC’s comments, the time required to address them and the nature of the SEC’s workload. Comments can include requests for clearer or additional disclosure or for supplemental information to support claims made in the registration statement.

### C. Communication by Issuers During the Offering Process

Prior to the filing of a registration statement with respect to an offering, the Securities Act generally prohibits<sup>30</sup> issuers from making offers of the securities being registered. The SEC has construed the concept of premature offers broadly to include publicity that may stimulate interest in the issuer or its securities. While some safe harbors exist for pre-filing communications,<sup>31</sup> an issuer contemplating a registered offering should generally not publicly release any forecasts or projections relating to its financial performance and should put in place procedures to review all public statements, press releases and content posted on its website or through social media.

Following the filing of a registration statement with respect to an offering, issuers are permitted to make written “offers” and other communications relating to the offering subject to compliance with the conditions of Securities Act Rule 433.<sup>32</sup>

Issuers making unregistered offerings of securities are not subject to the aforementioned rules, but are restricted from offering securities to investors who are not accredited investors or Qualified Institutional Buyers through general solicitation or general advertising<sup>33</sup> and must also comply with any other restrictions on communications about the offering set forth in the authorizing rules.<sup>34</sup>

### D. Emerging Growth Companies

The Jumpstart Our Business Startups Act of 2012 (the “JOBS Act”) created a category of issuers (including foreign private issuers) called emerging growth companies (“EGC”). An issuer qualifies as an EGC if it earned annual gross revenue of less than USD 1 billion during its most recent fiscal year and did not sell common stock in a registered offering prior to December 9, 2011.

Foreign private issuers that qualify for EGC status and are seeking to publicly issue securities in the U.S. may take advantage of the following regulatory benefits:

- Liberalized Communications with Potential Buyers. EGCs may engage in written or oral communications with Qualified Institutional Buyers<sup>35</sup> and “institutional accredited investors”<sup>36</sup> to gauge interest in the offering during the pre-filing period.<sup>37</sup>

- Lower Financial Disclosure Burden. EGCs need only provide two years of audited financial statements in their Form F-1 registration statements, rather than the three years of audited financial statements that are ordinarily called for.<sup>38</sup> The EGC also need not discuss financial information for years prior to the audited periods in the other sections of the registration statement.
- Confidential Submission of Registration Statements. EGCs who have not yet sold common equity securities pursuant to a registration statement may submit draft registration statements on Form F-1 to the SEC for confidential review prior to publicly filing the registration statement.<sup>39</sup> As a result, the EGC does not need to publicly disclose its initial registration statement and all subsequent amendments until 21 days before the commencement of a road show and, if it chooses to abandon or delay the offering prior to that point, can avoid publicly disclosing the information contained in the registration statement.
- Slower Adoption of New Accounting Standards. EGCs need not comply with any update of accounting standards adopted by the Financial Accounting Standards Board until such standards are applied to private companies.<sup>40</sup> Foreign private issuers that are EGCs and that submit financial statements prepared using local GAAP are accordingly exempt for complying with such standards when reconciling their financial statements to U.S. GAAP.<sup>41</sup>

## II. EXCHANGE ACT

### A. Applicability of Registration and Reporting Requirements

A foreign private issuer becomes subject to the reporting requirements of the Exchange Act if it meets any of the following tests set out under the Act:

- Section 12(b). A class of the issuer's securities is listed on a national securities exchange (including NYSE and NASDAQ).<sup>42</sup>
- Section 12(g). The issuer has a class of equity securities held of record by 300 persons who are U.S. residents and a total of either (a) 2000 persons or (b) 500 persons who are not accredited investors. In addition, the total value of the issuer's assets on the last day of the fiscal year must exceed USD 10 million.<sup>43</sup>
- Section 15(d). The issuer has filed a registration statement under the Securities Act that has become effective during a given fiscal year or, in any subsequent fiscal year, securities of the class registered under such registration statement are held of record by 300 or more holders as of the beginning of such fiscal year.



A foreign private issuer that becomes subject to the Exchange Act's reporting requirements under Section 12(b) or Section 12(g) must register with the SEC by filing a registration statement on Form 10<sup>44</sup> or Form 20-F. The registration statement will automatically become effective upon the latest to occur of (a) the filing of the form with the SEC, (b) the receipt by the SEC of notice from the applicable securities exchange that the issuer's listing application has been approved, if applicable, and/or (c) the effectiveness of the Securities Act registration statement for the securities, if applicable.<sup>45</sup>

While almost all issuers who register a sale of equity securities under the Securities Act must also separately register the securities that they are selling under the Exchange Act, the converse is not always true. Issuers who register equity securities under the Exchange Act pursuant to Section 12(g) often have not made a public offering that requires registration under the Securities Act. Rather, such issuers may have made one or more unregistered issuances of shares and, as a result, the number of stockholders of the issuer exceeds the numerical threshold for registration under the Exchange Act. (As described below, foreign private issuers may be exempt from Exchange Act registration in such cases under Exchange Act Rule 12g3-2(b).)

Once registered under the Exchange Act, the issuer (a "reporting issuer") must file with the SEC certain reports (discussed below) on an ongoing basis disclosing certain information.<sup>46</sup> A reporting issuer also becomes subject to a variety of other rules requiring ongoing compliance, including the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act"),<sup>47</sup> the Foreign Corrupt Practices Act of 1977 ("FCPA")<sup>48</sup> and other standards relating to accounting controls and audit requirements.

## **B. Rule 12g3-2(b) Exemption from Exchange Act Registration**

If a foreign private issuer would otherwise be required to register as a reporting issuer under Section 12(g) of the Exchange Act, it can claim an exemption under Rule 12g3-2(b) if it satisfies both of the following conditions:

- **Foreign Listing.** The issuer must maintain a listing on one or more foreign markets constituting the primary trading market for the subject class of securities.<sup>49</sup> For these purposes, "primary trading market" means that at least 55% of the trading in the relevant securities on a worldwide basis in the issuer's last fiscal year occurred on markets in no more than two foreign jurisdictions and, if such securities traded on markets in more than one foreign jurisdiction, that the trading of such securities in at least one of those foreign jurisdictions was greater than the trading in the U.S.
- **Electronic Publication.** The issuer must publish, in English, on its website or through an electronic information delivery system, certain categories of information<sup>50</sup> released since the first day of its most recently completed fiscal year. At a minimum, this information must include the issuer's annual report and annual financial statements, interim reports that include financial statements, press releases and all other communications and documents distributed directly to holders of the securities to which the exemption relates.

Exemption under Rule 12g3-2(b) frees the foreign private issuer from the obligations to make the required reports described below and to comply with the terms of the Sarbanes-Oxley Act. It is available only for issuers that have not registered an issuance of securities under the Securities Act and have not listed securities on a U.S. securities exchange. However, because ADRs are not treated for this purpose as securities listed on a securities exchange, the Rule 12g3-2(b) exemption can be used by foreign private issuers to establish a Level 1 ADR program. (ADR programs are discussed below in Section IV.A.)

### **C. Required Periodic Reports**

If a foreign private issuer is required to register under the Exchange Act, it must file the following periodic reports with the SEC:

#### **1. Annual Report on Form 20-F**

A reporting foreign private issuer must file its annual report on Form 20-F within four months after the issuer's fiscal year end. An issuer's annual report on Form 20-F must include, among other things, audited financial statements and disclosure regarding certain categories of information about the issuer and its business. For further description of the categories of information required on Form 20-F, see Exhibit A.

#### **2. Current Reports on Form 6-K**

A reporting foreign private issuer is required to "promptly" furnish<sup>51</sup> reports on Form 6-K disclosing material information<sup>52</sup> that the issuer (a) discloses or is required to disclose pursuant to the laws of its country of organization, (b) files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange or (c) distributes or is required to distribute to its security holders. Any information or material published in the form of a press release or distributed directly to security holders is to be in English. However, an English summary of such materials may be furnished in lieu of an English translation.

## **III. FOREIGN PRIVATE ISSUER STATUS**

### **A. Qualification as a Foreign Private Issuer**

Any issuer (other than a foreign government) organized under the laws of a jurisdiction outside of the U.S. qualifies for foreign private issuer status unless (a) more than 50% of the issuer's outstanding voting securities are directly or indirectly owned of record by U.S. residents and (b) it falls into one of the following three categories:

- The majority of its executive officers or directors are U.S. citizens or residents;
- More than 50% of its assets are located in the U.S.; or
- Its business is administered principally in the U.S.<sup>53</sup>

The determination of whether an issuer qualifies as a foreign private issuer is made as of the last business day of its most recently completed second fiscal quarter (except in the case of new registrants, whose determination is made as of a date within 30 days prior to the issuer's registration statement). Once an issuer qualifies as a foreign private issuer, it will immediately be able to use the forms and rules designated for foreign private issuers until it fails to qualify for this status on the last day of its second fiscal quarter.<sup>54</sup>

## **B. Benefits of Foreign Private Issuer Status**

Qualification for foreign private issuer status offers the issuer exemption from a number of requirements that apply to issuers under U.S. securities laws and flexibility in complying with other requirements. These benefits include:

- 10-Qs and 8-Ks Not Required. Foreign private issuers are not required to file two kinds of reports that are required of domestic issuers: quarterly reports on Form 10-Q and current reports on Form 8-K.<sup>55</sup>
- Accounting Principle Flexibility. The financial statements of foreign private issuers must be prepared in accordance with either U.S. GAAP, IASB-issued IFRS or local home-country GAAP.<sup>56</sup> By contrast, domestic issuers must prepare financial statements in accordance with U.S. GAAP. Foreign private issuers that use the English version of IFRS issued by the IASB need not reconcile these financial statements with U.S. GAAP. If local GAAP or non-IASB IFRS is used, financial statements (both annual and interim) must be reconciled to U.S. GAAP.
- Exemption from Exchange Rules. Foreign private issuers who are listed on NYSE and NASDAQ are generally allowed to follow home-country practice in lieu of complying with corporate governance standards imposed by exchange rules on listed issuers.<sup>57</sup>
- Exemption from Proxy Rules. Foreign private issuers are exempt from the U.S. proxy rules, which set forth procedures for soliciting stockholder votes, prescribe information that must be disclosed to stockholders in connection with such solicitation and provide for review and comment by the SEC of documents that are sent to stockholders by the issuer to solicit votes.<sup>58</sup>
- Exemption from Section 16 of the Exchange Act. Foreign private issuers are exempt from Section 16 of the Exchange Act,<sup>59</sup> which requires reports regarding purchases and sales of securities in the issuer by officers, directors and certain significant beneficial stockholders. This section also subjects members of these groups to liability for disgorgement of certain profits realized from the purchase and sale of securities of the issuer within six months of each other.
- Exemption from Regulation FD. Although, as discussed in Section IV.B.5 below, NYSE and NASDAQ typically require listed issuers to promptly

disclose material information to the public, foreign private issuers are exempt from Regulation FD, which requires issuers to make public disclosure<sup>60</sup> of any material non-public information that has been selectively disclosed to securities industry professionals or stockholders.<sup>61</sup>

- Later Filing Deadline for Annual Reports. Reporting foreign private issuers must file annual reports on Form 20-F within four months after the issuer's fiscal year end.<sup>62</sup> By contrast, the deadlines for filing annual reports for domestic issuers are 60, 75 and 90 days after the fiscal year end, depending on the issuer's market capitalization.
- Other Items. Foreign private issuers also have some advantages under other rules, including (a) certain exemptions in the areas of audit committee independence, black-out trading restrictions and the use of non-GAAP financial measures under the Sarbanes-Oxley Act,<sup>63</sup> (b) more limited disclosure requirements, such as allowing executive compensation to be disclosed on an aggregate basis if the information is reported on such a basis in the issuer's home country<sup>64</sup> and (c) confidential review of initial registration statements by the SEC under certain circumstances.<sup>65</sup>

#### IV. LISTING ON A U.S. SECURITIES EXCHANGE

##### A. Listing through an American Depositary Receipt Program

Many foreign private issuers that list their equity securities on a U.S. exchange do so by establishing an ADR program. An issuer establishes an ADR program by depositing shares of its common stock with a depositary bank in the U.S. The depositary bank will then issue negotiable receipts (the ADRs) that are evidence of ownership of the deposited shares. The use of ADRs permits the underlying securities to be traded through U.S. trading and settlement systems. The depositary bank converts distributions by the issuer into U.S. dollars and assists ADR holders with tax filings and other reporting requirements.

There are three types of ADR programs, which have differing aims and require different levels of disclosure under U.S. securities laws:

- Level 1 Programs (Unlisted), in which the issuer deposits already-issued shares to the depositary bank and the ADRs are traded over-the-counter rather than listed on a U.S. securities exchange. To establish a Level 1 program, a foreign private issuer must file a short-form registration statement for the ADRs of Form F-6, but need not become a reporting issuer under the Exchange Act. Because no new shares are issued, a Level 1 program cannot be used to raise new capital. Rather, a Level 1 ADR program will create a trading market for the issuer's shares in the U.S.
- Level 2 Programs (Listed), in which the issuer deposits already-issued shares to the depositary bank and the ADRs issued by the depositary bank are listed on a U.S. securities exchange. To establish a Level 2 program, a foreign

private issuer must file (a) a short-form Securities Act registration statement for the ADRs of Form F-6 and (b) an Exchange Act registration statement. Like a Level 1 program, a Level 2 program cannot be used to raise new capital for the issuer. However, it will create a trading market for the issuer's shares on a U.S. securities exchange and attract the publicity and prestige associated with a U.S. listing.

- Level 3 Programs (Offering), in which the issuer issues new shares as part of a public offering of securities and the ADRs are listed on a U.S. securities exchange. To establish a Level 3 program, a foreign private issuer must file (a) a Securities Act registration statement, (b) a short-form Securities Act registration statement for the ADRs on Form F-6 and (c) an Exchange Act registration statement. A Level 3 program may be used to raise capital for the issuer, issue securities in acquisitions and structure equity incentive compensation for U.S. employees. It also attracts the publicity and prestige associated with a U.S. listing.

## **B. Exchange Application Process and Listing Standards**

Foreign private issuers that wish to list common stock, ADRs and other securities on either NYSE or the NASDAQ Capital Market (“NCM”)<sup>66</sup> must apply for listing with the exchange. To be listed, all issuers must meet certain quantitative standards regarding the issuer's financial situation and the market for the issuer's securities that are set out in the rules of the applicable exchange (either the NYSE Listed Company Manual (“NYSE Rules”) or the NASDAQ Stock Market Rules (“NASDAQ Rules”)). Listing issuers must also comply with corporate governance rules set by the exchange. However, many of those rules are waived or relaxed for foreign private issuers that follow their home-country practice.

### **1. Exchange Application Process**

A foreign private issuer seeking to list shares on the major U.S. exchanges must first apply to the exchange's staff for listing and submit certain support documentation to the exchange such as its charter documents, annual reports and its latest prospectus.<sup>67, 68</sup> The exchange application process typically takes anywhere from four to 12 weeks, depending on the exchange on which the issuer wishes to list, and on other factors such as whether the issuer must submit additional supporting documentation and whether the application raises any issues that need to be addressed by the issuer.

When the applicable review process is completed, the issuer's securities will be approved for listing by that exchange, and the exchange will certify the listing of the issuer's shares to the SEC. Thereafter, the issuer must register with the SEC under the Exchange Act by filing the appropriate registration form. The issuer's shares will then be admitted to trading once the listing has been certified and the Exchange Act registration has become effective.<sup>69</sup>

## 2. Quantitative Listing Standards

Foreign private issuers that wish to list their shares on NYSE in connection with an initial public offering of shares must satisfy one of the two sets of quantitative listing standards described in Exhibit B relating to the issuer's financial situation and the trading market for its shares.

NASDAQ applies differing quantitative listing standards depending on whether the issuer wishes to be listed on its Global Select Market, its Global Market or on the NCM.<sup>70</sup> Foreign private issuers wishing to list their shares on the NCM must satisfy the quantitative listing standard described in Exhibit B.

## 3. Quantitative Maintenance Standards

Following listing, both NYSE and NASDAQ require issuers to satisfy certain distribution, trading and financial standards on a continuous basis. For further description of the quantitative maintenance standards imposed by NYSE and NASDAQ, see Exhibit C.

## 4. Corporate Governance Standards

### (a) Generally Applicable Standards

Issuers of securities listed on NYSE and NASDAQ must generally comply with rules regarding the issuer's corporate governance. For further description of the corporate governance standards imposed by NYSE and NASDAQ, see Exhibit D.

### (b) Standards Applicable to Foreign Private Issuers

In lieu of complying with the exchange's corporate governance requirements, NYSE Rules and NASDAQ Rules both allow foreign private issuers to follow their home-country practice with one principal exception: The issuer must maintain an audit committee of the Board that meets the requirements set out in Exchange Act Rule 10A-3.<sup>71</sup> In addition, listed foreign private issuers following the practice in their home countries must disclose in their annual reports on Form 20-F any significant ways in which the issuer's corporate governance practices differ from those followed by U.S. issuers under the applicable exchange rules and comply with certain other requirements imposed by such rules.<sup>72, 73, 74</sup>

## 5. Disclosure and Notification Requirements

Both the NYSE Rules and the NASDAQ Rules prescribe certain disclosures and notifications that foreign private issuers must make to the applicable exchange and to the public at large. Both exchanges require that listed foreign private issuers timely file all periodic reports that such issuers must file with the SEC. In addition, the exchange rules require disclosure to the public and to the exchange in the following circumstances:

- General Disclosure Obligation. A listed issuer must promptly release to the public any news or information that might be reasonably expected to affect the

market for its securities or influence investors' decisions.<sup>75</sup> Generally, this disclosure must be made through a method or combination of methods that complies with Regulation FD.<sup>76,77</sup>

- Financial Disclosure Obligation. Listed foreign private issuers must publish on a Form 6-K an interim balance sheet and income statement as of the end of their second fiscal quarter no later than six months following the end of such quarter.<sup>78</sup>
- Obligation to Disclose Specific Events. All issuers must also give notice to the exchange and/or the public prior to, or prompt notice following, the occurrence of certain specified business, legal and market events.<sup>79</sup> In addition, issuers who receive from an exchange a notification of deficiency with respect to the issuer's compliance with applicable listing standards are required to issue a public announcement of such notifications.<sup>80</sup>

\* \* \* \* \*

## EXHIBIT A

**Disclosure Required under Form 20-F****I. Annual Reports**

An issuer's annual report on Form 20-F must include, among other things, disclosure regarding the following categories of information about the issuer:

- Financial Information, including an audited balance sheet and audited statements of income, cash flows and changes in equity and related notes and schedules thereto covering each of the last three fiscal years, as well as an audit report.<sup>81</sup> The financial statements must be prepared in accordance with U.S. GAAP, IFRS or local GAAP (provided that the local preparation method is reconciled to U.S. GAAP). The issuer is also required to include certain selected historical financial information for each of the last five fiscal years (subject to certain exceptions).<sup>82</sup>
- Risk Factors, including a summary of the risks facing the issuer, such as lack of operating history, lack of cash flow, litigation, competition, dependence on key personnel, suppliers or sources of capital or adverse regulatory developments.<sup>83</sup>
- The Issuer's Business, including a description of the nature of the issuer's operations and principal activities, the markets in which it operates, the sources and availability of its raw materials, its marketing channels, the extent to which it is dependent on any contracts, manufacturing processes, licenses or patents and the material effects of government regulation. Additional information must be furnished if the issuer's business falls under one of the categories set forth in Regulation S-K.<sup>84</sup>
- Management's Discussion and Analysis of the Issuer's Financial Condition and Results of Operations ("MD&A"), including summary and analysis of the changes in the issuer's earnings, liquidity and capital resources during the previous year.<sup>85</sup>
- Management, including biographical information regarding company's directors, senior managers and other key employees.<sup>86</sup>
- Share Ownership, including a listing of the names of "major stockholders"<sup>87</sup> of the issuer, significant changes in the percentage ownership of these stockholders in the past three years and any different voting rights afforded to these stockholders.<sup>88</sup>
- Transactions with Related Parties, including descriptions of material or unusual transactions with, and any loans to or guarantees in favor of, certain related parties.<sup>89</sup>



- Descriptions of Constitutional Documents and Material Agreements, including summaries of the issuer's memorandum and articles of association and any material agreements that the issuer or a member of its group has entered into in the past two years outside of the ordinary course of business.<sup>90</sup>
- Other information about the issuer, including information about Board practices, employees, legal proceedings, dividend policy, market for the issuer's securities, exchange controls, taxation, quantitative and qualitative information about market risk, defaults and delinquencies, material modifications to the rights of security holders, controls and procedures, audit committee financial expert, code of ethics, principal accountant fees and services, exemptions from the listing standards for audit committees, purchases of equity securities by the issuer and affiliates, use of conflict minerals, safety of extractive practices, changes in and disagreements with the issuer's accountants and corporate governance practices (including a description of differences from those followed by companies in the issuer's home jurisdiction).
- Exhibits, including certain certifications required by the Sarbanes-Oxley Act,<sup>91</sup> the documents listed as exhibits to be filed in connection with a registration statement (which may be incorporated into Form 20-F by reference to the original registration statement) and any new documents that fall into the categories enumerated in Item 601 of Regulation S-K.

## II. Registration Statements

As noted above, foreign private issuers may use Form 20-F to register securities under the Exchange Act, and the forms prescribed for use by foreign private issuers to register securities under the Securities Act extensively cross-reference the requirements of Form 20-F. If it is being used in reference to a registration statement for registration under the Securities Act (e.g., Form F-1 or Form F-3), or as a registration statement under the Exchange Act, Form 20-F also requires additional disclosures that may include:

- Description of the Securities Being Registered, including type and class of securities offered and rights evidenced by the securities.<sup>92</sup>
- Description of the Offering, including total amount of securities offered, expected price at which the securities will be offered, method and timetable of the offering, reasons for the offering, use of the proceeds, information related to the plan of distribution (including the identities of underwriters, arrangements with underwriters and groups of investors being targeted), markets or exchanges on which the securities will be traded, identities of any selling stockholders and a listing of expenses related to the issuance (including discounts and commissions offered to the underwriters and other selling agents).<sup>93</sup>

- Additional Financial Information, including (a) if the registration statement is to become effective more than nine months after the end of the last audited fiscal year, unaudited financial statements covering the first six months of the issuer's fiscal year,<sup>94</sup> (b) a statement of capitalization and indebtedness as of a date no earlier than 60 days prior to the date of the registration statement<sup>95</sup> and (c) if debt securities are being registered, a ratio of earnings to fixed charges for each of the last five fiscal years and the last interim period.<sup>96, 97</sup>
- Exhibits, including any underwriting agreements, the constitutional documents of the issuer, any material plans of acquisition or reorganization of the issuer, instruments defining the rights of holders of the securities being registered and any long-term debt of the issuer, legal opinions regarding the legality of securities being registered, opinions of counsel or accountants regarding certain tax matters, voting trust agreements, certain other material contacts<sup>98</sup> and a list of significant subsidiaries of the issuer.<sup>99</sup> If the document required to be included as an exhibit is written in a language other than English, the issuer must provide either an English translation or an English summary.

**EXHIBIT B**

**Quantitative Listing Standards**

Foreign private issuers that wish to list common stock or ADRs on NYSE or on NASDAQ’s NCM must satisfy the applicable quantitative listing standards set out in this Exhibit B. (A foreign private issuer may be listed on NYSE if it satisfies either of the two sets of standards applicable to foreign private issuers under NYSE Rules.) Foreign private issuers seeking to list on NASDAQ’s Global Select Market or Global Market are subject to certain quantitative listing standards stricter than the standards for the NCM.

Type of Standard	NYSE Standard 1 (Both Domestic Issuers and Foreign Private Issuers)	NYSE Standard 2 (Foreign Private Issuers Only)	NASDAQ Capital Market Listing Standards
<u>Distribution and Market Value Standards</u>	The issuer must have at least (a) 400 holders of 100 hundred shares or more, <sup>100</sup> (b) 1.1 million publicly held shares, <sup>101</sup> (c) an aggregate market value of USD 40 million and (d) a per share price of USD 4.00 at the time of initial listing. <sup>102</sup>	On a worldwide basis, the issuer must have at least (a) 5,000 holders of 100 shares or more, (b) 2.5 million publicly held shares, (c) an aggregate market value of USD 100 million and (d) a per share price of USD 4.00 at the time of initial listing if listed in connection with an IPO. <sup>103</sup>	The issuer must have (a) a minimum bid price per share of USD 4.00 (or USD 2.00 or USD 3.00 under certain circumstances), (b) at least 1,000,000 publicly held shares, (c) at least 300 round lot holders, and (d) at least three registered and active market makers. <sup>104, 105</sup>
<u>Financial Standards</u> <sup>106</sup>	The issuer must also pass one of the following two financial tests: <sup>107</sup> <ul style="list-style-type: none"> <li>• <i>Earnings Test</i>: The issuer must have earned a pre-tax income from continuing operations of at least (a) (i) USD 10 million in the aggregate for the last three fiscal years, (ii) USD 2 million in each of the two most recent fiscal years and (iii) USD zero in each of the last three year fiscal years or (b) (i) USD 12 million in the aggregate for the last three fiscal years, (ii) USD 5 million in the last recent fiscal year and (iii) USD 2</li> </ul>	The issuer must also pass one of the following three tests: <sup>108</sup> <ul style="list-style-type: none"> <li>• <i>Earnings Test</i>: The issuer must have earned a pre-tax income from continuing operations of at least (a) USD 100 million in the aggregate for the last three fiscal years and (b) USD 25 million in each of the two most recent fiscal years.</li> <li>• <i>Valuation/Revenue Test</i>: The issuer must pass either the: <ul style="list-style-type: none"> <li>○ “Valuation/Revenue with Cash Flow Test,” under which the issuer has (a) global market</li> </ul> </li> </ul>	The issuer must also pass one of the following three financial tests: <sup>109</sup> <ul style="list-style-type: none"> <li>• <i>Stockholders’ Equity Standard</i>: The issuer must have (a) stockholders’ equity of at least USD 5 million, (b) publicly held shares with a market value of at least USD 15 million and (c) an operating history of at least two years.</li> <li>• <i>Market Value of Securities Standard</i>: The issuer must have (a) stockholders’ equity of at least USD 4 million, (b) publicly held shares with a market value of at least USD 15 million and (c) listed securities having a market value of USD 50 million.</li> <li>• <i>Net Income Standard</i>: The issuer must have</li> </ul>

Type of Standard	NYSE Standard 1 (Both Domestic Issuers and Foreign Private Issuers)	NYSE Standard 2 (Foreign Private Issuers Only)	NASDAQ Capital Market Listing Standards
	<p>million in the next most recent fiscal year.</p> <ul style="list-style-type: none"> <li>• <i>Global Market Capitalization Test:</i> The issuer must have at least USD 200 million in global market capitalization.</li> </ul>	<p>capitalization of at least USD 500 million, (b) revenues of at least USD 100 million during the most recent 12 month period, (c) cash flows of at least (i) USD 100 million in the aggregate for the last three fiscal years and (ii) USD 25 million in each of the last two fiscal years; or</p> <ul style="list-style-type: none"> <li>○ “Pure Valuation” Revenue Test, under which the issuer has (a) global market capitalization of at least USD 750 million and (b) revenues of at least USD 75 million during the most recent fiscal year.</li> <li>• <i>Affiliated Company Test:</i> The issuer (a) has at least USD 500 million in global market capitalization, (b) has at least 12 months of operating history, (c) the issuer’s affiliate is a listed company in good standing and (d) such affiliate retains control of the issuer or is under common control with the issuer.</li> </ul>	<p>(a) stockholders’ equity of at least USD 4 million, (b) net income of at least USD 750,000 in either (i) the last fiscal year or (ii) two of the last three fiscal years and (c) publicly held shares having a market value of at least USD 5 million.</p>

**EXHIBIT C**

**Quantitative Maintenance Standards**

Both NYSE and NASDAQ will generally consider suspension and delisting proceedings for listed issuers of common stock or ADRs if the issuer is judged deficient under any of the standards applicable to issuers listed on the exchange set out in this Exhibit C.<sup>110</sup> Foreign private issuers seeking to list on NASDAQ’s Global Select Market or Global Market will be subject to certain quantitative maintenance standards stricter than the standards for the NCM.

Type of Standard	NYSE Quantitative Maintenance Standards	NASDAQ Capital Market Quantitative Maintenance Standards
<u>Distribution Standard</u>	The issuer has (a) less than 400 total stockholders, (b) less than 600,000 publicly held shares or (c) (i) less than 1,200 total stockholders and (ii) an average monthly trading volume of less than 100,000 shares in the most recent 12 months. <sup>111</sup>	The issuer has (a) less than 500,000 publicly held shares, (b) less than USD 1 million in the market value of publicly held shares, (c) less than 300 public stockholders and (d) less than two registered and active market makers with respect to the shares. <sup>112</sup>
<u>Pricing Standard</u>	The average closing price of the issuer’s shares over a 30-day trading period is less than USD 1.00. <sup>113</sup>	The bid price per share of the issuer’s equity securities is less than USD 1.00. <sup>114</sup>
<u>Market Capitalization and Financial Standard</u>	The issuer will (a) be considered to be below compliance standards if it has (i) less than USD 50 million in average global market capitalization over any 30-day trading period and (ii) less than USD 50 million in stockholders’ equity, and (b) immediately face suspension and delisting procedures if its average global market capitalization over any consecutive 30-day trading period is less than USD 15 million. <sup>115</sup>	The issuer is judged deficient under all of the following three tests: <sup>116</sup> <ul style="list-style-type: none"> <li>• <i>Stockholders’ Equity Test:</i> The issuer’s stockholders’ equity is less than USD 2.5 million.</li> <li>• <i>Net Income Test:</i> The issuer’s net income is less than USD 500,000 in either (a) the last fiscal year or (b) two of the last three fiscal years.</li> <li>• <i>Market Value of Securities Test:</i> The market value of the issuer’s listed securities is less than USD 35 million.</li> </ul>

**EXHIBIT D**

**Corporate Governance Standards**

Issuers of securities listed on NYSE and NASDAQ must comply with corporate governance standards set out below:

Type of Standard	NYSE General Standard for Listed Issuers	NASDAQ General Standard for Listed Issuers	Standard Applicable to Foreign Private Issuers
<u>Director Independence</u>	A majority of the issuer’s Board must consist of directors who are independent <sup>117</sup> under the NYSE Rules. <sup>118</sup> The independent directors must meet in regularly scheduled executive sessions (at least once a year) without management present or have meetings where only independent directors are present. <sup>119</sup>	A majority of the issuer’s Board must consist of members who are independent <sup>120</sup> under the NASDAQ Rules. <sup>121</sup> The independent directors must have regularly scheduled executive sessions (at least twice a year) at which only independent directors are present. <sup>122</sup>	<p><i>NYSE Rules:</i> The foreign private issuer may follow its home country practice in lieu of the general standard,<sup>123</sup> but must disclose in its public filings that it follows its home country practice and describe the significant differences between its home country practice and the applicable general standard.<sup>124</sup></p> <p><i>NASDAQ Rules:</i> The foreign private issuer may follow its home country practice in lieu of the general standard, but must disclose in its public filings that it follows its home country practice and describe its home country practice.<sup>125</sup></p>
<u>Nominations</u>	The issuer’s Board must have a nominating committee composed entirely of independent directors. <sup>126</sup> The committee must have a charter that tasks the committee with, among other things, identifying individuals qualified to become directors as well as selecting or recommending that the Board select nominees for the issuer’s Board. <sup>127</sup>	The issuer’s Board must have a nominating committee composed solely of independent directors, or, alternatively, new directors can be chosen by a majority of the independent directors on the Board. <sup>128</sup> If the issuer has a nomination committee, the committee must adopt a written charter addressing, among other	<i>NYSE Rules:</i> The foreign private issuer may follow its home country practice in lieu of the general standard, <sup>130</sup> but must disclose in its public filings that it follows its home country practice and describe the significant differences between its home country practice and the applicable general standard. <sup>131</sup>

Type of Standard	NYSE General Standard for Listed Issuers	NASDAQ General Standard for Listed Issuers	Standard Applicable to Foreign Private Issuers
		things, the director nomination process. <sup>129</sup>	<i>NASDAQ Rules:</i> The foreign private issuer may follow its home country practice in lieu of the general standard, but must disclose in its public filings that it follows its home country practice and describe its home country practice. <sup>132</sup>
<u>Compensation</u>	The issuer’s Board must have a compensation committee composed entirely of independent directors. <sup>133</sup> The compensation committee must have a charter that tasks the committee with, among other things, evaluating the CEO’s performance and approving his or her compensation, as well as making recommendations to the Board regarding the compensation of other executive officers. <sup>134</sup>	The issuer’s Board must have a compensation committee composed entirely of independent directors. <sup>135</sup> The committee will be required to have a charter that tasks it with, among other things, determining or recommending to the Board the compensation for the CEO and other executive officers. <sup>136</sup>	<p><i>NYSE Rules:</i> The foreign private issuer may follow its home country practice in lieu of the general standard,<sup>137</sup> but must disclose in its public filings that it follows its home country practice and describe the significant differences between its home country practice and the applicable general standard.<sup>138</sup></p> <p><i>NASDAQ Rules:</i> The foreign private issuer may follow its home country practice in lieu of the general standard, but must disclose in its public filings that it follows its home country practice and describe its home country practice.<sup>139</sup></p>
<u>Audit Committee</u>	The issuer must have an audit committee of at least three members, each of whom must be financially literate and one of whom must have accounting or related financial management	The issuer must have an audit committee of at least three members, one of whom must have past employment experience in finance or accounting or other comparable	<i>NYSE Rules:</i> The foreign private issuer must have an audit committee that satisfies the requirements of Exchange Act Rule 10A-3. <sup>147</sup> The foreign

Type of Standard	NYSE General Standard for Listed Issuers	NASDAQ General Standard for Listed Issuers	Standard Applicable to Foreign Private Issuers
	<p>expertise.<sup>140</sup> Directors appointed to the issuer’s audit committee must meet the independence standards of both the NYSE Rules that are applicable to all independent directors and of Exchange Act Rule 10A-3 that is applicable to members of an audit committee.<sup>141</sup> The audit committee must have a charter that tasks the committee with, among other things, fulfilling the duties assigned to audit committees under Exchange Act Rule 10A-3,<sup>142</sup> assisting the Board with oversight of the issuer’s financial statements, complying with legal and regulatory requirements and the performance of independent auditor and internal auditors, as well as reviewing and discussing the issuer’s financial statements, earnings press releases, reports of the independent auditor regarding internal control procedures and risk management policies.<sup>143</sup></p>	<p>experience or background which results in financial sophistication.<sup>144</sup> Directors appointed to the issuer’s audit committee must meet the independence standards of both the NASDAQ Rules that are applicable to all independent directors and Exchange Act Rule 10A-3 that is applicable to members of an audit committee, as well as certain other requirements.<sup>145</sup> The audit committee must have a charter that tasks the committee with, among other things, fulfilling the duties assigned to audit committees under Exchange Act Rule 10A-3.<sup>146</sup></p>	<p>private issuer must also disclose in its public filings if it follows its home country practice in lieu of other standards related to its audit committee and describe the significant differences between its home country practice and the applicable general standard.<sup>148</sup></p> <p><i>NASDAQ Rules:</i> The foreign private issuer must have an audit committee whose members meet the independence standards of Exchange Act Rule 10A-3.<sup>149</sup> The audit committee must also be tasked with the duties assigned to audit committees under Exchange Act Rule 10A-3.<sup>150</sup> And the foreign private issuer must disclose in its public filings if it follows its home country practice in lieu of other standards related to its audit committee and describe its home country practice.<sup>151</sup></p>
<p><u>Stockholder Meetings</u></p>	<p>The issuer must hold an annual meeting of stockholders and must provide notice of that meeting to NYSE.<sup>152</sup> NYSE does not mandate a specific quorum for the stockholder meeting but gives “careful consideration” to provisions fixing the quorum required for stockholder meetings at a proportion less than 50% when authorizing new listings.<sup>153</sup> The issuer must solicit proxies, provide proxy statements for all stockholder meetings and provide copies of such solicitations to NYSE for review and comment by the NYSE staff in certain circumstances.<sup>154</sup></p>	<p>The issuer must hold an annual meeting of stockholders and must provide notice of that meeting to NASDAQ.<sup>155</sup> A quorum of at least 33.33% of the outstanding shares of voting common stock must be represented at the meeting. The issuer must solicit proxies, provide proxy statements for all stockholder meetings and provide copies of such solicitations to NASDAQ.<sup>156, 157</sup></p>	<p><i>NYSE Rules:</i> NYSE Rules are silent on applicability of these standards to foreign private issuers; however, practitioners generally recognize that a foreign private issuer may follow its home country practice in lieu of the general standard as long as it discloses in its public filings that it follows its home country practice and describes the significant differences between its home country practice and the applicable general standard.</p> <p><i>NASDAQ Rules:</i> The foreign private issuer may follow its home country</p>



Type of Standard	NYSE General Standard for Listed Issuers	NASDAQ General Standard for Listed Issuers	Standard Applicable to Foreign Private Issuers
			practice in lieu of the general standard, but must disclose in its public filings that it follows its home country practice and describe its home country practice. <sup>158</sup>
<u>Stockholder Approval</u>	The issuer must obtain stockholder approval prior to certain issuances of securities, including: <sup>159,160</sup> (a) issuances where the issued common stock <sup>161</sup> will equal 20% or more of the number of shares of common stock or voting power outstanding before such issuance, except if the issuance involves (i) a public offering for cash or (ii) a bona fide private financing that involves the issuance of common stock, for cash, at a price at least as great as each of (1) the book value and (2) the market value of the issuer’s common stock; <sup>162</sup> (b) issuances that would result in a change of control of the issuer; (c) issuances pursuant to the adoption or material revision of any equity compensation plan; and (d) issuances of common stock <sup>163</sup> to any director, officer or substantial existing security holder of the issuer or any affiliate, subsidiary or other entities in which any of the aforementioned categories has a substantial interest. <sup>164</sup>	The issuer must obtain stockholder approval prior to certain issuances of securities, including: <sup>165, 166</sup> (a) issuances where the issued common stock <sup>167, 168</sup> will equal 20% or more of the number of shares of common stock or voting power outstanding before the issuance, except if the issuance is (i) a public offering or (ii) at a price not less than the greater of (1) the book value or (2) the market value of the stock; (b) issuances that would result in a change of control of the issuer; (c) issuances in connection with certain equity compensation arrangements; and (d) issuances in connection with the acquisition of the stock or assets of another company that, on issuance, will equal 20% or more of the number of shares or voting power outstanding before such issuance.	<i>NYSE Rules:</i> NYSE Rules are silent on applicability of these standards to foreign private issuers; however, practitioners generally recognize that a foreign private issuer may follow its home country practice in lieu of the general standard as long as it discloses in its public filings that it follows its home country practice and describes the significant differences between its home country practice and the applicable general standard. <i>NASDAQ Rules:</i> The foreign private issuer may follow home country practice in lieu of the general standard, but must disclose in its public filings that it follows its home country practice and describe its home country practice. <sup>169</sup>
<u>Voting Rights</u>	The issuer may not disparately reduce or restrict the voting rights of existing stockholders of listed common stock, including by issuing (a) stock with voting rights that are superior to those of outstanding listed common stock or (b) stock with voting rights that are inferior to those of outstanding listed common stock through an	The issuer may not disparately reduce or restrict the voting rights of existing stockholders of listed common stock, including by issuing (a) stock with voting rights that are superior to those of outstanding listed common stock or (b) stock with voting rights that are inferior to	<i>NYSE Rules:</i> The foreign private issuer may take any action relating to its voting rights structure that either (a) is in compliance with the NYSE Rules’ standards for U.S. issuers or (b) is not prohibited by the law of the foreign private issuer’s home country. <sup>174</sup>

Type of Standard	NYSE General Standard for Listed Issuers	NASDAQ General Standard for Listed Issuers	Standard Applicable to Foreign Private Issuers
	exchange offer. <sup>170</sup> However, the issuer may maintain a class of stock with superior voting rights that was issued prior to listing, and may also issue stock with inferior voting rights or no voting rights by means other than an exchange offer. <sup>171</sup>	those of outstanding listed common stock through an exchange offer. <sup>172</sup> However, the issuer may maintain a class of stock with superior voting rights that was issued prior to listing. <sup>173</sup>	<i>NASDAQ Rules:</i> The foreign private issuer may take any action relating to its voting rights structure that either (a) is in compliance with the NASDAQ Rules’ standards for U.S. issuers or (b) is not prohibited by the law of the foreign private issuer’s home country. <sup>175</sup>
<u>Other Standards</u>	The issuer should conduct an appropriate review of all related party transactions <sup>176</sup> and determine whether the relationship serves the best interests of the issuer and its stockholder. <sup>177</sup> The issuer must adopt a code of business conduct and ethics applicable to all directors, officers and employees that contains compliance standards and procedures which ensure prompt and consistent action against violators of the code. <sup>178</sup> Finally, the issuer must make the code publicly available on or through its website and disclose any waivers granted to executive officers or directors. <sup>179</sup>	The issuer must conduct an appropriate review of all related party transactions <sup>180</sup> for potential conflicts of interest, and all such transactions must be approved by the audit committee or another independent committee of the Board. <sup>181</sup> The issuer must adopt a code of conduct containing an enforcement mechanism applicable to all directors, officers and employees. Finally, the issuer must make the code publicly available. <sup>182</sup>	<i>NYSE Rules:</i> NYSE Rules are silent on applicability of these standards to foreign private issuers; however, practitioners generally recognize that a foreign private issuer may follow home country practice in lieu of the general standard as long as it discloses in its public filings that it follows its home country practice and it describes the significant differences between its home country practice and the applicable standard.  <i>NASDAQ Rules:</i> The foreign private issuer may follow home country practice in lieu of the general standard, but must disclose in its public filings that it follows its home country practice and describe its home country practice. <sup>183</sup>

## NOTES

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- <sup>1</sup> Under Securities Act Section 2(a), the term “security” is defined broadly and includes common and preferred stock, bonds, notes and other debt instruments, as well as derivative securities such as options, warrants and swaps.
- <sup>2</sup> Types of securities that are exempt from registration are listed in Securities Act Section 3, including municipal securities, securities issued or guaranteed by a bank, certain short term commercial paper and securities of nonprofit issuers.
- <sup>3</sup> Transactions that are exempt from registration are enumerated in Securities Act Section 4 and are described in further detail in Section I.A.1.
- <sup>4</sup> Securities Act Rule 902(h) deems a sale of securities by an issuer or its underwriter to be an “offshore transaction” if (a) the offer and sale is not made to a person in the U.S. and (b) either the buyer is outside the U.S. when the buy order is originated or the transaction takes place through the facilities of a non-U.S. securities market.
- <sup>5</sup> Securities Act Rule 902(c) defines “directed selling efforts” as “any activity undertaken for the purpose of, or that could be reasonably expected to result in, conditioning the U.S. market for the relevant securities.” Examples of directed selling efforts include (a) advertising in a publication with an average circulation of 15,000 per issue in the previous 12 months, (b) mailing materials to U.S. investors, (c) conducting promotional seminars in the U.S. and (d) making offers to identifiable groups of U.S. citizens in a foreign country (e.g., members of the U.S. military). The rule also deems certain activities not to be “directed selling efforts,” including certain advertisements and notices, as well as routine activities conducted by the issuer in the U.S. unrelated to selling efforts.
- <sup>6</sup> Securities Act Rule 903 establishes three categories of off-shore offerings that each have an applicable set of restrictions described in general terms below:
- Category 1 Offerings. Category 1 offerings are offerings in which (a) there is no “substantial U.S. market interest” (as defined in Rule 903) in the offered securities, (b) the security is issued (i) by a foreign issuer or (ii) by a U.S. issuer of non-convertible debt securities that meet certain restrictions, in each case, in an offering that is either directed to the residents of a single country other than the U.S. in accordance with the local laws and customary practices of such country or (c) are issued by a foreign government or in connection with certain foreign employee benefit plans. There are no additional restrictions with respect to Category 1 offerings.
  - Category 2 Offering. Category 2 offerings are offerings of (a) equity securities of a non-U.S. issuer who is a reporting issuer under the Exchange Act, (b) the debt securities of a U.S. issuer or (c) the debt securities of a non-U.S. issuer who is not a reporting issuer under the Exchange Act. The issuer and any other distributor of the issued securities are forbidden from making offers or sales to U.S. persons or for the account or benefit of a U.S. person during the forty day period following when the securities are first offered to persons other than distributors (the “Compliance Period”) and may not engage in hedging transactions during the same period unless such hedging activities are in compliance with the Securities Act. Distributors must make written undertakings to comply with the aforementioned restrictions. In addition, all offering materials distributed prior to the conclusion of the Compliance Period must contain a legend that the securities have not been registered under the Securities Act and may not be offered or sold in the U.S. or to U.S. persons (except distributors) without registration under the Securities Act or an exemption therefrom and that certain hedging activities may not be conducted unless done so in accordance with the Securities Act.
  - Category 3 Offerings. Category 3 offerings are offerings that are not eligible to be deemed Category 1 offerings or Category 2 offerings and subject to differing restrictions depending on whether equity or debt securities are being issued. Issuers and distributors of debt securities in a Category 3 offering may not make offers or sales to a U.S. person other than a distributor during the Compliance Period. In addition, the issued securities must be represented by a temporary global security that is not exchangeable for a definitive security until the Compliance Period ends and certain other certification requirements are fulfilled. Issuers and distributors of equity securities may make offers or sales to or for the account or benefit of a U.S. person for a Compliance Period that is extended to one year (six months if the issuer is a reporting issuer.) If the issuer or distributor makes an offer or sale during this period, then (a) the purchaser of the securities must (x) certify that it is not a U.S. person and is not making the purchase for the account or benefit of any U.S. person, and (y) agree to resell the securities only in accordance with Regulation S or another exemption from registration and not to engage in hedging transactions except as permitted under the Securities Act, (b) the securities must contain an appropriate legend and (c) the issuer is required by a corporate organizational document to refuse to register any transfer not made in accordance with Regulation S, another exemption from registration or pursuant to a registration under the Securities Act. In addition, distributors in all Category 3 offerings must make undertakings to comply with

the aforementioned restrictions, and all offering materials must have the legends described under the description of Category 2 offerings.

- <sup>7</sup> This is typically accomplished by (a) requiring the purchaser to make representations regarding its investment intent, (b) disclosing that the securities have not been registered and cannot be resold absent registration or another exemption from the registration requirement and (c) placing a legend on any instrument evincing the security regarding such transfer restrictions.
- <sup>8</sup> Under Securities Act Rule 502(c), general solicitations and general advertising include (a) advertisements, articles, notices or other communications published in any newspaper, magazine or similar media or broadcast over television or radio; and (b) any seminar or meeting whose attendees have been invited by general solicitation or general advertising.
- <sup>9</sup> Under Securities Act Rule 502, all sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales within the period starting six months before and ending six months after the Regulation D offering may be considered part of the same offering.
- <sup>10</sup> Securities Act Rule 501(a) defines “accredited investor” to include (a) institutional investors such as banks, brokers, dealers, insurance companies, investment companies and employee benefit plans, (b) tax-exempt organizations with more than USD 5 million in assets, (c) directors or executive officers of the issuers, (d) certain individuals of net worth that exceeds USD 1 million (exclusive of the value of the individual’s primary residence) or income that exceeds USD 200,000 and (e) entities in which all of the equity owners are accredited investors.
- <sup>11</sup> Securities Act Rule 506(c). The issuer must take reasonable steps to verify that all of the investors who purchase securities in connection with the offering are accredited investors. Reasonable steps can include: (a) a review of specified documentation (e.g., Internal Revenue Service forms, bank statements, credit reports) showing that the investor meets either the income test or net worth test set out under Securities Act Rule 506(a); (b) reliance on written confirmation from a third party showing that the third party has verified the investor’s accredited investor status; or (c) reliance on a certification from an existing investor who previously invested in a private placement by the issuer under Securities Act Rule 506(b).
- <sup>12</sup> Securities Act Rule 506(b). Under Securities Act Rule 502(b), if the issuer will issue securities to non-accredited investors, it must provide certain financial and other business information to the investors that would otherwise be provided in a registration statement (described in Exhibit A.II). If the issuer is a foreign private issuer, it may provide its most recent annual report on Form 20-F.
- <sup>13</sup> Issuers typically sell the securities to the initial purchaser as an offshore transaction or a private placement.
- <sup>14</sup> Under Securities Act Rule 144A, “qualified institutional buyer” is defined to include certain insurance companies, investment advisors, broker dealers, banks and other entities that own and invest on a discretionary basis at least USD 100 million in securities of issuers that are not affiliates.
- <sup>15</sup> Section 4(a)(1) of the Securities Act exempts from registration “transactions by any person other than an issuer, underwriter, or dealer.” Rule 144 is a non-exclusive safe harbor that sets forth conditions under which an affiliate of an issuer or a holder of restricted securities may resell its securities without being deemed to be engaged in a distribution and, therefore, not an “underwriter.” These conditions differ depending upon whether the seller is an affiliate of the issuer:
- Non-Affiliate Sales. Sales of restricted securities by persons who are not affiliates of an issuer that is a reporting company current in its SEC filings are freely permitted after a six-month holding period. If the issuer is not current in its SEC filings, sales of restricted securities by non-affiliates of a reporting company issuer are freely permitted after a one-year holding period. Sales of restricted securities by non-affiliates of a non-reporting company issuer are also freely permitted after a one-year holding period.
  - Affiliate Sales. Sales of securities by affiliates of a reporting company issuer that has been a reporting company for at least 90 days are permitted after a six-month holding period, subject to compliance with the current public information, manner of sale and filing requirements, and volume limitations under the rule. Sales by an affiliate of a non-reporting issuer are permitted after a one-year holding period, subject to compliance with the same conditions.
- <sup>16</sup> While Section 4(a)(1) of the Securities Act exempts “transactions by any person other than an issuer, underwriter, or dealer,” underwriters are defined to include any “person who has purchased from an issuer with a view to . . . the

distribution of any security.”<sup>16</sup> Section 4(a)(2) only exempts transactions “by an issuer” not involving any public offering. Taking these two provisions together, practitioners have generally recognized a “Section 4(1½)” exemption for resales of securities by a security holder that fit the criteria for a private placement. Although the SEC had recognized this exemption’s validity even before any formal statutory or regulatory adoption of the exemption, many practitioners understand that “Section 4(1½)” exemption has now been codified into the Securities Act as Section 4(a)(7) under the Fixing America’s Surface Transportation Act.

For a resale transaction to qualify under this new non-exclusive safe harbor, the transaction must satisfy several requirements including the following: (a) each purchaser must be an accredited investor; (b) the seller or any of its agents cannot use general solicitation or general advertising; (c) for securities of certain non-reporting corporate issuers, the seller and purchaser must obtain from the issuer certain information; (d) if the seller is an affiliate of the issuer, the seller must disclose certain information; (e) the seller and any person that will be compensated for its participation in the transaction cannot be subject to a disqualification event under Rule 506(d)(1) of Regulation D or a statutory disqualification under Section 3(a)(39) of the Exchange Act; (f) the issuer must be engaged in business and cannot be a shell company; (g) the exemption cannot be used by an issuer or its subsidiary; (h) the exemption cannot be used for an unsold allotment held by a broker or dealer as underwriter; and (i) the class of securities to be resold in the transaction must have been authorized and outstanding for at least ninety days prior to the transaction.

- <sup>17</sup> Under the U.S. securities laws, the term “affiliate” is frequently considered to include directors, officers and holders of more than 10% of the outstanding voting shares of an issuer, as well as any other person or entity that exercises significant control over the issuer.
- <sup>18</sup> Strictly speaking, a sale by an affiliate of an issuer need only be registered if the sale is made with a “view to ... a distribution.” Nevertheless, there is little definitive guidance as to what is meant by a “view to ... a distribution.” As a result, resales by affiliates of issuers are typically registered or made pursuant to one of the exemptions.
- <sup>19</sup> Securities Act Section 5(c). In addition to registration under the Securities Act, nearly every state has securities laws (known as “blue sky” laws) that require an issuer of securities to register certain offers and sales within that state. Under the National Securities Markets Improvement Act of 1996, as amended, offers and sales of “covered securities” need not be registered under state blue sky laws. Covered securities include securities listed or authorized for listing on a national securities exchange or securities that rank equal or senior to a security of the same issuer that is so listed, those sold to a “qualified purchaser” or sold in a Rule 144A transaction where the issuer is a reporting company under the Exchange Act. The SEC has proposed a definition of “qualified purchaser” that would essentially include almost all private placement transactions involving sophisticated investors. However, an issuer offering a security that is not a covered security would need to determine the applicability of, and ensure compliance with, state blue sky laws.
- <sup>20</sup> Canadian foreign private issuers may also be eligible to register securities using the forms prescribed under the multi-jurisdictional disclosure system rules governing issuances of securities by Canadian issuers into the U.S. market and issuances by U.S. issuers into the Canadian market.
- <sup>21</sup> Form F-3 General Instructions Item I.B. These offerings include (a) secondary securities offerings for cash by issuers that have a worldwide aggregate market value of common equity held by non-affiliates of at least USD 75 million; (b) primary offerings of non-convertible investment grade securities for cash if the issuer has issued securities meeting certain volume requirements or is a wholly-owned subsidiary of a well-known seasoned issuer; (c) securities to be offered on the exercise of outstanding convertible securities or rights under a dividend or interest reinvestment plan; or (d) any primary securities offerings for cash if the issuer meets the following additional requirements: (i) it is not and has not been a shell company for at least the past 12 months from the date of the offering, (ii) it has a class of common stock listed on a U.S. national securities exchange, and (iii) during the past 12 months from the date of the offering, it has not sold a total number amount of securities under this exception (including the proposed securities to be sold in this offering) that exceeds one-third of the market value of the common equity of the issuer held by non-affiliates.
- <sup>22</sup> Form F-3 General Instructions Item I.A. This designation means that the issuer has a class of securities registered pursuant to the Exchange Act, has been a reporting issuer for at least 12 calendar months, has filed in a timely manner all reports, other documents and interactive data files required to be filed by it under the Exchange Act during such period and has not failed to pay or materially defaulted on any dividend or installment with respect to preferred stock, indebtedness for borrowed money or rental payments on any long term lease.
- <sup>23</sup> Periodic reports that foreign private issuers must file under the Exchange Act are described in Section II.C.

- <sup>24</sup> Under Securities Act Rule 415, foreign private issuers that are eligible to register securities using Form F-3 may file a registration statement that contains a “base prospectus” disclosing information about the offering and descriptions of the types of securities it intends to issue, but omits most information about the specific terms of the offering. The issuer may later file a prospectus supplement or other amendment to the registration statement with the SEC containing pricing information and other specific information. This rule allows the issuer to make multiple offerings of securities at differing prices over a continuous period. It also allows the issuer to delay finalizing the terms of the offering (effectively keeping the securities “on the shelf”) so that it can finalize the offering terms and issue the registered securities when market conditions are favorable.
- <sup>25</sup> Form F-4 Items I.3-5 and I.15-17.
- <sup>26</sup> Under Securities Act Rule 802, exchange offers and business combination transactions in which the issued securities are offered in consideration of the securities of a foreign private issuer are generally exempt from registration if (a) U.S. persons own less than 10% of securities of the foreign private issuer that are the subject of the offer or transaction, (b) the offeror allows U.S. holders to participate in the offer on terms at least as favorable as terms offered to other holders and (c) the offeror disseminates to U.S. holders and furnishes to the SEC English versions of any informational documents that it provides to the holder of the securities that are subject to the offer or transaction and these documents contain the appropriate legend.
- <sup>27</sup> Form F-6 Item I.1.
- <sup>28</sup> Under Form F-6 Item I.2, the registering foreign private issuer must make a statement that either (a) it publishes information in English on its web site or through an electronic information delivery system generally available to the public in its primary trading market, or (b) that it is subject to the periodic reporting requirements of the Exchange Act and accordingly files reports with the SEC, and that these reports are available through the EDGAR system or at public reference facilities maintained by the SEC.
- <sup>29</sup> “Well known seasoned issuers” are defined under Securities Act Rule 405 to be an issuer that (a) meets the eligibility requirements of Form S-3 or Form F-3; (b) as of a date within 60 days of its eligibility determination date either has an aggregate market value of common equity held by non-affiliates of at least USD 700 million or has both registered and issued at least USD 1 billion in aggregate principal amount of non-convertible securities (other than common equity) in primary offerings for cash during the past three years; and (c) is not an “ineligible issuer,” which is defined to include issuers that are not current in the Exchange Act reporting obligations or that in the past three years have filed for bankruptcy, been convicted of a felony or misdemeanor under certain provisions of the Exchange Act, been the subject of certain judicial or administrative decrees or orders or filed a registration statement that was subject to a refusal order or stop order.
- <sup>30</sup> Certain categories of issuers are exempted from this prohibition. Under Securities Act Rule 163, WKSIs (defined in note 29 and the accompanying text) may make offers (but not sales) without restriction prior to filing a registration statement with the SEC if the issuer complies with certain filing requirements that are related to written communications with offerees. Further, as described in Section I.D, “emerging growth companies” may “test the waters” by meeting with certain institutional investors to gauge market interest in a potential public offering of its securities.
- <sup>31</sup> Securities Act Rule 168 permits reporting issuers to disseminate regularly released factual business statements (e.g., factual information about the issuer, its business and its financial situation) and forward looking information (e.g., financial projections and statements regarding future plans) as long as these statements are not offering related and are released in a manner that is materially consistent with the issuer’s past releases of such information in timing, manner and form. Securities Act Rule 135 permits an announcement of a planned registered offering if it contains (a) a legend to the effect that it does not constitute an offer of securities and (b) only limited information, including the name of the issuer, the title, amount and basic terms of the securities being offered, the anticipated timing of the offering and a brief statement of the manner and purpose of the offering.
- <sup>32</sup> Under Securities Act Rule 433(b), issuers may also communicate with prospective investors using a “free writing prospectus,” which generally includes written and electronic communications other than a preliminary or statutory prospectus (a portion of the issuer’s filed registration statement). Most issuers may use a free writing prospectus only (a) after the issuer has filed the draft registration statement with the SEC and (b) if the free writing prospectus is accompanied or preceded by a copy of the preliminary prospectus. However, the requirement that a free writing

prospectus be accompanied or preceded by a copy of the preliminary prospectus does not apply to seasoned issuers and WKSIs in most circumstances. Further, WKSIs may use free writing prospectuses to communicate with potential investors prior to the filing of a registration statement.

- <sup>33</sup> The rules governing the use of general solicitations and general advertising in private placements are further described in note 8 and the accompanying text.
- <sup>34</sup> Securities Act Rule 135e allows reporting companies and certain foreign private issuers to issue a press release or other notice announcing a proposed or completed unregistered offering. This press release will not be considered general solicitation or advertising under Regulation D or directed selling efforts in connection with an offshore transaction as long as the press release contains only information specified in the rule (e.g., the name of the issuer, the amount and basic terms of the securities being offered and the timing of the offering) and a prescribed legend, and is filed or furnished with the SEC using the appropriate current reporting form.
- <sup>35</sup> “Qualified institutional buyers” are described in note 14 and the accompanying text.
- <sup>36</sup> “Institutional accredited investors” include banks, employee benefit plans, brokers, dealers and certain other categories of investors that qualify as “accredited investors” under Securities Act Rule 501(a) and that are not individuals.
- <sup>37</sup> Securities Act Section 5(d).
- <sup>38</sup> Securities Act Section 7(a).
- <sup>39</sup> Securities Act Section 6(e). Specifically, an EGC is eligible for confidential review prior to “date of the first sale of common equity securities of [the] issuer pursuant to an effective registration statement under the Securities Act of 1933.” The SEC has noted that the “first sale of common equity securities” is not limited to an initial primary offering of common equity securities for cash and can include an offering of common equity security pursuant to an employee benefit plan or a secondary offering of shares by a selling stockholder.
- <sup>40</sup> Securities Act Section 7(a)(2)(B).
- <sup>41</sup> The accounting standards applicable to financial statements required to be reported by foreign private issuers are discussed in Section III.B.
- <sup>42</sup> Exchange Act Section 12(a)-(b).
- <sup>43</sup> Exchange Act Section 12(g).
- <sup>44</sup> Form 10 is the default form for registering a class of securities under Exchange Act Sections 12(b) or 12(g); however, it is rarely used because of the availability of the shorter and less burdensome Form 8-A, which can be used by issuers already required to file reports under Section 13 or 15(d) of the Exchange Act. Unlike Form 10, Form 8-A does not require financial statements or extensive disclosure about the issuer.
- <sup>45</sup> Form 8-A General Instructions A(c)-(d).
- <sup>46</sup> Exchange Act Rules 13a-1 and 13a-16.
- <sup>47</sup> Broadly speaking, the Sarbanes-Oxley Act imposes obligations on reporting issuers intended to improve internal controls, financial reporting and oversight of accountants. Foreign private issuers are generally subject to the following requirements under the Sarbanes-Oxley Act:
- CEO and CFO Certifications. Foreign private issuers are required to file with the SEC certifications by the issuer’s CEO and CFO as to the truthfulness and completeness of their annual reports filed on Form 20-F.
  - Audit Committees. Foreign private issuers that are listed companies must generally comply with the following rules regarding the audit committees of their board of directors (“Board”): (a) the audit committee must be responsible for the appointment, compensation, retention, termination and oversight of the issuer’s external auditors, (b) the audit committee must have procedures for the treatment of complaints or submissions identifying possible accounting misdeeds, (c) the audit committee must be able to obtain advice and assistance from outside advisors as it deems necessary to carry out its duties, (d) the issuer must provide appropriate funding for the audit committee to perform

- its duties and (e) each audit committee member must be an “independent” member of the Board (as determined under Exchange Act Rule 10A-3). Exemptions from certain of these rules may be available for foreign private issuers that have a board of auditors or one or more statutory auditors who are appointed pursuant to the law or listing provisions of the issuer’s home country or securities exchange and who meet certain other standards of independence.
- Controls Over Financial Reporting. Management of foreign private issuers must make annual assessments of whether the issuer’s internal controls over financial reporting are effective and disclose in the issuer’s annual report on Form 20-F the results of this evaluation and any material weakness in the issuer’s internal controls. The independent auditors of certain foreign private issuers with large market capitalizations must also issue a report attesting to the effectiveness of the issuer’s internal controls over financial reporting.
  - Additional Provisions. The Sarbanes-Oxley Act contains additional provisions applicable to foreign private issuers, including rules that require issuers to use only auditors registered with the Public Company Accounting Oversight Board to audit financial statements that will be included in filings with the SEC and prohibit listed companies from making personal loans to directors and officers.
- <sup>48</sup> Generally speaking, the FCPA forbids a reporting issuer (as well as other persons and entities engaging in transactions with a connection to the U.S.) from offering or giving anything of value to officials of foreign governments and organizations and enterprises affiliated with foreign governments (as well as officials or candidates of foreign political parties) to assist the issuer in obtaining or retaining business. The FCPA also requires issuers to maintain books and records that accurately record the transactions of the issuer to prevent the issuer from hiding forbidden payments.
- <sup>49</sup> Exchange Act Rule 12g3-2(b)(ii).
- <sup>50</sup> Under Exchange Act Rule 12g3-2(b)(iii), this information includes information that the issuer (a) makes public or is required to make public pursuant to the laws of its country of organization, (b) files or is required to file with the principal stock exchange on which its securities are traded and which was made public by that exchange, or (c) distributes or is required to distribute to its security holders.
- <sup>51</sup> The information and documents furnished on Form 6-K are not deemed to be “filed” for purposes of Exchange Act Section 18, which imposes liability for certain misleading statements.
- <sup>52</sup> Material information includes information with respect to the issuer and its subsidiaries concerning changes in business; changes in management or control; acquisitions or dispositions of assets; bankruptcy or receivership; changes in registrant’s certifying accountants; financial condition and results of operations; material legal proceedings; changes in securities or in the security for registered securities; defaults upon 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 granting of options or payment of other compensation to directors or officers; and any other information which the registrant deems of material importance to security holders.
- <sup>53</sup> Securities Act Rule 405 and Exchange Act Rule 3b-4.
- <sup>54</sup> An issuer’s determination that it fails to qualify as a foreign private issuer governs its eligibility to use the forms and rules designated for foreign private issuers beginning on the first day of the fiscal year following the determination date. Once an issuer fails to qualify for foreign private issuer status, it will remain unqualified unless it meets the requirements for foreign private issuer status as of the last business day of its second fiscal quarter.
- <sup>55</sup> Exchange Act Rules 13a-13(b)(2) and Rule 13a-11(b).
- <sup>56</sup> Form 20-F Items 17-18.
- <sup>57</sup> The corporate governance requirements imposed by NYSE and NASDAQ and the standards applicable to foreign private issuers are discussed further in Section IV.B.4.
- <sup>58</sup> Exchange Act Rule 3a12-3(b).
- <sup>59</sup> Exchange Act Rule 3a12-3(b).



- <sup>60</sup> Under Regulation FD, public disclosure may be effected by use of one or more of the following methods (a) filing a Form 8-K with the SEC, (b) issuing a press release to a widely circulated news or wire service or (c) staging a conference call, press conference or webcast where the public is provided adequate notice and granted access. Posting news on the issuer’s website or disclosing information via social media can also be considered public disclosure if investors have been made aware that they should look to the issuer’s website or social media page. However, it is advisable to combine disclosure via website or social media with one or more of the aforementioned methods.
- <sup>61</sup> Regulation FD Rule 100(a).
- <sup>62</sup> Form 20-F General Instructions A(b). Foreign private issuers that wish to be eligible to issue securities using “shelf” registration statements must file their annual report on Form 20-F within three months of the end of the issuer’s fiscal year. Shelf registration statements are described in further detail in note 24 and the accompanying text.
- <sup>63</sup> For a further description of the Sarbanes-Oxley Act, see note 47.
- <sup>64</sup> Form 20-F Item 6B.
- <sup>65</sup> According to the release by the SEC staff “Non-Public Submissions from Foreign Private Issuers,” dated December 8, 2011 and amended May 30, 2012, the SEC will review initial registration statements from a foreign private issuer on a confidential basis if the issuer is (a) a foreign government registering its debt securities, (b) listed or concurrently listing its securities on a non-U.S. securities exchange, (c) being privatized by a foreign government or (d) can demonstrate that the public filing of an initial registration would conflict with the laws of an applicable foreign jurisdiction. Foreign private issuers that are EGCs may also file initial registration statements confidentially, provided it publicly files its registration statement and all other confidential submissions at least 21 days before commencing a road show for the offering.
- <sup>66</sup> The NCM is one of three markets maintained by the NASDAQ. For a further description of the three markets, see note 70 and the accompanying text.
- <sup>67</sup> NYSE Rules 104.02 and 702.02. A foreign private issuer seeking to list shares on the NYSE must first undergo a confidential eligibility review in which it submits a set of documents and information to the exchange. The eligibility review for NYSE typically takes two to three weeks. Once the issuer clears the eligibility review, it may then submit a listing application and further supporting documentation. The entire listing process for NYSE typically takes 12 weeks in the absence of any unusual developments.
- <sup>68</sup> NASDAQ Rule 5205. A foreign private issuer seeking to list shares on the NCM must submit an online listing application disclosing to the exchange information about the issuer and the shares that will be listed. NASDAQ staff reviews the listing application and provides comments to the issuer. This process generally takes four to six weeks, but may take less time if the application raises no issues and the issuer responds promptly to staff comments.
- <sup>69</sup> NASDAQ Rule 5210(f).
- <sup>70</sup> The NASDAQ Global Select Market and NASDAQ Global Market are each viewed as being more prestigious than the NCM and have stricter initial quantitative listing requirements. Both also have higher application fees and annual fees.
- <sup>71</sup> NYSE Rule 303A.00 and NASDAQ Rule 5615(a)(3)(A). For an explanation of the requirements of Exchange Act Rule 10A-3 as applied to foreign private issuers, see note 141.
- <sup>72</sup> NYSE Rule 303A.11 requires a foreign private issuer that must file its annual report on Form 20-F to include the statement of significant differences in this report. All other foreign private issuers are allowed to either include the statement in the annual report they file with the SEC or post the statement on the issuer’s website. Similarly, under NASDAQ Rule 5615(a)(3)(B), a foreign private issuer must include such descriptions in its (a) annual report to the SEC and (b) registration statement filed in connection with its IPO or first U.S. listing on NASDAQ. An issuer that is not required to file an annual report on Form 20-F may provide these disclosures in English on its website instead of providing these disclosures on its registration statement or annual report. In addition, NASDAQ Rules require a foreign private issuer that does not have a compensation committee composed entirely of independent directors to specifically disclose why it does not have such a committee in its annual report.

- <sup>73</sup> NYSE Rule 303A.12 requires listed foreign private issuers following home country practice to submit an annual written affirmation of its compliance with the NYSE corporate governance standards that are applicable to foreign private issuers and that it has duly disclosed the significant ways in which the issuer’s corporate governance practices differ from those mandated by the NYSE Rules. NASDAQ Rules do not impose a similar requirement; however, NASDAQ Rule IM-5615-3 requires a listing foreign private issuer to submit to NASDAQ a written statement from an independent counsel in the foreign private issuer’s home country certifying that the issuer’s practices are not prohibited by such country’s laws.
- <sup>74</sup> Under NASDAQ Rule 5615(c) and NYSE Rule 303A.00, both NASDAQ and NYSE also provide exemptions from certain corporate governance requirements to “controlled companies,” which are listed issuers (including foreign private issuers) of which 50% or more of the voting power for the election of directors is held by an individual, entity or group. Controlled companies are generally exempt from exchange rules requiring that a majority of the members of the Board be “independent” and from exchange rules governing the compensation committee and the nomination committee of the Board. A controlled company claiming exemption from any exchange rules must disclose in its periodic filings with the SEC that it is claiming such exemption and the basis for its determination that it is entitled to such exemption.
- <sup>75</sup> NYSE Rule 202.06 and NASDAQ Rule IM-5250-1 each list, among other things, earnings, corporate reorganizations and acquisitions, major management changes and other substantive items of unusual or non-recurrent nature as events that issuers are required to disclose under this general obligation. The rules of each exchange also require issuers to make a clear and complete disclosure if rumors or unusual market activity indicate the public disclosure of information regarding facts that the issuer sought to keep secret such as merger negotiations or an adverse business development.
- <sup>76</sup> NYSE Rule 202.06 and NASDAQ Rule 5250(b). The issuer must inform the staff of the applicable exchange of the substance of the announcement prior to the issuer’s general disclosure of the announcement. The disclosure to the public must then be made through the fastest available means that complies with Regulation FD.
- <sup>77</sup> For a description of communication methods that comply with Regulation FD, see note 60 and the accompanying text.
- <sup>78</sup> NYSE Rule 203.03 and NASDAQ Rule 5250(c)(2).
- <sup>79</sup> These events include changes in the issuer’s business, management, dividend policy and securities. For a complete list of these specified events and the applicable disclosure deadlines, see NYSE Rules 204.01-204.25 and NASDAQ Rule 5250(e).
- <sup>80</sup> NYSE Rule 802.03 and NASDAQ Rule 5810(b).
- <sup>81</sup> Form 20-F Item 8. As discussed in Section I.D, EGCs need only file two years of audited financial statements in their registration statements.
- <sup>82</sup> Form 20-F Items 3 and 8.
- <sup>83</sup> Form 20-F Items 3 and 8.
- <sup>84</sup> Form 20-F Item 4.B, and Items 801-802 and 1201-1208 of Regulation S-K.
- <sup>85</sup> Form 20-F Item 5. This section also requires management to identify any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the issuer’s earnings, liquidity or capital resources.
- <sup>86</sup> Form 20-F Item 6.
- <sup>87</sup> Under Form 20-F Item 7.A(1), “major stockholders” means stockholders that are the beneficial owners of 5% or more of each class of the issuer’s voting securities (unless the issuer is required to disclose a lesser percentage in its home country, in which case that lesser percentage applies).
- <sup>88</sup> Form 20-F Item 7.A.
- <sup>89</sup> Form 20-F Item 7.B. “Related parties” include, among others: (a) enterprises that, directly or indirectly, control, are controlled by or are under common control with, the issuer; (b) unconsolidated enterprises in which the issuer has a

significant influence or which has significant influence over the issuer; (c) individuals owning, directly or indirectly, an interest in the voting power of the issuer that gives them significant influence over the issuer and close members of any such individual's family; and (d) key management personnel, including directors and senior management of the issuer and close members of any such individual's family.

<sup>90</sup> Form 20-F Item 10.B-C.

<sup>91</sup> The certifications required under the Sarbanes-Oxley Act are discussed in note 47.

<sup>92</sup> If the securities being issued are debt, warrants, rights, American Depositary Shares or securities other than equity securities, Form 20-F Item 12 calls for disclosure of specific information regarding the terms of those securities. For example, if the issuer is registering debt securities, it must disclose, among other things, information regarding interest, conversion, maturity, redemption, retirement of the securities, liens granted in connection with the securities and subordination of the holders of the securities to other security holders or creditors.

<sup>93</sup> Form 20-F Items 1-3, Item 9.

<sup>94</sup> Form 20-F Item 8.A.

<sup>95</sup> Form 20-F Item 3.B.

<sup>96</sup> Form 20-F Instructions As To Exhibits 7.

<sup>97</sup> Registration statements filed on Form F-1 or F-3 need not include certain specified information that would otherwise be required on annual reports filed on Form 20-F regarding certain topics, including uses of proceeds for prior securities offerings, controls and procedures, code of ethics and purchases of equity securities by the issuer and affiliates.

<sup>98</sup> Issuers are generally required to attach as exhibits any contract that is material to the issuer, falls outside of the ordinary course of the business of the issuer and its subsidiaries and (a) is to be performed in whole or in part on or after the date the issuer files a registration statement or (b) was entered into not more than two years before the filing date. Material leases and contracts with certain related parties must also generally be disclosed as exhibits unless they fall into certain specified categories.

<sup>99</sup> Item 601 of Regulation S-K. Documents attached to filings as exhibits become publically available. To the extent an agreement that the issuer would otherwise be required to file as an exhibit contains business secrets or other confidential commercial or financial information (or falls into one of several other categories of information), the issuer may apply for confidential treatment of the agreement or sensitive portions of the agreement under Securities Act Rule 406 and/or Exchange Act Rule 24b-2.

<sup>100</sup> This criterion applies to issuers listing in connection with an IPO. Under NYSE Rule 102.01A, issuers listing in connection with a transfer from another exchange or a quotation may also satisfy this requirement if it has either (x) 2,200 total stockholders and an average monthly trading volume of 100,000 shares for the most recent six months or (y) 500 total stockholders and an average monthly trading volume of 1,000,000 shares for the most recent 12 months.

<sup>101</sup> Under NYSE Rule 102.01B, shares held by directors, officers, their immediate family members or certain other significant stockholders are excluded from the number of publicly held shares.

<sup>102</sup> NYSE Rule 102.01.

<sup>103</sup> NYSE Rule 103.01A.

<sup>104</sup> In addition, if the issuer is issuing ADRs, the NCM minimum listing standards require that it issue a minimum of 400,000.

<sup>105</sup> NASDAQ Rule 5505(a).

<sup>106</sup> Tests under the following financial standards are shortened where applicable on account of the shorter financial history that the JOBS Act requires EGCs to present.

<sup>107</sup> NYSE Rule 102.01C.

<sup>108</sup> NYSE Rule 103.01B.

<sup>109</sup> NASDAQ Rule 5505(b).

<sup>110</sup> The NASDAQ quantitative maintenance standards listed below apply to NCM listed issuers. Differing standards apply to issuers listed on NASDAQ Global Select Market and NASDAQ Global Market.

<sup>111</sup> NYSE Rule 802.01A.

<sup>112</sup> NASDAQ Rule 5550(a).

<sup>113</sup> NYSE Rule 802.01C.

<sup>114</sup> NASDAQ Rule 5550(a).

<sup>115</sup> NYSE Rule 802.01B.

<sup>116</sup> NASDAQ Rule 5550(b).

<sup>117</sup> Under NYSE Rule 303A.02, a director is independent if the issuer's Board affirmatively determines that he or she has no material relationship with the listed issuer (either directly or as a partner, stockholder or officer of an organization that has a relationship with the issuer) and does not fall into one of the other categories enumerated in the rule.

<sup>118</sup> NYSE Rule 303A.01.

<sup>119</sup> NYSE Rule 303A.03.

<sup>120</sup> Under NASDAQ Rule 5605(a)(2), an "independent" director is a director other than an executive officer or employee of the issuer, or any other individual having a relationship which, in the opinion of the issuer's Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The rule also enumerates specific categories of individuals who are deemed to be not independent, including any director who was employed by the issuer in the past three years.

<sup>121</sup> NASDAQ Rule 5605(b)(1).

<sup>122</sup> NASDAQ Rule 5605(a).

<sup>123</sup> NYSE Rule 303A.00.

<sup>124</sup> NYSE Rule 303A.11.

<sup>125</sup> NASDAQ Rule 5615(a)(3).

<sup>126</sup> NYSE Rule 303A.04(b).

<sup>127</sup> NYSE Rule 303A.04(b).

<sup>128</sup> NASDAQ Rule 5605(e).

<sup>129</sup> NASDAQ Rule 5605(e)(2).

<sup>130</sup> NYSE Rule 303A.00.

<sup>131</sup> NYSE Rule 303A.11.

<sup>132</sup> NASDAQ Rule 5615(a)(3).

<sup>133</sup> NYSE Rule 303A.05(a). Under NYSE Rule 303A.02(ii), the Board of a listed issuer must consider whether a director appointed to the compensation committee who otherwise is independent under NYSE Rules has a relationship with the listed issuer that is material to the director's ability to be independent from management in connection with his or her duties as a member of the compensation committee. This includes an analysis of the individual director's compensation and his or her affiliate relationship with the issuer and its senior management.

<sup>134</sup> NYSE Rule 303A.05(b).

<sup>135</sup> NASDAQ Rule 5605(d)(2).

<sup>136</sup> NASDAQ Rule 5605(d).

<sup>137</sup> NYSE Rule 303A.00.

<sup>138</sup> NYSE Rule 303A.11.

<sup>139</sup> NASDAQ Rule 5615(a)(3).

<sup>140</sup> NYSE Rule 303A.06-07.

<sup>141</sup> To be "independent" under Exchange Act Rule 10A-3(b), a director may not be an affiliate of the issuer or any subsidiary of the issuer and may not accept any consulting, advisory or other compensatory fee from the listed company, other than in his or her capacity as a member of the committee, the Board, or any Board committee. The rule contains a non-exclusive safe harbor under which a person is not considered an affiliate of the issuer if the person does not own 10% or more of the issuer's voting securities and is not an executive officer of the issuer. Any director who serves as an executive officer, employee, general partner or managing member of an affiliate is also deemed to be an affiliate and, thus, not independent.

Notably, there are certain exceptions to this requirement for directors of foreign private issuers under Exchange Act Rule 10A-3(b)(1)(iv). A director of a foreign private issuer is exempt from the requirement that he or she be independent as long as he or she is not an executive officer of the issuer and is either elected or named to the Board or audit committee pursuant to the issuer's governing law, constitutional documents or a collective bargaining agreement or similar document. In addition, a director who would otherwise be considered an affiliate or a representative of an affiliate of a foreign private issuer (and thus not independent) will not be considered an affiliate for purposes of determining independence if the director is not an executive officer of the issuer and either (a) a non-voting member of the committee or (b) a representative or designee of a foreign government or a foreign government entity who is an affiliate of the issuer. A foreign private issuer that relies on one of these exemptions must disclose on its annual report on Form 20-F its assessment of whether (and, if so, how), such reliance will materially adversely affect the ability of the audit committee to act independently and satisfy the other requirements of Exchange Act Rule 10A-3(b).

<sup>142</sup> For further description of the duties assigned to audit committees of listed issuers under Exchange Act Rule 10A-3, see note 47.

<sup>143</sup> NYSE Rule 303A.07.

<sup>144</sup> NASDAQ Rule 5605(c)(2).

<sup>145</sup> NASDAQ Rule 5605(c)(2).

<sup>146</sup> NASDAQ Rule 5605(c)(1).

<sup>147</sup> NYSE Rules 303A.00 and 303A.06. For further description of the requirements imposed by Exchange Act Rule 10A-3, see notes 47 and 141.

<sup>148</sup> NYSE Rule 303A.00.

- <sup>149</sup> NASDAQ Rules 5605(c)(2)(A)(ii) and 5615(a)(3).
- <sup>150</sup> NASDAQ Rule 5605(c)(3).
- <sup>151</sup> NASDAQ Rule 5615(a)(3).
- <sup>152</sup> NYSE Rule 302.00.
- <sup>153</sup> NYSE Rule 310.00(A).
- <sup>154</sup> NYSE Rule 402.02.
- <sup>155</sup> NASDAQ Rule 5620.
- <sup>156</sup> If the issuer files its proxy statement via EDGAR, it has fulfilled its notification requirement with NASDAQ.
- <sup>157</sup> NASDAQ Rule 5620.
- <sup>158</sup> NASDAQ Rule 5615(a)(3).
- <sup>159</sup> NYSE Rule 312.03.
- <sup>160</sup> Under NYSE Rule 312.05, an issuer need not obtain stockholder approval for an issuance of securities when (a) the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and (b) reliance by the issuer on this exception is expressly approved by the audit committee of the Board. An issuer that receives such an exception must mail to all stockholders not later than 10 days before issuance of the securities a letter alerting them to its omission to seek the stockholder approval that would otherwise be required and indicating that the audit committee of the Board approved the issuance.
- <sup>161</sup> Under NYSE Rule 312.03(c), this rule also encompasses securities exercisable for, or convertible into, common stock.
- <sup>162</sup> NYSE Rule 312.03(c).
- <sup>163</sup> Under NYSE Rule 312.03(b), this rule also encompasses securities exercisable for, or convertible into, common stock.
- <sup>164</sup> Under NYSE Rule 312.03(b)(3), a substantial interest includes an interest of the director, officer or security holder that exceeds one percent of the number of shares of common stock outstanding before the issuance or one percent of the voting power outstanding prior to the issuance.
- <sup>165</sup> NASDAQ Rule 5635.
- <sup>166</sup> Under NASDAQ Rule 5635(f), an issuer need not obtain stockholder approval for an issuance of securities when (a) the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and (b) reliance by the issuer on this exception is expressly approved by the audit committee or a comparable body of the Board comprised solely of independent, disinterested directors. An issuer that receives such an exception must mail to all stockholders not later than 10 days before issuance of the securities a letter alerting them to its omission to seek the stockholder approval that would otherwise be required and disclosing, among other things, the terms of the transaction. The issuer must also make a public announcement by filing a Form 8-K, where required by SEC rules, or by issuing a press release disclosing the same information as promptly as possible, but no later than 10 days before the issuance of the securities.
- <sup>167</sup> Under NASDAQ Rule 5635, this rule also encompasses securities exercisable for, or convertible into, common stock.
- <sup>168</sup> NASDAQ Rule 5635(d). In determining whether stockholder consent is needed under this rule, the issuance will be considered together with sales by officers, directors and “substantial stockholders.”
- <sup>169</sup> NASDAQ Rule 5615(a)(3).

<sup>170</sup> NYSE Rule 313.00.

<sup>171</sup> NYSE Rule 313.00.

<sup>172</sup> NASDAQ Rule 5640.

<sup>173</sup> NASDAQ Rule 5640.

<sup>174</sup> NYSE Rule 313.40.

<sup>175</sup> NASDAQ Rule 5640.

<sup>176</sup> NYSE Rule 314.00 describes “related party transactions” as normally including transactions between officers, directors and principal stockholders, on the one hand, and the issuer, on the other hand.

<sup>177</sup> NYSE Rule 314.00.

<sup>178</sup> NYSE Rule 303A.10.

<sup>179</sup> NYSE 303A.10.

<sup>180</sup> NASDAQ Rule 5630. For foreign private issuers, related party transactions are transactions or loans between the company and the individuals described in note 89.

<sup>181</sup> NASDAQ Rules 5630(a) and 5610.

<sup>182</sup> Under NASDAQ Rule 5610, the code of conduct must comply with the definition of “code of ethics” under the Sarbanes-Oxley Act.

<sup>183</sup> NASDAQ Rule 5615(a)(3).