IPO READINESS MEMO

Non U.S. ISSUERS

GOODWIN

IPO Readiness Memo – Non U.S. Issuers

SECTION I

INTRODUCTION

This memorandum is intended to provide a practical, executive level overview of key considerations for non-U.S. issuers who are contemplating raising equity capital in the U.S. Our experience demonstrates that anticipating the requirements and issues that will arise in a U.S. public offering in advance of the commencement of the offering is cost-effective and greatly increases the likelihood of a successful transaction. Since many aspects of the U.S. capital markets and securities laws will be unfamiliar to non-U.S. issuers, anticipating potential pitfalls is especially critical for them.

The globalization of commerce has been accompanied by a rise in the number of non-U.S. companies seeking to access the U.S. securities markets. While the absolute number of non-U.S. companies seeking to access the U.S. securities market in any given year rises and falls in tandem with overall market conditions, initial public offerings ("IPOs") by foreign companies on U.S. exchanges averaged approximately 20% of all IPOs in the U.S. each year over the last decade.

Accessing the U.S. capital markets requires preparation and hard work but is an entirely doable and potentially rewarding undertaking. It is our job to help you turn the relevant rules of the road into a competitive advantage, to anticipate problems that may arise based on past experience, and to smooth the bumps. In this regard, this memorandum focuses on several key areas with important lead time or cost implications:

- Financial statement requirements – a non-U.S. issuer will, depending on its size, need two or three years of audited financial statements;
- Board composition – a non-U.S. issuer will be required to have an independent audit committee and will often be expected to have an independent compensation committee and a majority of independent directors on its board of directors;
- The Securities and Exchange Commission ("SEC") review and comment process – the U.S. offering process will involve approximately 3-4 months;
- Requirements under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or the "Sarbanes-Oxley Act") – public companies in the U.S. are required to implement controls and procedures designed to assure financial statements and disclosures are accurate; and
- Unique aspects of the U.S. securities markets relative to other global markets.

This overview is by nature general as the laws in this area are complex and constantly evolving. For example, the SEC is still in the process of promulgating rules applicable to public companies to implement various provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act enacted in 2010 (the "Dodd-Frank Act"), which among other things further expanded the already extensive corporate governance and disclosure requirements applicable to IPOs and public companies that were created under the Sarbanes-Oxley Act. In addition, in an effort to facilitate IPOs for "emerging growth companies" by reducing associated compliance costs, risks and other burdens, the Jumpstart Our Business Startups Act (the "JOBS Act") was signed into law on April 5, 2012, significantly relaxing many of the accounting, corporate governance and executive compensation requirements under Sarbanes-Oxley and the Dodd-Frank Act. Emerging growth companies, as defined under the JOBS Act, broadly include all companies with gross annual revenue of less

than $1.07 billion during their most recently completed fiscal year whose first public offering of common equity securities occurred on or after December 9, 2011. More recently, the SEC has been extending certain benefits under the JOBS Act and relaxing certain other rules for all issuers, regardless of size, to help facilitate capital formation in the public markets. An issuer will be able to retain its status as an emerging growth company until the earliest of: (i) the last day of the fiscal year in which its total gross revenues equaled $1.07 billion or more; (ii) the last day of the fiscal year following the fifth anniversary of its first sale of common equity securities pursuant to an effective registration statement; (iii) the date on which such issuer has, during the previous three-year period, issued more than $1 billion in non-convertible debt; and (iv) the date on which such issuer is deemed to be a "large accelerated filer" under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which could occur as early as the end of the company's first full fiscal year after its IPO.

We would be happy to provide additional information concerning any of the topics contained in this memorandum at your convenience.

SECTION II

THE U.S. REGULATORY FRAMEWORK – A BRIEF OVERVIEW

As a general rule, offers and sales of securities in the United States must either be registered with the SEC under the Securities Act of 1933, as amended (the "Securities Act"), and applicable state securities or "blue sky" laws, or they must be eligible for an exemption from these registration requirements. Each specific securities transaction must be registered or exempt, in contrast to the procedure in many non-U.S. markets in which a class of an issuer's shares is listed, allowing any shares of that class to be sold in the market by shareholders. Accordingly, there are generally two principal options available to a non-U.S. issuer seeking to access the U.S. capital markets:

- a registered, underwritten public offering accompanied by listing on a U.S. exchange; or
- a private offering to institutional investors pursuant to an exemption from the registration requirements of the U.S. securities laws; and
- either one of these options may be implemented in connection with the establishment of an American Depository Receipt ("ADR") facility, which can facilitate either public or private offerings and trading.

Each of these options – and their perceived advantages and disadvantages – is discussed below.

SECTION III

REGISTERED PUBLIC OFFERINGS BY NON-U.S. COMPANIES

A public offering and exchange listing in the U.S. is a relatively lengthy and expensive process. However, it is also a process that results in access to a wide range of potential investors and an extremely liquid trading market, in addition to U.S. securities analyst coverage and media exposure. As a public company trading on a U.S. exchange, a non-U.S. company generally will also become subject to the corporate governance and ethics standards applicable in the United States under (i) Sarbanes-Oxley, as further supplemented by rules adopted by the SEC, and (ii) rules adopted by either the New York Stock Exchange ("NYSE") or the NASDAQ Stock Market ("NASDAQ"). Furthermore, once the offering is completed, the company will be subject to the ongoing reporting requirements of the Exchange Act, generally via the SEC's "EDGAR" electronic reporting system.

The advantages and disadvantages of a U.S. public offering and exchange listing include the following:

Advantages:

Shares can be offered and sold to a wide array of potential investors, both institutional and retail.

Listing on a U.S. exchange provides access to the most liquid equity markets in the world.

A U.S. exchange-listed company is more likely to attract robust research coverage and more U.S. market makers.

A U.S. registered listing creates acquisition currency that can facilitate acquisitions of other companies, particularly on a tax-deferred basis.

A non-U.S. company's securities may be priced higher if listed/traded on a U.S. exchange than might be the case otherwise.

Disadvantages:

Generally, a slower and costlier path to market, with minimum lead times of three to four months.

Costs/burdens associated with SEC registration, including detailed disclosure requirements and U.S. GAAP reconciliations if IFRS financial statements are not available.

Costs/burdens associated with corporate governance compliance under the Sarbanes-Oxley Act, including internal control attestation and audit committee composition.

Costs/burdens associated with ongoing reporting requirements with the SEC.

Heightened risk of shareholder litigation as a U.S. public company

It is important to note that public company rules and requirements do not always apply to U.S. and non-U.S. companies in equal measure. Indeed, if a company is a "foreign private issuer" under the U.S. securities laws, then its IPO and subsequent Exchange Act disclosure requirements will be less burdensome as compared to a domestic U.S. company. Some additional benefits of being a foreign private issuer include:

- the flexibility to prepare required financial statements in accordance with either U.S. GAAP, IFRS or local home country GAAP with reconciliation to U.S. GAAP;
- the ability to include less recent financial information in registration statements than domestic U.S. companies;
- foreign private issuers are not subject to the U.S. proxy rules in soliciting shareholder votes or the requirement to file quarterly reports on Form 10-Q and current reports on Form 8-K;
- officers, directors and affiliates of foreign private issuers are exempt from the short-swing profit reporting and disgorgement rules under Section 16 of the Exchange Act; and
- less stringent pre- and post-offering corporate governance requirements as compared to domestic U.S. companies.

A company organized outside of the United States will generally qualify as a "foreign private issuer" unless more than 50% of its outstanding voting securities are owned of record by U.S. residents *and* any one of the following is applicable: (1) a majority of its executive officers or directors are U.S. citizens or residents; (2) more than 50% of its assets are located in the U.S.; or (3) its business is administered principally in the United States. Non-U.S.

companies that do not meet the SEC's definition of foreign private issuer become subject to the more extensive requirements applicable to domestic U.S. public companies. Given the current investment climate, some non-U.S. companies that qualify as foreign private issuers nonetheless choose to voluntarily disclose additional information (such as executive compensation details) and comply with the more burdensome corporate governance requirements applicable to U.S. companies in an effort to build investor confidence and enhance their marketability. The considerations set forth below are relevant to non-U.S. companies that qualify as foreign private issuers under the U.S. securities laws.

1. *The Registration Statement*. One of the most important tasks involved in offering securities to the public in the United States is the registration of those securities with the SEC under the Securities Act. The registration statement must satisfy the requirements of the prescribed form (which, for a first-time non-U.S. issuer, will generally be SEC Form F-1) and must include detailed disclosures on a variety of topics, including the company's business and financial condition, management and shareholders, and must also include audited financial statements.[1] The SEC will carefully review the registration statement upon its submission and will then provide the issuer with a detailed set of comments on the various disclosures, including financial statements and accounting items. The issuer then amends the registration statement to address these comments and resubmits it to the SEC. After several rounds of back and forth, the SEC will indicate that it no longer has any objections to making the registration statement "effective". Once effective, sales can be made under the registration statement by means of the prospectus contained in the registration statement and delivered to potential purchasers.[2] Registration of securities with the SEC in conjunction with a listing of the securities on a U.S. stock exchange effects registration with the relevant states for all interests and purposes.

2. *Confidential Submissions of IPO Registration Statements*. Companies are now permitted to confidentially submit registration statements for their IPOs, as well as subsequent amendments, for confidential nonpublic review by the staff of the SEC, provided that all such confidential submissions are publicly filed at least 15 days prior to commencing the IPO road show. This change is significant in that it permits companies to begin the IPO registration process without making public their intention to do so and disclosing at the beginning of the process all of the sensitive business information required to be included in registration statements, such as material contracts. The SEC has confirmed that no registration fee will be due in connection with a confidential submission and the submission is not required to be signed or include the consent of auditors and other experts (although a signed audit opinion must be included).

3. *Confidential Treatment for Exhibits to the IPO Registration Statement:* Issuers are required to include disclosure in the registration statement regarding its material contracts. In addition, the SEC requires each material contract to be publicly filed as an exhibit to the registration statement. However, companies are permitted to preserve the confidentiality of certain competitively sensitive portions of the material contracts they are required to file with the SEC. The SEC has rules detailing how confidential treatment may be obtained for information contained in such documents. Generally, to be granted confidential treatment, such requests must be narrowly tailored and typically limited to information that, if publicly disclosed, would cause competitive harm to the issuer. The IPO registration statement will not be declared effective until all confidential treatment requests are resolved, so, given the time required for the SEC's review of the confidential treatment request and the potential involvement of the third parties with whom the company has contracted, we encourage companies to begin this process as early as possible.

4. *Timing/Process*. Preparation of the initial draft of the registration statement is generally a concerted effort involving the company, its counsel and its auditors, as well as the underwriters and their counsel. As time passes, existing financial statements can become "stale" and the filing must wait until more recent financial

[1] The requirement for financial statements are discussed in section IV below.

[2] An underwritten public offering is also subject to review and approval by the Financial Industry Regulatory Authority ("FINRA"), a self-regulatory organization that governs the underwriting activities of U.S. underwriters. The SEC generally will not declare a registration statement effective until it is notified by the FINRA that it has satisfactorily completed its review of the compensation arrangements between the issuer and the underwriters.

information can be prepared and finalized. Or, if the company is acquisitive, the filing may need to include financial statements for acquired businesses or properties. The company thus needs to coordinate these and other activities with the underwriters and its auditors to ensure a drafting period that is as smooth as possible.

While each IPO process is unique, most involving non-U.S. issuers proceed along a fairly familiar course. Once an underwriter is chosen, there is usually an all hands organizational meeting. From the date of the organizational meeting until closing, the IPO process often takes three to four months or more. This breaks down as follows:

- 4 to 8 weeks for working group drafting sessions prior to filing the registration statement with the SEC; then
- 4 to 5 weeks until delivery of first round of SEC comments, with 6 to 8 weeks overall for review by the SEC and resolution of SEC comments; then
- 2 to 4 weeks for the underwriters' marketing process (the "roadshow[3]") and the closing.

While it is possible to conduct a road show prior to resolution of SEC comments, issuers do so very, very rarely, as they do not wish to risk having to send revised disclosures to investors or, more importantly, delay the pricing of the offering to resolve comments and obtain clearance by the SEC.

5. *Selection of Underwriters*. Selecting the right underwriters is critical to a successful IPO. A company will be associated with the underwriter of the IPO, which means that the reputation of the underwriter will also be important to the success of the offering. Many companies undertake an interview process, meeting with underwriter candidates in a so-called "bake off" to discuss plans, experience, thoughts on valuation and willingness to serve as a lead manager, co-manager or other member of the underwriting team. For non-U.S. issuers who may have dual listings in U.S. and non-U.S. markets, global capabilities and reputation of an underwriter are obviously important requirements.

Some companies select underwriters on the basis of expected analyst coverage from the investment bank. Although analyst coverage is important to maintaining investor interest in a company's stock following its IPO, an expectation of future coverage by a particular analyst should not be the primary basis for selecting a lead manager. Prior well-publicized scandals involving relationships between U.S. investment banks and analysts in connection with underwriting engagements have led to separation between the two sets of professionals in the United States. U.S. analysts are no longer permitted to agree in advance to cover a company undertaking an IPO, nor can they agree to initiate coverage with any specific rating. A company may still lean toward an underwriter who has a "star" analyst on its team, but should understand that analysts may only develop their own investment models and cannot coordinate with the investment banking team. Any promise of coverage or a rating by the underwriter is not permitted. Analysts are prohibited from participating in a "pitch" for investment banking business or a roadshow, and, with limited exceptions for certain chaperoned communications and due diligence sessions, are restricted from communicating with investment banking department personnel or an IPO client in the presence of such personnel. This separation of the underwriters' personnel tends to result in a duplication of communication with the underwriters for senior management.

Importantly, in U.S. IPO practice there is no contractual relationship between the issuer and the underwriter until an IPO is priced, which occurs after the roadshow near the end of the IPO process. Except in the unusual circumstance where an IPO is terminated between pricing and closing (typically three trading days), underwriters bear their own expenses, including the fees of their counsel, whether or not the deal closes.

[3] Due to the ongoing global pandemic, roadshows have become virtual and are conducted over four days whereas previously these were conducted in person over a two-week period.

6. *Publicity*. The U.S. federal securities laws restrict the public distribution of certain information by companies that are registering a public offering of securities. The SEC has not specified exactly when these restrictions begin to apply, but has indicated that they may apply even before a company contacts an underwriter. Companies that are found to have violated these so called "gun-jumping" provisions are often required to delay or even stop their offerings, which can result in missing a market window. Restrictions on "gun-jumping" are intended to prevent a company from inappropriately promoting the sale of its securities. Although the SEC has implemented rules to clarify permitted pre-offering publicity and the JOBS Act permits emerging growth companies to engage in limited communications to "test the waters," the company should nonetheless establish a process for reviewing public announcements to ensure compliance with these laws and should consider creating a track record of announcing transactions, products and services. This will generally allow the company to continue to issue such public announcements even during the registration process, since disclosures relating to products and the like that are consistent with established practices generally should not be viewed as "gun jumping."

7. *Disclosures*. Much of the information required in a registration statement is similar to that required by the securities regulators of other countries, including descriptions of an issuer's business, board of directors and management. There are a number of required disclosure items, however, that are U.S.-specific, such as:

- management's detailed discussion and analysis of financial condition and results of operation (the "MD&A");
- tabular presentation of the company's capitalization and indebtedness as of a date within 60 days;
- dilution information, pro forma for the proposed offering;
- exhaustive risk factor disclosure;
- information on the company's exposure to market risk associated with activities in derivative and other financial instruments;
- disclosures regarding whether or not the company has a "code of ethics" and information about changes in its independent accountants; and
- the terms of agreements and other relationships with the underwriters.

Foreign private issuers are also required to disclose, among others, the following items in their Securities Act registration statements:

- information regarding any public takeover offers for the company in the current or prior year;
- detailed information regarding employees, including gross number, breakdown by activity and geographic region, material changes and the number of temporary employees;
- disclosure regarding whether any significant changes have occurred since the date of the most recent financial statements included in the document;
- a description of material contracts (which contracts must also be filed with the SEC as exhibits to the registration statement); and

- a description of the terms of charter documents, such as memorandum and articles of association, as well as any home country taxes, voting requirements or payment restrictions applicable to the offered securities.

All disclosures in registration statements filed with the SEC must comply with its "plain English" rules, which generally require that disclosures be in plain, everyday language, in the active voice and include tabular presentation or bullet lists for complex material whenever possible. Overly legal jargon or highly technical business terms are strongly discouraged.

8. *SEC Comment Letter Process*. The SEC staff provides companies with comments to IPO registration statements designed to improve and enhance disclosures in the registration statement. The comments take time to resolve and could result in a restatement of previously filed financial statements. Because the comment process could potentially delay an IPO or even cause a postponement if market conditions deteriorate, advance awareness of and preparation for comments likely to be made by the SEC can be an important timing advantage. Set forth below are several topics that have been recent areas of SEC focus when reviewing IPO registration statements.

- *Revenue Recognition*. The SEC staff has frequently requested clarification of the terms and conditions of revenue transactions and the circumstances that lead to the recognition of revenue. The SEC staff has commented on whether certain conditions for revenue recognition have been met, in particular those relating to the transfer of significant risks and rewards of ownership to the buyer. SEC guidance provides that revenue generally is realized or realizable and earned when all of the following criteria are met: (i) persuasive evidence of an arrangement exists; (ii) delivery has occurred or services have been rendered; (iii) the seller's price to the buyer is fixed or determinable; and (iv) collectability is reasonably assured. Specific areas of revenue recognition focus by the SEC include the accounting and disclosure of multiple-element arrangements, reseller arrangements, warranty and return right contingencies, and rebates and allowances.

The SEC staff has also focused on the appropriateness of an entity's accounting policy for certain expenditures associated with revenue transactions. Specifically, the staff has commented on the appropriateness of capitalizing certain costs and the classification of costs as a reduction of revenue or as an expense.

- *Statutory or Deemed Underwriter*. The SEC staff continues to insist that significant stockholders who are selling substantial amounts of stock in the IPO, and who purchased such stock relatively close to the time of the IPO, consent to being named as a "deemed underwriter" in the registration statement, and thus potentially accept the increased liability that attaches to underwriters.

- *OFAC*. The Office of Foreign Assets Control (OFAC) is an agency of the United States Department of Treasury which administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign states, organizations and individuals, such as Cuba, Iran, Syria, Sudan and North Korea. The SEC will comment on the disclosure provided by issuers with material business activities in or with such countries. If material and therefore required to be disclosed in its registration statement, the SEC can be expected to request detailed explanations of relevant transactions in part to assure that all relevant sanction laws are being complied with by the foreign private issuer.

- *Third-Party Support*. If a company wishes to make a competitive claim regarding its market share, products or technology, the SEC staff generally requires that the company disclose the basis for such claim and provide independent, objective, verifiable third-party support of such claim.

- *Cheap Stock*. The granting of equity to employees with purchase or exercise prices below the fair market value of the stock on the grant date results in a compensation charge to the company. The SEC invariably will focus on this "cheap stock" issue as part of the registration process, calling upon the company to justify the fair market value at which it made equity grants to employees, especially for grants made in proximity to the commencement of the IPO process. To resolve such inquiries in a timely manner (and avoid earnings charges and potential tax problems), it is imperative that the company's board of directors (or compensation committee) carefully determine valuations and contemporaneously document the process it has used to determine fair market value. The most persuasive indicator of value is a contemporaneous valuation report from a third-party appraiser. Valuations established in recent third-party acquisitions or financing transactions are also given significant weight. The SEC will often challenge the underlying valuations, as well as the related financial statement and MD&A disclosures.

- *Warrants and Convertible Securities*. The SEC staff focuses on the classification and measurement of warrants and conversion features found in convertible debt and convertible preferred stock. The SEC staff typically asks companies that have outstanding convertible securities that may be settled in common stock to address "beneficial conversion feature" concepts and provide a detailed description of the valuation methodologies used and the accounting literature followed when these securities were issued.

9. *EDGAR*. Foreign private issuers are required to file most of their SEC documents electronically through the SEC's EDGAR system, including registration statements and periodic reports.

10. *Liability*. If the registration statement contains an untrue statement of material fact or an omission of a material fact, the Securities Act and related regulations provide that purchasers may sue every person who signed the registration statement for damages or for rescission, including the company/issuer, principal executive and financial officers and members of the board of directors, and the underwriters, accountants and other experts named in the registration statement. It is important to note that Securities Act liability can now be predicated on any information conveyed to investors prior to or at the time of sale, even if it was conveyed orally or other than by means of inclusion in the registration statement.

While the company/issuer itself is absolutely liable for material misstatements, directors, officers, underwriters and others can assert a "due diligence" defense to liability, assuming they had no reasonable grounds to believe the statement was untrue at the time.

The U.S. securities markets have generally involved more litigation than non-U.S. securities markets, and many non-U.S. issuers view this as a reason to avoid them. It is important to note that the risk of litigation can be effectively managed though careful and scrupulous attention to good, clear and complete disclosure, supplemented by robust (albeit not inexpensive) insurance.

11. *Legal Audit/Due Diligence*. A thorough due diligence investigation will be performed on the company in connection with an IPO. Accordingly, many companies perform a legal audit of their material operations in advance of an IPO. The material operations that need to be audited differ from company to company. For example, if a company operates in a regulated environment, it should consider having counsel or a qualified consultant do a regulatory compliance audit. Any problems discovered in this audit can then be resolved in advance of the potential IPO. Further, as the underwriters begin their due diligence, the audit will allow the company to present a more organized and professional image, which is beneficial to completing the IPO on schedule. Other areas that might be audited are the intellectual property portfolios of technology companies, material agreements with business partners, the registration rights granted to investors in most U.S. venture-backed entities, and stock option records. The due diligence investigation conducted in connection with an IPO, as well as the drafting of the registration statement, is a costly undertaking.

In connection with the due diligence process, underwriters typically conduct background checks on the CEO and CFO of the company as well as certain other key persons associated with the company. The registration statement for a public offering must disclose involvement in legal and similar proceedings in the preceding ten years by officers, directors or persons nominated to become directors. The legal proceedings that must be disclosed include filings under the federal bankruptcy law or any state insolvency law (including filings by companies with which such persons were associated), convictions for any criminal proceedings, judicial or administrative findings prohibiting the person from engaging in any business practice or the sale of securities or commodities, and any other violation of any securities or commodities laws. In most cases, this information is solicited from officers and directors through the use of director and officer questionnaires.

In addition, companies should seek to resolve any ongoing disputes or threatened claims well in advance of any public filing of the IPO registration statement. An opposing party may attempt to capitalize on the risk that the uncertainty of pending litigation will impair the marketability of the IPO, and obtaining a favorable litigation settlement for the company may become more difficult.

12. *Resale of Restricted Securities*. The shares of stock purchased by officers, directors and affiliates of the company prior to the IPO are restricted and/or control securities for purposes of the U.S. securities laws. Once the company is public, these securities are often resold in the U.S. under an exemption from registration such as SEC Rule 144. In connection with an IPO, all officers, directors and significant stockholders, and often other security holders, will typically be required to enter into an agreement with the underwriters not to sell any shares of the company's stock for at least 180 days (the so-called "lock-up" agreement). Accordingly, although the holding period requirements under Rule 144 may permit an insider to sell restricted or control securities at an earlier date under the securities laws, the existence of the contractual lock-up agreement will continue to prevent such insiders and existing stockholders from selling during the first six months as a public company.

The lock-up agreements are generally collected at the time of the filing of the initial registration statement, thereby avoiding the need to negotiate to obtain them later. Accordingly, having a pre-existing contractual right to obtain lock-ups from insiders is advantageous. Companies considering an IPO should also assess whether contractual "registration rights" with stockholders exist and any need or desire to integrate these rights as part of the offering process.

Unlike domestic U.S. companies, officers, directors and affiliates of a foreign private issuer are not subject to Section 16 of the Exchange Act. Accordingly, they are not required to publicly report changes in their beneficial ownership of the issuer's securities or obligated to disgorge any profits from transactions in such securities occurring within any six month period.

SECTION IV

FINANCIAL INFORMATION

Required financial statements are often the most critical gating item in a U.S. IPO, and the most common source of costly delays, is the financial statements. If an issuer considering a U.S. offering could do only a single thing to prepare, in our view it would be to assure that it has available (or can obtain) all required financial statements prepared in an SEC-acceptable format and has anticipated and planned for likely SEC comments concerning the statements.

The financial information that non-U.S. issuers are required to include in SEC registration statements is substantially the same as that required of U.S. domestic issuers. The various requirements are discussed below:

1. *Type and Age*. The JOBS Act permits emerging growth companies to file IPO registration statements that only include two years of audited financial statements and selected financial data in addition to any required unaudited interim financial statements, with a correspondingly reduced MD&A section. For other companies,

the registration statement filed in connection with an IPO generally will need to contain three years of audited financial statements[4], two additional years of unaudited financial statements and unaudited interim financial statements. A registration statement on Form F-1 must also generally contain audited financial statements that include:

- statement of changes in equity;
- related notes and schedules required by the system of accounting standards under which the financial statements were prepared; and
- a note analyzing the changes in each caption of shareholders' equity presented in the balance sheet (if not included in the primary financial statements).

If the relevant issuer has been in existence for fewer than the required number of years, information must be provided that covers the life of the company/issuer (and any predecessors).

These audited financial statements may be no older than 15 months at the time the Form F-1 becomes effective. In addition, if the Form F-1 becomes effective more than nine months after the end of the last audited fiscal year, the registration statement must contain interim financial statements (which may be unaudited) covering at least the first six months of the current year and the corresponding interim period for the prior year.[5]

2. *GAAP*. Financial statements may be prepared either in accordance with U.S. GAAP or in accordance with another comprehensive body of accounting principles (i.e., home-country GAAP or IFRS). Financial statements prepared in accordance with IFRS, as adopted by the International Accounting Standard Board (IASB), are accepted "at par" by the SEC and do not need to be reconciled to U.S. GAAP. Financial statements prepared in accordance with other non-U.S. GAAP, however, must be reconciled to U.S. GAAP. The reconciliation must include an explanation of the principal differences between the accounting principles used and U.S. GAAP, a numerical reconciliation of net income and shareholders' equity as reported under its accounting practices and under U.S. GAAP, and an explanation of the reasons for the differences. First-time registrants are required to reconcile only the last two complete fiscal years of financial statements and the financial statements for any required interim periods. If a first-time registrant elects to prepare its financial statements in accordance with U.S. GAAP, only the last two complete fiscal years and any required interim periods must be presented if the information with respect to the earliest of the last three complete fiscal years has not previously been presented in a Securities Act or Exchange Act filing.[6]

3. *Currency*. Financials may be presented in any currency the issuer deems appropriate (assuming that the primary financials given to non-affiliated shareholders are in the same currency). If financials are in a currency other than U.S. dollars, the registration statement must also disclose, among other information, average exchange rates for each of the preceding five years and any interim period. U.S. dollars-equivalent convenience translations may be presented only for the most recent fiscal year and any subsequent interim period using the exchange rate as of the most recent balance sheet included in the filing, except that a rate as of the most recent practicable date must be used if materially different.

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4 For non-emerging growth companies, (i) three years of audited balance sheets are required if the balance sheets are not prepared in accordance with U.S. GAAP and three years are required in the company's home jurisdiction, and (ii) only two years are required if U.S. GAAP is used for initial registration in the United States.

5 If a non-U.S. issuer has published more recent interim financial information than would otherwise be required, the more recent financial information must also be included in the Form F 1.

6 Note that the SEC has indicated that it will generally require a no-action letter from a foreign private issuer who, after its initial SEC registration, desires to switch from presenting its financial statements in U.S. GAAP to home country GAAP or IFRS with a reconciliation to U.S. GAAP (or vice versa).

4. *Selected Financial Data.* The SEC has adopted amendments to modernize and streamline its disclosure requirements. As part of these amendments, the requirement to include selected financial data table (Item 301) has been eliminated.

5. *Restrictions on Pro Forma and Use of Non-GAAP Financial Measures*. Under SEC Regulation G, the use of "non-GAAP" financial measures in registration statements and other SEC filings is restricted. Subject to limited exceptions, Regulation G applies to non-U.S. issuers. A non-GAAP financial measure for purposes of Regulation G is one that:

- excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the income statement, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or

- includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

Examples of non-GAAP financial measures include earnings before interest and taxes (EBIT), earnings before interest, taxes, depreciation and amortization (EBITDA) and operating income that excludes expense or revenue items identified as non-recurring. If a non-U.S. company's primary financial statements are prepared in accordance with non-U.S. GAAP, then "GAAP" for purposes of Regulation G refers to the principles under which the financials are prepared (unless the non-GAAP financial measure is derived from or based on a measure calculated in accordance with U.S. GAAP).

Issuers that use non-GAAP financial measures in SEC filings must include a prominent presentation of the most directly comparable GAAP financial measure and a reconciliation of such measure to the directly comparable GAAP financial measure. The issuer must also provide a description regarding the uses and purposes of the non-GAAP financial measures. Because the SEC tends to be more tolerant of non-GAAP financial measures such as EBITDA if they are used by management and the board as internal financial metrics, establishing a precedent for their use while the company is private can facilitate later use a public company.

Nevertheless, a non-GAAP financial measure otherwise prohibited in a registration statement is permitted in a filing by a non-U.S. company/issuer if the measure is (i) required or expressly permitted by the standard-setter that establishes the generally accepted accounting principles used in the foreign private issuer's primary financial statements and (ii) included in the foreign private issuer's annual report or financial statements used in its home country.

6. *MD&A Information*. Issuers should include the following information in keeping with the required objectives of MD&A disclosure:

Provide readers with material information relevant to assessment of the financial condition and results of operations of the Issuer, including amounts and certainty of cash flows from operations and outside sources;

Focus on material events and uncertainties known to management of the Issuer that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or financial condition; and

Discussion and analysis from management's perspective of material financial and statistical information that will enhance a reader's understanding of the Issuer's financial condition, cash flows and other changes in financial condition and results of operations.

The objectives of MD&A, is intended to "emphasize a registrant's future prospects and highlight the importance of materiality and trend disclosures to a thoughtful MD&A" and "to remind registrants that MD&A should provide an analysis that encompasses short term results as well as future prospects."

7. *Financial Information for Acquired Businesses*. Rule 3-05 of SEC Regulation S-X generally requires that an issuer include in its registration statement audited financial statements covering any significant acquisition of a business that has been recently consummated, or for which consummation is "probable." In addition, Rule 11-01 of Regulation S-X further requires that, when a material acquisition has occurred or is probable, an issuer must include pro forma financial information in the registration statement for the most recent fiscal year and most recent interim period. There are various levels of applicable significance thresholds (e.g., 20%, 40% or 50% of total assets or income), requiring respectively one, two or three years of accompanying audited financial information. A non-U.S. company contemplating a U.S. registered offering that has recently completed a material acquisition, or that is planning a "probable" acquisition, should consult with its accountants and U.S. counsel to determine whether financial statement information for the acquired business will need to be included in the registration statement.

Company strategies involving concurrent or nearly concurrent IPO and acquisition processes are fairly complex due to the financial statement disclosure requirements. A company can go public in the U.S. with a pending acquisition but will need to disclose information concerning the target(s), including financial statements, if the target is sufficiently material. This necessitates gaining contractual rights to disclose the target's otherwise confidential information.

Target company financials may not be in SEC-ready format or may require reports from independent auditors who are not the issuer's regular auditors, both of which can cause costs and delays. The SEC may scrutinize the allocation of purchase price in connection with acquisitions, including allocations to amortizable intangibles making it important to have documentation and/or valuations supporting such allocations.

8. *The Finance Group*. A company considering a U.S. IPO should ensure that it has a sufficient number of qualified finance personnel to timely complete required certifications and filings. A public company ultimately needs to have in place and certify both internal control over financial reporting and disclosure controls and procedures.

9. *Auditor Independence Rules*. The non-U.S. company considering a U.S. IPO should select (or retain) a public accounting firm that is registered with the Public Company Accounting Oversight Board (the "PCAOB") and otherwise admitted to practice before the SEC. Accounting firms registered with the PCAOB are required to be independent. Independence is based on a number of factors. The PCAOB will consider all relevant circumstances, including all relationships between the accountant and the client, and is not limited to issues relating to reports filed with the SEC. An accounting firm will not be deemed independent of its audit client if it provides certain non-audit services, such as bookkeeping, financial information systems design, valuation services, actuarial services, management functions, or human resource functions including recruiting assistance, legal services and internal audit outsourcing services. Registered firms may still provide tax services and other services not specifically prohibited, provided that in each case such services are approved in advance by the company's audit committee.

SECTION V

CORPORATE GOVERNANCE

The Sarbanes-Oxley Act and related SEC regulations ushered in the broadest changes to the U.S. securities laws since the 1930s. The adoption of these new rules, including those adopted by the NYSE and NASDAQ, has resulted in expanded independent board and board committee responsibilities, changed relationships between auditors and issuers, and encouraged an aggressive SEC enforcement posture. While the Sarbanes-Oxley Act

on its face makes no distinction between U.S. issuers and non-U.S. issuers, the SEC has utilized its rulemaking and interpretive authority to accommodate the home country requirements and regulatory approaches of home jurisdictions of "foreign private issuers" in several instances.

The Dodd-Frank Act, which made sweeping reforms to financial market regulations, also includes a number of provisions that further increase the corporate governance and disclosure practices of public companies. Although its requirements are primarily directed to U.S. public companies, the Dodd-Frank Act contains certain provisions applicable to foreign companies, such as whistleblower regulations that reward employees for reporting violations directly to the SEC. Under the Sarbanes-Oxley Act, the Dodd-Frank Act and related corporate governance reforms, non-U.S. companies seeking to complete a registered public offering and exchange listing in the United States are now subject to a number of governance and disclosure requirements, which are discussed below.

1. *Internal Controls*. Publicly-registered companies in the United States must have internal controls over financial reporting that provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements. Each company's management must evaluate the effectiveness of the company's internal controls and file a certification regarding this evaluation in the company's annual reports beginning with the second annual report following an IPO. In addition, unless a "non-accelerated filer", each company's independent auditors must attest as to the adequacy of the company's internal controls (the so-called "Section 404 Certification") in such annual reports.

However, so long as a company maintains emerging growth company status under the JOBS Act, it will be exempt from the Sarbanes-Oxley requirement for public companies to provide an independent auditor attestation of management's assessment of the effectiveness of their internal control over financial reporting. Emerging growth companies, like non-accelerated filers, will still be required to maintain internal control over financial reporting and assess the effectiveness of their internal controls on an annual basis. Practical experience indicates that investors will expect the controls to be in place (or on course for adoption) when the company goes public. Accordingly, readiness and lead time relating to a company's internal controls has become an important factor in IPO planning.

Companies have found that building a system of internal controls that is in compliance with Section 404 is one of the major incremental cost elements of being a public company in the United States. According to statistics compiled by the SEC, the median cost of compliance with Section 404 requirements for a company with a public float in the range of $75 million to $750 million is approximately $700,000 per year. For many non-U.S. issuers, these costs and the associated certification processes are an important factor in considering a U.S. IPO. The JOBS Act seeks to alleviate this burden for emerging growth companies by exempting them from the auditor attestation requirement.

Systems of internal control, among other things, must provide reasonable assurance regarding the prevention and timely detection of the unauthorized acquisition, use or disposition of the company's assets. It should be noted that the company's regular accounting firm is not permitted to design the actual controls and procedures because the regular independent accounting firm will be required to attest to them. Accordingly, many companies opt to work with smaller accounting or consulting firms to develop the controls and procedures, doing so in communication with the regular auditors to ensure they will be found adequate. Use of an external advisor or advisors for this purpose is not required, however.[7]

Sarbanes-Oxley does not require an IPO company to submit auditor certifications regarding internal controls until prescribed dates after it is public. However, practical experience indicates that investors will expect an IPO

[7] Section 404 Certification requirements can also affect a company's acquisition strategy. The review and certification of financial controls by the acquiror's management and accountants will need to include those of acquired companies. Thus, consideration of financial controls is an important part of acquisition due diligence.

issuer at a minimum to have a coherent plan for developing them when the company goes public. Accordingly, anticipation of the requirements for internal controls has become a factor in IPO planning. In addition, the Section 404 Certification requirements can also affect a public company's post-IPO acquisition strategy. Once subject to the Section 404 Certification requirements, the review and certification of internal controls by a public company's management and accountants will need to include the internal controls of any acquired companies. Thus, consideration of internal controls is an important part of the acquisition due diligence process.

2. *Disclosure Controls and Procedures*. Once public, a U.S. public company is also required to have in place disclosure controls and procedures designed to ensure that the information required to be disclosed in its SEC reports is recorded, processed, summarized and reported accurately, and within the time periods specified by the SEC. As with the internal controls over financial reporting, a public company must report on the design and effectiveness of these disclosure controls and procedures in its public filings. In addition, both the CEO and the CFO of a public company must certify that they are responsible for developing and evaluating the disclosure controls and procedures and must disclose the results of their required evaluation in the company's public filings. Many companies considering a public offering adopt quarterly closings and management review procedures designed to track the practices for closings and disclosure that will be required once a U.S. company is public.

A company faces a variety of problems if it fails to materially comply with any financial reporting requirements applicable to it. Among other things, misleading public disclosures are likely to result in class action lawsuits alleging securities fraud. In addition, if financial results are restated, the CEO and CFO of the issuer may be required under the Sarbanes-Oxley Act to reimburse the company for any bonus received or profits realized from the sale of securities during the 12-month period following the initial release of the deficient statement. In addition, the Dodd-Frank Act mandates the SEC to adopt rules requiring companies (including foreign companies) listed on a U.S. stock exchange to implement policies to "claw back" compensation that was awarded in error prior to a restatement of their financial statements. The requirements, which have yet to be implemented through SEC rulemaking, would cover both present and former executive officers and would result in a recovery of any excess incentive compensation paid over the prior three-year period.

3. *Audit Committee Composition*. A NASDAQ or NYSE listed company is required to have an audit committee comprised of at least three independent members of the board. At least one independent member must be on the committee when the company first lists on the exchange, the second must be on the board not later than 90 days thereafter, and the third must be on the board not later than one year thereafter. As a practical matter most issuers in the U.S. have most of their independent directors identified and in place at the time of their IPO, or earlier, in order to allow the directors sufficient time to become familiar and comfortable with the company and its disclosures. In addition to each exchange's own "independent" standards (discussed below), members of the audit committee:

- may not accept, directly or indirectly, any consulting, advisory or other compensatory fee from the company or its subsidiaries;
- may not control, be controlled by, or under common control with the company. A director who owns, or whose affiliated company owns, less than 10% of the company's common stock will not be deemed to control the company. Investors who own 10% or more of a company (but less than 20%) may be deemed independent for audit committee purposes subject to an analysis of facts and circumstances;
- may not have participated in the preparation of the company's financial statements during the past three years; and
- must be able to read and understand financial statements.

In an effort by the SEC to accommodate home country practices, non-U.S. issuers are eligible for certain exceptions from these audit committee independence requirements, including:

- non-management employees can sit on the audit committee if the employee is elected or named to the board or committee pursuant to home country legal or listing requirements; and

- one member of the audit committee can be a shareholder, or representative of a shareholder or group, owning more than 50% of the company's voting securities, so long as the "no compensation" prong of the independence requirements is satisfied, the member has only observer status on, and the member is not a voting member or the chair of, the audit committee, and the member is not an executive officer of the issuer.

A non-U.S. company must also disclose in its annual report whether it has at least one "audit committee financial expert" serving on its audit committee and, if not, explain why it does not have such an expert. A "financial expert" must, among other things, have an understanding of the generally accepted accounting principles used by the company in preparing its primary financial statements filed with the SEC.[8]

4. *Board Composition and Other Committees*. U.S. companies that list on a U.S. exchange must have a majority of "independent directors" on their boards, as well as a nominating/corporate governance committee tasked with selecting future directors and a compensation committee tasked with determining officer compensation, both of which committees must be comprised entirely of "independent directors". For purposes of these listing requirements, independence generally requires an affirmative determination by the company's board of directors that no material relationship exists that would interfere with the exercise of independent judgment by such person. Foreign private issuers are permitted to follow home country practices instead of the provisions of the exchanges on these points. However, they must make their U.S. investors aware of the significant ways in which their corporate governance practices differ from those required of U.S. companies under the exchange listing standards. A foreign private issuer may publish such differences on its internet website and/or its annual report. The Dodd-Frank Act separately mandates the SEC to promulgate rules, which have not yet been proposed by the SEC, that require a foreign private issuer listed on a U.S. stock exchange to have independent compensation committees or disclose the reasons for its failure to do so.

5. *Personal Loans*. Personal loans and other extensions of credit to directors and executive officers are prohibited under the Sarbanes-Oxley Act (though loans made prior to July 2002 are grandfathered, provided they are not amended in any respect). Thus, actions that were once relatively common may no longer be undertaken, such as a loan to an officer to buy stock, unless the loan is repaid at the time the registration statement is filed with the SEC. Because of the vagueness of the statutory provision, other transactions that are not readily identified as loans may also be prohibited. Common arrangements such as deferred compensation, split-dollar life insurance policies and, according to some commentators, the "cashless" exercise of options may be deemed illegal personal loans. A company planning on going public should avoid situations in which directors or officers receive economic benefits that may be repaid at a subsequent time. As noted, this provision applies to a company as soon as the company files its registration statement, not upon consummation of an actual public offering. Accordingly, a company should consider restructuring any such loans prior to or shortly after engaging underwriters in connection with a U.S. public offering.

6. *Code of Ethics Disclosure*. A non-U.S. company/issuer must disclose whether it has adopted a code of ethics applicable to its principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. The company must also disclose any change to, or waiver

[8] For most non-U.S. companies, this would be home-country GAAP or IFRS. Note, however, that if a non-U.S. company elects to present U.S. GAAP financial statements rather than presenting home country or IFRS financial statements with a reconciliation to U.S. GAAP, then the "audit committee financial expert" must have an understanding of US. GAAP.

from, an adopted code of ethics that has occurred during the past fiscal year. A company disclosing that it has not adopted such a code must disclose this fact and explain why it has not done so.

7. *Pension Fund Blackout Periods*. Directors and executive officers are prohibited from directly or indirectly purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during certain pension plan blackout periods that prevent plan participants and beneficiaries from engaging in transactions involving issuer equity securities held in their plan accounts. For non-U.S. companies/issuers, this prohibition is triggered only if (i) a blackout period lasts more than three consecutive business days and restricts the ability of at least 50% of the participants or beneficiaries under all individual account plans from engaging in sale or purchase transactions in the issuer's securities and (ii) the number of U.S. plan participants subject to the trading restrictions is either greater than 15% of the issuer's worldwide workforce or greater than 50,000.

8. *Attorney Duties*. Attorneys representing non-U.S. companies before the SEC must report material violations of securities laws "up the ladder" within the issuer's governance structure.

9. *Related-Party Transactions*. Non-U.S. companies seeking to complete a listing in the United States are also required to report any related-party transactions or series of transactions which are material to the company or to the related person, or are otherwise unusual. Related persons include directors, director nominees, executive officers, 10% stockholders and close members of any of their families or entities under any of their control. This disclosure applies to any transaction since the beginning of the issuer's last three completed fiscal years. Thus, related party transactions consummated before a U.S. public offering may need to be disclosed in a registration statement. Non-U.S. companies seeking to list in the United States should consider altering or terminating any related party relationships which may not be viewed as appropriate in the public company context.

10. *Foreign Corrupt Practices Act*. A non-U.S. company that completes a public listing in the United States also becomes subject to the record keeping and improper payment provisions of the Foreign Corrupt Practices Act ("FCPA") which prohibits questionable payments (typically bribery) to foreign governmental officials. The FCPA applies to the conduct of the company and its officers, directors, employees, agents, stockholders or others acting on behalf of the company. The FCPA essentially recognizes that corporate accounting and control deficiencies may encourage improper practices and thus the FCPA sets standards in order to discourage such behavior, including imposing criminal liability upon persons who knowingly circumvent or knowingly fail to implement a system of internal controls. These provisions of the FCPA relating to internal controls are in addition to the provisions of the Sarbanes-Oxley Act relating to internal controls.

11. *Whistleblower Rules*. The SEC adopted rules to implement the whistleblower provisions of the Dodd-Frank Act, which are applicable to non-U.S. public companies, that provide for the payment of cash awards, subject to certain limitations and conditions, to whistleblowers that provide the SEC with information about a violation of the federal securities laws, including violations of the FCPA. To be considered for an award, a whistleblower must voluntarily provide the SEC with original information that leads to a successful enforcement action resulting in monetary sanctions exceeding $1 million. An individual whistleblower may be eligible for an award of 10-30% of the amount of the monetary sanctions. The provisions prohibit companies from retaliating against individuals who provide the SEC with information about possible federal securities law violations.

SECTION VI

LISTING ON A U.S. EXCHANGE

An integral part of a U.S. public offering is applying for listing on the relevant stock exchange and ensuring compliance with all applicable listing standards and corporate governance requirements. NASDAQ maintains three separate markets each of which has its own minimum quantitative listing standards primarily based on the size of the listed company – the NASDAQ Global Select Market for the largest public companies, the NASDAQ

Capital Market for smaller public companies and the NASDAQ Global Market which is the primary market for most NASDAQ-listed companies, especially in connection with an IPO listing. Initial listing standards for companies seeking to list their securities on the NASDAQ Global Market or the NYSE are discussed in Appendix A.

Historically, NASDAQ has tended to attract growth companies, especially those in the technology sector, while the NYSE has tended to attract companies in more mature industries, and for some the NYSE has carried a greater cachet. However, the lines between the two exchanges have blurred and many companies now move from the NYSE to NASDAQ and vice-versa. Listing fees on NASDAQ are generally lower than listing fees on the NYSE.

SECTION VII

POST-IPO REPORTING REQUIREMENTS

Once a non-U.S. company registers an offering of securities with the SEC and completes a listing on a national exchange, the company becomes subject to the ongoing reporting requirements of the Exchange Act and related rules and regulations.

1. *Annual Reports*. Non-U.S. companies that are publicly traded in the United States must file annual reports with the SEC on Form 20-F. In addition to a thorough description of the company's business and audited financial statements, the annual report must include detailed risk factors and a section in which management discusses and analyzes its financial condition and results of operations. Most of the disclosure items discussed above under "Corporate Governance ", such as statements and attestations regarding the effectiveness of internal controls, will need to appear in the annual report on Form 20-F. Likewise, a large number of the basic disclosure items that are required in an initial registration statement on Form F-1, will need to be carried forward and updated as necessary in the Form 20-F report.

2. *Certification Requirements*. The Sarbanes-Oxley Act requires that an issuer's principal executive and financial officers each certify the financial and other information contained in each annual report filed with the SEC on Form 20-F. These officers must personally certify, among other things, that the information contained in the annual report fairly presents the financial condition and results of operations of the issuer and that the issuer's disclosure controls and procedures have been designed to ensure that material information relating to the issuer is made known to them. A knowing misrepresentation in making these certifications is punishable by a fine of up to $1 million and imprisonment of up to 10 years, and a willful misrepresentation is punishable by a fine of up to $5 million and imprisonment of up to 20 years. False certifications may also be subject to the civil and criminal penalties applicable to violations of the Exchange Act.

3. *Periodic Reporting*. In addition to annual reports, non-U.S. listed companies must furnish interim reports to the SEC on Form 6-K. As a general rule, a non-U.S. company/issuer is only required to furnish to the SEC material information that the company has made publicly available in its home jurisdiction or otherwise provides to its shareholders. Non-U.S. companies need not file quarterly reports with the SEC but many furnish reports either quarterly or semi-annually using Form 6-K. Non-U.S. companies are not required to file current reports on Form 8-K upon the occurrence of material corporate events, as are U.S. domestic issuers. In other words, other than the annual report filed with the SEC on Form 20-F, a non-U.S. listed company does not generally have to make any incremental filings with the SEC beyond what it otherwise publicly discloses in its home country.

4. *XBRL*. In 2009, the SEC issued rules requiring public companies (both domestic and foreign) to provide their financial statements to the SEC and on their corporate website in an interactive format using Extensible Business Reporting Language (XBRL). In preparing the interactive data files, items in the financial statements are labeled with unique computer-readable "tags" based on a taxonomy specified by the SEC. Properly coding interactive data submissions can present challenges for companies newly implementing processes to comply

with these rules. All domestic and foreign public companies that prepare their financial in accordance with U.S. GAAP are now subject to these rules.

5. *Section 13(d) Reporting*. As a publicly traded company in the United States, holders of more than five percent (5%) of the outstanding shares of any class of the company's voting equity securities registered under the Exchange Act are required to promptly report their holdings and intentions to the company, the SEC, and in some cases, to the relevant stock exchange, on Schedule 13D. Passive institutional investors may use the less demanding Schedule 13G for reporting shareholdings, typically annually.[9]

6. *Proxy and Tender Offer Rules*. Non-U.S. companies listed on a U.S. exchange are generally exempt from the U.S. proxy solicitation rules in deference to home country practice, but are generally not exempt from the U.S. tender offer rules. Tender offers in the United States for securities of non-U.S. issuers are eligible for relief from certain of the procedural tender offer rules if the U.S. level of ownership is below certain thresholds.

SECTION VIII

PRIVATE OFFERINGS TO INSTITUTIONAL INVESTORS

1. *General*. A relatively easy way for foreign issuers to access the U.S. capital markets is to effect a private placement of securities to U.S. institutional investors.[10] A properly conducted private placement can enable a foreign company to raise capital in the U.S. markets without imposing the registration, reporting and corporate governance requirements that result from a public offering in the U.S. There are two primary ways to effect a private offering of securities under the U.S. private placement rules:

- an offering directly to "accredited investors" pursuant to Regulation D under the Securities Act; and
- an offering to "qualified institutional buyers" ("QIB"s) pursuant to Rule 144A under the Securities Act.

A private placement in the U.S. generally can be executed quickly, as there are usually no requirements for prior government filings or approvals. Securities sold in the U.S. in a private placement cannot be resold freely in the United States, and thus limited liquidity may be reflected in pricing terms.

No matter which private placement exemption is used, the securities acquired by investors in the offering will be "restricted securities" under the Securities Act and will thus not be freely transferable in the U.S. public markets. These resale restrictions will typically expire after a minimum of a six month holding period in the hands of non-affiliates of the issuer.

2. *Regulation D*. In a private placement of securities in reliance on the exemption from registration contained in Regulation D under the Securities Act, the company sells the securities directly to investors, generally using a subscription agreement and the services of a placement agent. To qualify for the exemption, each of the investors must generally be an "accredited investor", which generally includes:

- individuals with a net worth (or joint net worth with the individual's spouse) of $1 million or more;

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[9] As discussed earlier, foreign private issuers are exempt from Section 16 of the Exchange Act, which requires director, officers and 10% owners of an issuer's stock to file reports regarding their share ownership and to disgorge profits resulting from purchases and sales of such shares within a 6-month period.

[10] SEC Regulation D under the Securities Act makes some provision for private sales to a limited number of retail investors as well. Nevertheless, the applicable limitations and attendant regulation make a private retail offering of any meaningful size highly impractical and thus this option is not discussed. As a practical matter most U.S. private offerings of any size are limited to qualified institutional investors.

- individuals with an annual income in excess of $200,000 or joint annual income with a spouse in excess of $300,000 in each of the two most recent years and a reasonable expectation of reaching the same income level in the current year;

- corporations, partnerships and certain trusts with $5,000,000 in assets; and

- banks, insurance companies and registered broker dealers.

3. *Rule 144A*. In a private placement of securities relying on the exemption from registration contained in Rule 144A under the Securities Act, the issuer first sells the entire new issue of securities to one or more "initial purchasers", generally in reliance on the general exemption for non-public offerings contained in Section 4(2) of the Securities Act. The initial purchasers, usually large investment banks, then resell their allocations of securities to individual institutional investors they have identified in advance. In order for this resale to come within the exemption from registration provided by Rule 144A, each of the investors must be a "qualified institutional buyer", or QIB, which generally includes:

- institutions that own and invest, on a discretionary basis, at least $100 million of qualifying securities; or

- broker-dealers that own and invest, on a discretionary basis, $10 million of qualifying securities.

Eligible Securities. Rule 144A is only available for securities that are not listed on, and are not fungible with a class of securities listed on, a U.S. securities exchange.[11] However, 144A securities may be quoted through PORTAL, the NASD's automated screen quotation system for dealers and QIBs, and this market is generally thought to be relatively liquid.

Information Requirement. Another requirement of the Rule 144A exemption is that the issuer must agree to provide certain information to potential investors. The information consists of (i) a very brief statement of the nature of the issuer's business and the products and services that it offers and (ii) the issuer's most recent balance sheet, profit and loss and retained earnings statements and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation. All information must be "reasonably current" [12] and the financial statements should be audited to the extent reasonably available.

4. *Registration sometimes required even for a private offering*. Note that a non-U.S. company that raises capital in the United States strictly through one or more private placements to institutional investors can still be required to become a fully registered and reporting company under the U.S. securities laws. Section 12(g) of the Exchange Act generally requires any foreign private issuer that (i) has assets in excess of $10 million, (ii) a class of equity securities held by more than 2000 holders of record or 500 persons who are not accredited investors, and (iii) the class of equity securities is held by more than 300 persons in the United States to register as a reporting company with the SEC. Under Rule 12g3-2(b) as adopted by the SEC, however, an exemption from this registration and reporting requirement is available to a non-U.S. company/issuer that meets the following criteria:

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[11] Convertible and exchangeable securities are deemed for purposes of Rule 144A to be of the same class as the underlying securities if the securities had at issuance an "effective conversion premium" of less than 10%. If the securities are convertible at the option of the issuer, they are "fungible" regardless of the effective conversion premium.

[12] Information is considered "reasonably current" if the description of the issuer's business is as of a date within 12 months prior to the offering, the balance sheet included is as of a date within 16 months of the offering and the statements of profit and loss and retained earnings cover the 12 months preceding the balance sheet date. Interim profit and loss and retained earnings statements must be provided if the balance sheet date is 9 months or more prior to the date of the sale. For non-U.S. issuers, the required information must also meet the timing requirements of the issuer's home country or principal trading markets.

- The issuer publishes on the Internet in English all material non-U.S. disclosure documents that it has released since the first day of its most recently completed fiscal year;
- The applicable class of securities of the issuer must be listed on one or more stock exchanges outside the United States constituting the primary trading market, meeting either of the following requirements:
- At least 55% of the worldwide trading volume of the security during the issuer's most recently completed fiscal year must have taken place on no more than two stock exchanges outside the United States; or
- If the primary trading market consists of two non-U.S. markets, the trading volume of the relevant security in one of those non-U.S. trading venues must be greater than the trading volume in the U.S.
- The issuer has not otherwise triggered an Exchange Act registration or reporting obligation (generally meaning that the issuer does not have securities publicly offered or listed on a U.S. exchange (e.g., NASDAQ or the NYSE) and it has not otherwise voluntarily registered its securities under the Exchange Act).

To maintain the Rule 12g3-2(b) exemption, an issuer must continue to publish electronically its disclosure documents in English promptly after they are made available to the public in its primary trading market. In addition, it is important for any non-U.S. company having U.S. shareholders – including those institutions or high-net-worth individuals who purchase securities in an exempt private placement – to monitor the absolute number of shareholders of the issuer resident in the United States or otherwise ensure that it continues to meet the requirements under Rule 12g3-2(b) for exemption from registration under the Exchange Act.

5. *Summary:* Advantages and Disadvantages

Advantages of a U.S. Private Placement:

Relatively quick and easy way to access U.S. markets.

Offering process can generally be as long or as short as necessary/desired.

Avoids the burdens associated with SEC registration, such as detailed disclosure requirements and reconciling non-U.S. GAAP financial statements to U.S. GAAP.

Avoids the corporate governance compliance and liability burdens associated with the Sarbanes-Oxley Act.

No ongoing reporting requirements with the SEC.

Disadvantages of a U.S. Private Placement:

Investors limited to qualified institutions and high-net-worth individuals.

Non-public trading market, resulting in relatively limited liquidity in the United States.

As a non-public company, there will likely be significantly less information about the price of the securities, limited research coverage (if any) and few U.S. market makers.

Generally will require detailed offering memorandum and thorough "due diligence" review by placement agents/initial purchasers.

SECTION IX

OFFERING OF AMERICAN DEPOSITARY SHARES/RECEIPTS

1. *General*. Non-U.S. companies seeking to access the U.S. capital markets often choose to do so by conducting an offering of American depositary receipts (ADR's) (sometimes called American depositary shares, or ADS's). ADRs are negotiable certificates issued by a U.S. depositary (typically a bank or trust company) which represent specified rights in respect of the securities of an issuer deposited with the depositary. ADRs are dollar-denominated and evidence interests in securities deposited in a home jurisdiction with a custodian, which may be a branch office of the depository bank. Generally, an ADR holder has the right to exchange its ADRs for underlying shares at any time. In addition, holders generally may deposit shares into the ADR facility and receive ADRs.

ADRs may be sold in registered public offerings or pursuant to Rule 144A or in other forms of private placements. ADRs are often issued to facilitate trading without making a public offering. In fact, non-U.S. issuers often seek to establish a secondary trading market in the U.S. for ADRs first to determine whether an active market for their securities will develop, and later make a primary distribution. ADRs may also be offered in a registered public offering and listed on an exchange.

ADRs can help facilitate U.S. trading where the law of the jurisdiction of the issuer requires the transfer agent for the securities to be in the home country and settlement procedures in that country are more lengthy than U.S. stock exchange and custom permit. By setting an appropriate ratio of underlying shares to each ADR, an ADR facility also helps to "equalize" the trading price of a non-U.S. company's shares to that of similar companies trading in the U.S. ADRs thus create a U.S. dollar-denominated security that represents an interest in a security denominated in another currency (which may make the security an "eligible investment" for some institutions), as all trades settle, and all dividends are paid in, U.S. dollars. Where applicable, a non-U.S. issuer may avoid foreign investment or stock registration restrictions through use of an ADR facility.

2. *Form F-6*. Most ADR facilities must be registered with the SEC on the Form F-6 short-form registration statement. To be eligible to use Form F-6,

- the holder of ADRs must be entitled to withdraw the underlying securities;
- the underlying securities must either have been registered with the SEC or sold in exempt transactions (e.g., either offshore or in private placements); and
- there must be information about the issuer available to U.S. investors. In other words, the non-U.S. company/issuer must either be filing periodic reports with the SEC or must be exempt from reporting by virtue of Rule 12g3-2(b) (which as discussed above, requires the furnishing to the SEC of all communications made public or delivered to shareholders or stock exchanges in the issuer's home country).

Form F-6 requires disclosure with respect to the depositary and its obligations, the depositary mechanism and the rights of ADR holders, and the depositary agreement must generally be filed as an exhibit to the registration statement.

3. *Sponsored and Unsponsored Facilities*. There are two general types of ADR facilities: (i) sponsored facilities, which are created jointly by the issuer and the depositary and (ii) unsponsored facilities, where the issuer of the underlying security does not actively participate:

- Sponsored Facilities. ADRs are issued by a single depositary appointed by the issuer of the underlying security. The issuer enters into a deposit agreement with a depositary and pays fees. As discussed below, a sponsored facility can be an "unrestricted" ADR facility (i.e., open to the public) or a "restricted" ADR facility (i.e., where trading is generally limited to institutional investors).

- Unsponsored facilities. ADRs are issued by one or more depositaries in response to market demand but without a formal agreement with the issuer of the underlying security. The depositary (but not the issuer) files the Form F-6 registration statement with the SEC to register the ADRs.[13] Once effective, a depositary can accept deposits of the underlying securities. Costs of facility are borne by ADR holders.

Note that in order for an issuer to establish a sponsored ADR facility, the issuer and sponsor ADR bank must arrange for all unsponsored ADR facilities to be terminated. The SEC will not declare a Form F-6 registration statement for a sponsored ADR facility effective until these arrangements have been made.

4. *Restricted ADR Facilities*. An ADR facility can also be either "restricted" or "unrestricted". A restricted ADR facility (or a "Rule 144A ADR Facility") is used by non-U.S. companies to facilitate the making of a private offering pursuant to the exemption from registration afforded by Rule 144A.[14] As are all privately-placed securities, these ADRs are "restricted securities" under the U.S. securities laws and cannot be offered or sold to the general public other than upon registration under the Securities Act or the availability of an exemption from registration (e.g., passage of time or sales to other institutional investors). Like other restricted securities, however, restricted ADRs can be traded among qualified investors through the PORTAL trading system. No registration is required to create a restricted ADR facility, though issuers need to be mindful of the number of U.S. holders of their securities and timely apply for the Rule 12g3-2(b) exemption to registration if necessary.[15]

5. *Unrestricted Sponsored Facilities*: A non-U.S. company may choose to sponsor an ADS facility for several different reasons. There are thus three "levels" of sponsored facilities:

- *Level I*. Level I facilities are used for ADRs to trade in the U.S. over the counter market and must be registered with the SEC on the Form F-6 registration statement. Assuming the issuer is eligible to rely on the Rule 12g3-2(b) exemption from registration (discussed below), establishing a Level I facility does not require compliance with the Sarbanes-Oxley Act and other corporate governance provisions applicable to full reporting issuers. Similarly, establishing a Level I facility does not trigger any ongoing material U.S. reporting obligations or the filing of financial statements prepared in accordance with U.S. GAAP or reconciled to U.S. GAAP.

- *Level II*. Level II facilities are used to list ADRs on a U.S. stock exchange but without an accompanying public offering in the United States. These facilities require a greater degree of SEC reporting and corporate governance compliance and trigger ongoing U.S. reporting obligations. A foreign private issuer must file a Form 20-F with financial statements prepared either in accordance with U.S. GAAP or IFRS, or reconciled to U.S. GAAP. A Level II facility must also be registered on the short-form Form F-6.

- *Level III*. Level III facilities are used to make a fully-registered U.S. public offering. The non-U.S. company must file a registration statement for the public offering that meets the full SEC disclosure requirements for non-U.S. issuers, including audited financial statements prepared in accordance with U.S. GAAP or IFRS, or reconciled to U.S. GAAP. Substantially full compliance with U.S. corporate

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13 While the issuer may not be involved in the filing of the Form F-6 registration statement or establishing the facility, it must still make information available to U.S. holders by way of either periodic reporting with the SEC or via the information-furnishing exemption of Rule 12g3-2(b).

14 Offerings under Rule 144A and other private placements are discussed above in Section VIII of this memorandum.

15 See the Rule 12g3-2(b) discussion above in Section VIII of this memorandum.

governance requirements and ongoing U.S. reporting obligations are also required. In addition, a Level III facility must also be registered on the short-form Form F-6.

The chart that follows summarizes basic information with respect to some of the various types of ADR facilities available to non-U.S. issuers:

	Level I	**Level II**	**Level III**	**Rule 144A**
Trading	OTC Bulletin Board / Pink Sheets	NYSE, NASDAQ or AMEX	NYSE, NASDAQ or AMEX with New Capital Raising	Private Placement, PORTAL
SEC Registration	Form F-6	Form F-6	Form F-6 and F-1	None
Financial Reports	Exemption under Rule 12g3-2(b)	Form 20-F	Form 20-F	Exemption under Rule 12g3-2(b)
SOX/Corporate Governance Requirements	None	Must comply with SOX and applicable exchange requirements	Must comply with SOX and applicable exchange requirements	None

6. *Leakage of Restricted Securities*. The SEC has recently expressed concern regarding the possibility for leakage of restricted securities (i.e., shares sold directly in a Rule 144A offering or shares underlying Rule l44A ADRs) into the U.S. public market where the issuer proposes to sponsor an unrestricted ADR program. As a condition to declaring a Form F-6 effective (which is required in order to establish the unrestricted ADR facility), the SEC will require that a number of measures be taken to prevent restricted shares from being deposited into the unrestricted ADR facility, including separate CUSIP numbers and written certificates upon withdrawal of underlying shares acknowledging applicable transfer restrictions. With respect to outstanding shares sold directly under Rule 144A, shares must have been legended (so that they can be identified by the ADR depositary as restricted) or the issuer must have obtained written certifications from the initial institutional purchasers regarding resales. If satisfactory measures were not taken at the time of the Rule 144A offering to prevent leakage of restricted shares into the unrestricted ADR facility, the SEC's view is that the issuer must wait two years for effectiveness of the Form F-6 or consummate a registered exchange offer for the restricted ADRs.

7. *Fee Letter/Financial Incentives*. The fee letter is often the first agreement entered into between an issuer and the depositary bank and covers key points such as fees for the ADR facility, initial term, termination and recoupment provisions and financial incentives provided by the bank to the issuer. The amount of financial incentives available is generally a function of the potential profitability to the bank of the ADR facility. The fee letter is generally confidential and not filed with the SEC.

The depositary bank may offer significant financial incentives to the issuer for selecting the ADR bank as depositary. These incentives include payment of initial and annual stock exchange listing fees, reimbursement of costs for investor roadshows in the U.S., ongoing contributions to investor relations programs, reimbursement of fees of the issuer's counsel in establishing the ADR facility and profit-sharing between the ADR bank and issuer.

8. *Summary*: Advantages and Disadvantages.

Advantages of Establishing a U.S. ADR Facility:

- ADRs facilitate U.S. trading where home-country law requires the registrar to be local and/or settlement procedures are less efficient than in U.S.
- The right share-to-ADR ratio can synthetically set an appropriate share price for U.S. trading and create a U.S. Dollar-denominated security.
- A sponsored ADR facility can be used to "test the waters" before proceeding with a full-blown U.S. public offering.

Disadvantages of a U.S. Registered Public Offering and Exchange Listing:

- ADRs may be labeled as "foreign" (even on trading screens) which may diminish U.S. investor interest.
- When unaccompanied by a public offering and/or exchange listing, the ADR facility may not attract sufficient investor interest.
- ADRs require depositary arrangements and the filing of a Form F-6.
- The issuer of the underlying securities has less control over the depositary (which may issue ADRs in stock lending for its own account without underlying shares on deposit) than over a traditional New York transfer agent.

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This memorandum is intended to provide general information regarding the various options available to non-U.S. issuers contemplating securities offerings in the United States. The general discussion provided does not purport to be a complete analysis of every detail of each option. If you require additional information or have any questions regarding the foregoing, please feel free to contact us.

APPENDIX A

STOCK EXCHANGE LISTING STANDARDS

1. *Initial Listing Standards on NASDAQ*. To qualify for an initial listing on the NASDAQ Global Market, a non-U.S. issuer must satisfy one of the following entry standards:

- Option 1. (i) annual pre-tax income from continuing operations of at least $1 million in the most recently completed fiscal year or in two of the last three most recently completed fiscal years; (ii) at least 1.1 million publicly held shares; (iii) market value of publicly held shares (i.e., excluding shares held by directors, officers and 10 percent shareholders) of at least $8 million; (iv) bid price per share of $4 or more; (v) stockholders' equity of at *least* $15 million; (vi) at least 400 holders of 100 or more shares (i.e., a holder of a normal unit of trading); and (vii) at least three registered and active market makers with respect to the security.

- Option 2. (i) stockholders' equity of at least $30 million; (ii) at least 1.1 million publicly held shares; (iii) market value of publicly held shares of at least $18 million; (iv) a bid price per share of $4 *or* more; (v) at least three registered and active market makers with respect to the security; (vi) a two-year operating history; and (vii) at least 400 holders of 100 or more shares.

- Option 3. (i) at least 1.1 million publicly held shares; (ii) market value of publicly held shares of at least $20 million; (iii) a bid price per share of $4 or more; (iv) at least four registered and active market makers with respect to the security; (v) at least 400 holders of 100 or more shares; and (vi) either a market capitalization of $75 million or total assets and total revenue of $75 million each for the most recently completed fiscal year or two of the last three most recently completed fiscal years.

2. *Quantitative Listing Maintenance Standards on NASDAQ*. In addition, once a non-U.S. issuer has been listed on the NASDAQ Global Market, it must continue to satisfy one of the following maintenance standards:

- Option 1. (i) at least 750,000 publicly held shares; (ii) market value of publicly held shares of at least $5 million; (iii) stockholders' equity of at least $10 million; (iv) at least 400 holders of 100 or more shares; (v) a bid price per share of $1 or more; and (vi) at least two registered and active market makers with respect to the security.

- Option 2. (i) at least 1.1 million publicly held shares; (ii) market value of publicly held shares of at least $15 million; (iii) a bid price per share of $1 or more; (iv) at least four registered and active market makers with respect to the security; (v) at least 400 holders of 100 or more shares and (vi) either a market capitalization of $50 million or total assets and total revenue of $50 million each for the most recently completed fiscal year or two of the last three most recently completed fiscal years.

3. *Initial Listing Standards on NYSE*. A non-U.S. issuer must meet the following criteria to qualify for initial listing under the Alternate Listing Standards of the NYSE.[16] The company must have at least:

- 5,000 holders of 100 or more shares worldwide;

- 2.5 million publicly-held shares worldwide; and

[16] A non-U.S. company may also elect to satisfy the domestic listing standards of the NYSE but these standards focus, among other things, on the number of shares and shareholders in the U.S. Consequently, it is typically difficult for non-U.S. companies to meet these standards.

- $100 million market value of publicly-held shares worldwide.

In addition, an issuer must satisfy one of the following four standards to qualify for listing under the Alternate Listing Standards. The company must have at least:

- Option 1. an aggregate $100 million in pre-tax earnings for the last three fiscal years (a minimum of $25 million in each of the two most recent fiscal years);

- Option 2. (i) $500 million in global market capitalization, (ii) $100 million in revenues during the most recent 12-month period, and (iii) an aggregate $100 million operating cash flow for the last three fiscal years (a minimum of $25 million in each of the two most recent fiscal years);

- Option 3. $750 million global market capitalization (and $75 million in revenues for the most recent fiscal year); or

- Option 4. (i) $500 million in global market capitalization, (ii) at least 12 months of operating history, (iii) a parent or affiliated company that is a listed company in good standing, and (iv) a parent or affiliated company retains control of the entity or is under common control with the entity.

4. *Quantitative Listing Maintenance Standards on NYSE*. In addition, once a non-U.S. issuer has been listed on the NYSE, it must continue to satisfy the maintenance standard that relates to the initial standard under which it was listed:

- Option 1. If securities of the issuer were listed on the NYSE pursuant to Option 1 above, the company will be below compliance if: (i) its average global market capitalization over a consecutive 30 trading–day period is less than $50 million and (ii) at the same time, its total stockholders' equity is less than $50 million.

- Option 2. If securities of the issuer were listed on the NYSE pursuant to Option 2 above, the company will be below compliance if: (i) its average global market capitalization over a consecutive 30 trading–day period is less than $250 million and (ii) at the same time, its total revenues are less than $20 million over the last 12 months; or (iii) its average global market capitalization over a consecutive 30 trading-day period is less than $75 million.

- Option 3. If securities of the issuer were listed on the NYSE pursuant to Option 3 above, the company will be below compliance if: (i) its average global market capitalization over a consecutive 30 trading–day period is less than $375 million and (ii) at the same time, its total revenues are less than $15 million over the last 12 months (unless the company qualifies as an original listing under one of the other original listing standards); or (iii) its average global market capitalization over a consecutive 30 trading-day period is less than $100 million.

- Option 4. If securities of the issuer were listed on the NYSE pursuant to Option 4 above, the company will be below compliance if: (i) the listed company's parent/affiliated company ceases to control the listed company, or the listed company's parent/affiliated company itself falls below the continued listing standards applicable to the parent/affiliated company and (ii) its average global capitalization over a consecutive 30 trading-day period is less than $75 million and, (iii) at the same time, total stockholders' equity is less than $75 million.

Furthermore, the NYSE will promptly initiated suspension and delisting procedures with respect to a company that is listed under any financial standard if a company is determined to have average global market

capitalization over a consecutive 30 trading-day period of less than $15 million, regardless of the original standard under which it is listed.