

United States

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United States

*Robert A Solomon and Clifford R Pearl
Solomon Pearl Blum Heymann & Stich LLP
New York, New York,
and Denver, Colorado, United States*

Regulatory System

In General

US1 In response to the stock market crash of 1929 and the Great Depression that followed, the United States Congress enacted a number of statutes that form the basis for the regulation of securities in the United States. These statutes are the cornerstone of the modern United States federal securities regulatory system.¹

US2 The securities laws are intended to assist in facilitating capital formation by issuers (entities that issue securities to investors), while emphasising the need to provide full and fair disclosure to potential investors and existing shareholders. The basic tenet of the United States securities laws is not to directly control or prevent investment or to substitute the judgment and values of the government for market forces. Rather, the legislation mandates disclosure standards and patterns of behaviour so that information made available by issuers accurately reflects the business operations, risks, and benefits of a new investment or existing operation.

¹ The authors wish to acknowledge the assistance of William L Blum, Allen E F Rozansky, Michael J Semack, and Timothy R Spiel, attorneys at Solomon Pearl Blum Heymann & Stich LLP, in the research, preparation, and updating of this chapter.

US3 The objective is to make readily available sufficient accurate information so that potential investors can make a fully informed decision whether to buy, to continue to hold, or to sell a security. The United States securities laws also provide severe penalties to deter misrepresentation, deceit, and other fraudulent behaviour and to penalise persons or entities that act outside the law and regulations.

US4 Securities transactions in the United States are subject to regulation at both the federal and the state level. However, the primary regulation of securities laws is on the federal level. Federal pre-emption, over competing state interests, stems from the Interstate Commerce Clause of the United States Constitution.¹ Federal securities laws preserve the right of the various states to enact laws to regulate securities transactions, so long as such enactments do not conflict with the federal law.²

US5 Those transactions that are wholly within a state, or which do not affect interstate commerce, are those primarily regulated by state securities laws, although the impact or applicability of state securities laws should be considered and evaluated on all transactions. Known as ‘blue sky’ laws, the state laws regulate activities within each state, such as registration or exemption of securities transactions within the state and registration of brokers and dealers who operate within the state. Administration within a state is left to state securities law commissions which promulgate rules and regulations for securities transactions within those state borders.

US6 This chapter focuses on the United States federal law with regard to international securities transactions. It is intended to provide an overview of federal securities law as applied to international transactions.

US7 The chapter has been updated from previous releases to include recent changes regarding a harmonised international disclosure standard. While the chapter outlines the impact these changes are intended to have, there will undoubtedly

¹ United States Constitution, art I, s 8.

² See, eg, National Securities Markets Improvement Act of 1996, Public Law Number 104-290 (1996).

be ramifications and other developments that have been anticipated. Practitioners should continue to track and monitor these developments.

Federal Law

US8 From 1933 to 1940, the United States Congress enacted a number of statutes that form the basis for the securities regulation in the United States. These statutes, and the rules and regulations promulgated under the authority granted to the United States Securities and Exchange Commission as part of the applicable law, form the cornerstone of the modern federal securities regulatory system. These Acts¹ are as follows:

- The Securities Act of 1933,² commonly known as the ‘Securities Act’ or the ‘1933 Act’, regulates the activities of the issuers of securities and the offer and sale of securities;
- The Securities and Exchange Act of 1934,³ commonly known as the ‘Exchange Act’ or the ‘1934 Act’, established the United States Securities and Exchange Commission and regulates the trading of securities;
- The Investment Company Act of 1940,⁴ commonly known as the ‘Investment Company Act’, regulates the activities of investment companies; and
- The Investment Advisers Act of 1940,⁵ commonly known as the ‘Investment Advisers Act’, regulates the activities of investment advisors.⁶

1 In addition, two other significant laws were enacted during this era which still have applicability to certain United States securities law issues, ie, the Public Utility Holding Company Act of 1935, 15 United States Code, ss 79 *et seq.*, and the Trust Indenture Act of 1939, 15 United States Code, ss 77a *et seq.*; however, these Acts are outside the scope of this chapter.

2 Securities Act of 1933, 15 United States Code, ss 77a *et seq.*

3 Securities and Exchange Act of 1934, 15 United States Code, ss 78a *et seq.*

4 Investment Company Act of 1940, 15 United States Code, ss 80a *et seq.*

5 Investment Advisers Act of 1940, 15 United States Code, ss 81a *et seq.*

6 Generally, those investment advisers who (a) have more than US \$25 million of assets under management, or (b) are advisers to a registered investment company under the Investment Company Act, or (c) are required to register as investment advisers in 30 or more states, are required to register as ‘Investment Advisers’ with the Securities and Exchange Commission. Investment advisers who do not meet these thresholds are prohibited from registering with the Securities and Exchange Commission, and are governed in accordance with the applicable state investment adviser statutes. Investment Advisers Act Release Number IA-1733 (July 1998).

Securities and Exchange Commission

US9 The United States Securities and Exchange Commission was formed under the Exchange Act,¹ and it is charged with the administration and enforcement of the United States securities laws. The Securities and Exchange Commission has broad rule-making authority to accomplish its goals to provide protection for investors. Its primary focus is to ensure that securities markets are fair and honest. Rules and regulations promulgated by the Securities and Exchange Commission affect all aspects of the United States capital markets, including the issuance and after-market trading of securities, and the registration of brokers and dealers, investment companies, and investment advisors.²

US10 Part of the authority of the Securities and Exchange Commission is carried out through management and oversight of self-regulatory organisations, which today include the major United States securities exchanges, and the National Association of Securities Dealers, Inc (NASD). Whether the issue is the sale of securities, the trading of securities, the organisation of stock exchanges, the role of underwriters or broker-dealers, the availability of credit for stock transactions, or the use of investment companies or advisors, it is primarily the Securities and Exchange Commission that proscribes behaviour, monitors activities, and penalises wrongdoers. The Securities and Exchange Commission also serves as an adviser to the United States federal courts in corporate reorganisation proceedings under chapter 11 of the Bankruptcy Reform Act of 1978, as amended.³

US11 The Securities and Exchange Commission consists of five commissioners appointed by the President and confirmed by the United States Senate (each a ‘Commissioner’ and, collectively, the ‘Commissioners’). The Securities and Exchange Commissioners serve staggered five-year terms.⁴ To ensure that the Securities and Exchange Commission remains non-partisan, no more than three Commissioners may belong to the same political party. The Securities and Exchange Commission headquarters are in Washington, DC, although the

1 Securities and Exchange Act of 1934, 15 United States Code, s 78d.

2 See 17 Code of Federal Regulations, ss 230 *et seq*, for rules and regulations promulgated under the 1933 Act and 17 Code of Federal Regulations, ss 240 *et seq*, for rules and regulations promulgated under the 1934 Act.

3 Bankruptcy Reform Act of 1978, 11 United States Code, ss 364, 1125, and 1145.

4 Securities and Exchange Act of 1934, 15 United States Code, s 78d.

Securities and Exchange Commission has numerous field offices throughout the United States. The staff of the Securities and Exchange Commission is organised into divisions and offices with specific areas of responsibilities. The major divisions are:

- The Division of Corporation Finance, which is responsible for ensuring that disclosure requirements are met by publicly held companies whose securities are registered with the Securities and Exchange Commission;
- The Division of Market Regulation, which is responsible for registration and regulation of broker-dealers and oversight of the nation's stock exchanges, transfer agents, and clearing organisations;
- The Division of Investment Management, which is responsible for administering investment companies and investment advisers; and
- The Division of Enforcement, which is responsible for enforcing the federal securities laws and regulations.

US12 In addition, the Office of the Chief Accountant has the responsibility for advising the Securities and Exchange Commission on accounting and auditing matters while creating policies to achieve compliance with accounting and financial disclosure standards. This office oversees private sector efforts at the Financial Accounting Standards Board and the American Institute of Certified Public Accountants to improve financial and auditing standards and financial disclosure.

US13 The Office of International Affairs of the Securities and Exchange Commission has primary responsibility for the international enforcement of United States securities laws and regulatory co-operation among international securities regulators. Its duties include the investigation of suspected unlawful conduct, market surveillance, and the oversight of regulated entities in cross border transactions. The Office of International Legislative Affairs also assists with international litigation matters, including:

- Service of process;
- Gathering of evidence; and
- Enforcing of judgments abroad.

US14 In addition to its enforcement activities, staff members engage in ongoing discussions with their non-United States counterparts, including the International Organisation of Securities Commissions (IOSCO) and the Council of

Securities Regulators of the Americas, to facilitate cross border transactions, and to assist other countries and their regulatory bodies in developing policies to provide for investor protection, education, and confidence.

US15 The Securities and Exchange Commission has the pre-eminent role in the regulation of United States securities matters, including cross border securities matters. It has power to:

- Make rules;
- Examine and inspect regulated entities to determine compliance with law;
- Interpret and provide guidance on the securities laws;
- Investigate complaints and indications of possible law violations; and
- Provide statutory sanctions and enforce the securities laws and rules by administrative action, conduct civil litigation, and refer criminal conduct for potential prosecution.

US16 The Securities and Exchange Commission will exercise its prosecutorial powers to safeguard the integrity of the markets. The manifestation of these prosecutorial powers is evidenced by the fact that, in 1999, the Securities and Exchange Commission's investigations and actions resulted in court orders requiring non-compliant parties to disgorge illegal profits of approximately US \$650 million. Civil penalties authorised by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, the Insider Trading Sanctions Act of 1984, and the Insider Trading and Securities Fraud Enforcement Act of 1988 totalled more than US \$191 million.¹

US17 Conspicuously absent from its duties and authority listed above is the ability of the Securities and Exchange Commission to approve, disapprove, or guarantee the value or merit of any security. Moreover, the Securities and Exchange Commission will not bar from sale any security, even if the security has questionable value, although it may halt trading in securities that are the subject of illegal market manipulation activities. That is because the Securities and Exchange Commission's role is to ensure that issuers and market participants fully comply with securities laws and provide full and fair disclosure. The ultimate investment decision is left for the investor to make.

¹ Securities and Exchange Commission, 1999 Annual Report.

US18 Notwithstanding the fact that the Securities and Exchange Commission does not pass on the merits of any security, the testimonial as to the issuer's belief and faith in the United States market is revealed in the following statistics:

- Securities filings reached US \$2.1 trillion in 1999;
- Common stock offerings of almost US \$1.18 trillion were filed for registration in 1999; and
- Offerings filed by the first time registrants (IPOs) totalled approximately US \$118 billion.

US19 As further evidence of the United States market's strength, non-United States companies' participation in the United States public market continued to show strong growth in 1999. During 1998, nearly 164 foreign companies from 34 countries entered United States public markets for the first time. At year-end 1999, there were nearly 1,200 non-United States companies from 57 countries filing reports with the Securities and Exchange Commission. More than US \$244 billion was registered in 1999 by non-United States companies for public offerings which set a record for an amount registered in a single year.¹

State Law

US20 Although federal law applies to securities transactions that take place across state borders, many states also have enacted their own state securities laws, commonly known as state blue sky laws, to cover the offer and sale of securities, registration of broker-dealers, and trading of securities by citizens within a state's boundaries. In addition, securities transactions that occur in many states (which is common place for a large offering or an IPO) will be subject to the blue sky laws in each of those states.

US21 Some of these blue sky laws, however, have now been specifically pre-empted under the National Securities Markets Improvement Act of 1996.² For example, states may no longer regulate the availability or the substance of an offering of securities that is exempt from registration under rule 506 of Regulation D promulgated under the Securities Act. Rather, they may only

¹ Securities and Exchange Commission, 1997 Annual Report.

² National Securities Markets Improvement Act of 1996, Public Law Number 104-290 (1996).

require that a notice filing, along with a filing fee, be delivered to their state securities commissioner. If, however, the state suspects securities fraud, it may request additional information and review the offering materials.

US22 These statutes also cover ‘intrastate’ transactions in securities that are exempt from federal law by reason of the issue being offered and sold only to persons resident within a particular state or territory, where the issuer of the security is a person resident and doing business or, if a corporation, incorporated by and doing business, within such state or territory.¹ Typically, these laws also have enforcement mechanisms which provide for penalties and sanctions for omissions or misrepresentations or other fraudulent behaviour.

US23 In addition to any applicable blue sky laws, individuals who act as ‘investment advisers’ and are not otherwise registered with the Securities and Exchange Commission under the Investment Advisers Act may be subject to certain state investment adviser statutes and regulations. Practitioners should consult the rules and regulations of the applicable state to insure compliance with these directives.

Extraterritorial Reach of United States Securities Laws

In General

US24 Increasingly, world financial markets have become more integrated and internationalised. Listings of non-United States issuers on United States exchanges and markets have surged and the consolidation of industry and commerce among international conglomerates with United States ties has increased the jurisdictional reach of the United States securities laws. This trend has focused attention on the extraterritorial reach of the United States securities laws.

US25 More than 20 years ago, it was observed that ‘[w]ith increasing frequency foreigners are becoming concerned with the extraterritorial reach of the United States securities laws’.² As financial markets have developed and integrated, what was once an observation of an infant trend is now an every

¹ Securities Act of 1933, 15 United States Code, s 77c(a)(11).

² Hacker and Rotunda, ‘The Extraterritorial Regulation of Foreign Business under the United States Securities Laws’, 59 *NCL Rev* 643 (1981).

day occurrence. A practitioner analysing the extraterritorial reach of the United States securities law must first identify the specific United States securities laws at issue and then analyse the specific facts and circumstances involved to determine whether United States securities law concepts apply.

Registration

US26 In the case of the registration of securities under the Securities Act, the law is clear as to extraterritoriality. The Securities and Exchange Commission has noted, '[u]nder the Securities Act, any issuer that seeks to offer or sell its securities publicly in the United States must register the offer and sale of those securities with the [Commission]. This requirement applies equally to securities issued by either United States or [non-United States] companies, including mutual funds'.¹

US27 In 1990, the Securities and Exchange Commission adopted Regulation S to clarify the extraterritorial application of the registration provisions of United States securities laws.² Regulation S employs a territorial approach, by which any offer or sale of a security that is deemed to occur within the United States is subject to the registration provisions of United States securities laws, while any offer or sale of a security that is not deemed to occur within the United States is not subject to the registration provisions of United States securities laws.³

US28 Regulation S is not an exemption from registration under United States securities laws; rather, it provides that offers and sales occurring outside of the United States are not subject to the registration requirements of United States securities laws.⁴

¹ Krechew, Securities and Exchange Commission No-Action Letter (5 November 1997), which held that non-United States mutual funds which offer securities in the United States must register with the Securities and Exchange Commission under both the 1933 Act and the Investment Company Act of 1940, unless exemptions from registration apply.

² Securities Act Release Number 6863 (24 April 1990).

³ 17 Code of Federal Regulations, s 230.901.

⁴ A full description of Regulation S and its applicability is discussed later in this chapter.

Antifraud Provisions

US29 When it comes to the application of the antifraud provisions of the 1934 Act, however, the law is not as clear.

US30 Section 10b of the 1934 Act, and more specifically rule 10b-5 promulgated thereunder, constitutes the primary ‘Antifraud Provisions’ of the United States securities laws. They serve the purpose of protecting investors, registrants, and the markets from unethical and manipulative practices. These broadly drawn provisions are a ‘catch-all’ provision whose breadth is necessary to police and ensure fair dealings in the securities markets.

US31 The Securities and Exchange Commission has recently adopted Regulation FD in an effort to further promote full and fair disclosure of information by issuers. Simultaneous with the adoption of Regulation FD, the Committee also adopted rules 10b5-1¹ and 105b-2,² which clarify and enhance the policing of prohibited insider trading activities.³

US32 As a general canon of construction, ‘legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States which is based on the assumption that Congress is primarily concerned with domestic conditions’.⁴

US33 Nonetheless, the United States federal courts have established a two-level test — an ‘effects test’ and a ‘conduct test’ — under which they will determine whether or not subject matter jurisdiction exists and, if it does, it will extend the antifraud provisions of the 1934 Act extraterritorially.⁵

Existence of Subject Matter Jurisdiction

US34 Generally, a United States federal court will have jurisdiction over the subject matter of a claim, despite the fact that the conduct in question

1 17 Code of Federal Regulations s 240.10b5-1.

2 17 Code of Federal Regulations s 240.10b5-2.

3 Securities Act Release 7881; Exchange Act Release 43154 (15 August 2000).

4 *Zoelsch v Arthur Andersen and Co*, 824 F2d 27, at p 31 (DC Cir, 1987), *cert denied*, 395 United States 906.

5 As will be discussed below, jurisdiction over the 1934 Act lies exclusively with the federal courts and not the courts of the individual states.

occurred outside the United States, if such conduct produces substantial effects on United States markets or United States investors. This is known as the ‘effects test’. This test was first enumerated by the Second Circuit Court of Appeals in *Schoenbaum v Firstbrook*.¹ In that case, it was held that s 10(b)² and rule 10b-5³ applied to the conduct of a Canadian corporation that sold shares of its common stock to a French purchaser at a price substantially higher than that paid by the Canadian corporation’s joint venture partner, another Canadian corporation.

US35 The court came to this conclusion despite the fact that all of the parties involved were non-United States entities. The reasoning of the case focused on the fact that the Canadian issuer was listed on the American Stock Exchange, which is located in the United States, and had, among others, United States shareholders. It said:

[T]he antifraud provision of s 10(b), which enables the [Commission] to prescribe rules ‘necessary or appropriate’ in the public interest or for the protection of investors’ reaches beyond the territorial limits of the United States and applies when a violation of the rules [promulgated under section 10(b)] is injurious to United States investors.⁴

US36 If, on the other hand, there is no effect on United States investors or the United States securities markets, the courts may still find that subject matter jurisdiction exists when conduct inside the United States directly caused the losses suffered by investors outside of the United States, ie, the ‘conduct test’. It is important to note that, although the trend is to find subject matter jurisdiction in an increasing number of situations, the United States federal courts have split in regard to the level of conduct that will cause them to have jurisdiction.

US37 For example, the Courts of Appeal for the Second, Fifth, and Seventh Circuits and the District of Columbia Circuit have held that jurisdiction will

1 *Schoenbaum v Firstbrook*, 405 F2d 200 (2nd Cir, 1968) *cert denied*, 395 United States 906 (1969).

2 Securities and Exchange Act of 1934, 15 United States Code, s 78j.

3 17 Code of Federal Regulations, s 240.10b-5.

4 *Schoenbaum v Firstbrook*, 405 F2d 200 (2nd Cir, 1968), *cert denied*, 395 US 906 (1969).

lie in the American courts only where the conduct is not merely preparatory to the alleged fraud, but rather comprises all the elements of a defendant's conduct necessary to establish a violation of s 10(b) or rule 10b-5; for example, the fraudulent statements or misrepresentations must originate in the United States, must be made with scienter in connection with the sale or purchase of securities, and must cause the harm to those who claim to be defrauded, even though the actual reliance and damages may occur elsewhere.¹

US38 The Third, Eighth, and Ninth Circuits, conversely, have applied a less strict standard, holding that subject matter jurisdiction will exist when the conduct in question merely 'was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment'.² Thus, it is essential for a practitioner to review the holdings of the Federal Circuit Court in the geographic area where the activity took place prior to initiating any action in the United States based on alleged fraudulent conduct of a non-United States entity or person.

United States Markets and Market Listing Requirements

In General

US39 In the United States, there are two basic types of stock markets or exchange on which a company, an 'issuer', can elect to have its securities trade. The first type is a centralised or fixed stock exchange where shares are traded in one central location through specialists that auction or execute buy and sell orders at the best available price. The best known examples of a centralised,

1 *IIT v Cornfeld*, 619 F2d 909, 920 and 921 (2nd Cir, 1980); *Robinson v TCI/US West Cable Comm Inc*, 117 F3d 900 (5th Cir, 1997); *Kauthur SDN BHD v Sternberg*, 149 F3d 659 (7th Cir, 1998) *cert denied*, 119 SCt 890, ___ US ___ (1999); *Zoelsch v Arthur Andersen and Co*, 824 F2d 27 (DC Cir, 1987).

2 *Continental Grain (Australia) Pty Ltd v Pacific Oilseeds, Inc*, 592 F2d 409, at p 421 (8th Cir, 1979); *Securities and Exchange Commission v Kasser*, 548 F2d 109 (3rd Cir, 1977), *cert denied*, 431 US 938 (1977); *Grunenthal GmbH v Holtz*, 712 F2d 421 (9th Cir, 1983).

specialist-based, physical stock exchange are the New York Stock Exchange¹ and the American Stock Exchange.²

US40 In addition to the New York Stock Exchange and the American Stock Exchange, there are a number of smaller regional exchanges that often specialise in certain defined types of activities, such as the Chicago Board Options Exchange which specialised in the trading of options, or which focus on a certain geographic area, such as the Pacific Stock Exchange.³

US41 The second type of stock market or exchange is an over-the counter market where securities are traded by a system that links brokers and dealers who buy and sell securities for clients without physical proximity but instead interact through computer networks. The NASDAQ is an example of an

1 The most prestigious national securities exchange in the United States is the New York Stock Exchange. The New York Stock Exchange provides a liquid, tightly regulated market for the most seasoned of issuers. More information about the New York Stock Exchange can be found at the New York Stock Exchange web site, www.nyse.com, which is an excellent source of information.

2 The National Association of Securities Dealers, Inc, is the largest securities-industry, self-regulatory organisation in the United States. It is the parent organisation of the American Stock Exchange, LLC, NASD Regulation, Inc, and NASD Dispute Resolution, Inc. For more information about the NASD and its subsidiaries, see the following Web sites: www.nasd.com, www.nasdaq.com, the NASDAQ Newsroom at www.nasdaqnews.com, www.amex.com, www.nasdr.com, or www.nasdadr.com. The NASDAQ Stock Market Inc (the 'NASDAQ') was previously a wholly owned subsidiary of the National Association of Securities Dealers. However, under a recent reorganisation and recapitalisation of NASDAQ, the National Association of Securities Dealers has reduced its ownership stake in the NASDAQ with the ultimate goal being to create an independent investor-owned NASDAQ, which would permit the National Association of Securities Dealers to focus on tough, fair, and efficient regulation. The American Stock Exchange continues to operate as a separate specialist-based auction market, like the New York Stock Exchange. Historically, the American Stock Exchange was the market for smaller companies than those listed on the New York Stock Exchange but, in recent years, its market and the number of its listed companies has eroded due to the success of the New York Stock Exchange in the fixed, physical location specialist-based auction market favoured by 'blue chip' companies and the success of the NASDAQ in the computer-based trading market favoured by 'technology' companies. As a result of these defections and filing tendencies, the American Stock Exchange has evolved to become a leader in offering markets for option trading and other derivative products.

3 Other active registered securities exchanges include regional exchanges such as the Boston Stock Exchange, the Cincinnati Stock Exchange, the Chicago Stock Exchange, and the Philadelphia Stock Exchange.

over-the counter market. This over-the counter market is regulated by the National Association of Securities Dealers. The NASDAQ Stock Market is comprised of:

- The NASDAQ National Market for larger companies; and
- The NASDAQ SmallCap Market for emerging growth companies that are generally smaller, less seasoned issuers.¹

US42 Some of the world's largest technology companies, including Microsoft, Oracle, Sun Microsystems, and Cisco, trade on the NASDAQ.

US43 Another group, Pink Sheets LLC, which was formerly known as the National Quotation Bureau (NQB), provides lists of securities, commonly known as the 'Pink Sheets', reporting trades for relatively thinly traded over-the-counter (OTC) securities. This name was derived from the fact the original pink sheets, listing these over-the-counter transactions, were printed on pink paper. They are now tracked both electronically and via print products.

US44 Due to an increase in the number of issuers delisted or dropped by the OTC Bulletin Board, Pink Sheets has expanded its quotation service and has recently introduced real-time pricing. It is anticipated that these services will bring more liquidity and more transparency to these markets.²

US45 In addition, brokers-dealers can report trades for small, less widely traded securities on the OTC Bulletin Board. The OTC Bulletin Board is not an actual stock exchange but merely an electronic bulletin board service.

US46 Non-United States entities seeking to list on a United States stock exchange or market must adhere not only to the requirements of the Securities and Exchange Commission, but to those of the stock exchange or market where the securities are listed or intend to be listed. Whether the issue is the sale of securities, the trading of securities, the organisation of stock exchanges, the role of underwriters or broker-dealers, the availability of credit for stock transaction, or the use of investment companies or advisors, it is primarily the

¹ The NASDAQ Stock Market also includes among its subsidiaries NASDAQ International, which is 'the trans-Atlantic extension of the NASDAQ Stock Market' that operates during the London and European trading hours.

² Pink Sheets web site visited 1 April 2001. More information about the Pink Sheets can be found at the web site www.pinksheets.com.

Securities and Exchange Commission that proscribes behaviour, monitors activities, and penalises wrongdoers.

US47 In addition to the Securities and Exchange Commission's regulations, the exchanges are self-regulatory organisations that maintain their own qualitative listing requirements for issuers, beyond those mandates imposed by the Securities and Exchange Commission. Each of these major stock exchanges and markets outline their specific compulsory listing requirements in their respective listing markets.

US48 Recent technological developments and the worldwide growth of the Internet may provide another alternative for trading securities. In 1996, several small, development-stage companies began to make a market for their own shares through the facilities of the world wide web. The Securities and Exchange Commission is closely monitoring developments on the Internet, and it has interceded aggressively to halt behaviour deemed detrimental to investors. The Securities and Exchange Commission has since issued a 'no-action letter' that permitted a company to make a market in its own shares using the Internet under certain circumstances.¹

US49 Non-United States entities are welcome and encouraged to exclusively list their securities on all the available exchanges and markets. Non-United States entities that are evaluating listing on an exchange or market, or moving from one exchange to another, need to carefully weigh the requirements and benefits of each choice in hopes of having its securities actively traded where shareholders are provided liquidity in good markets and bad, and where the quantitative and qualitative disclosure requirements are not unduly burdensome. Often representatives from the exchange and the issuer will meet to discuss and evaluate the prospects for a successful listing.

American Depository Receipts

US50 Foreign entities have the option of directly listing their shares on an exchange or to create a new security, known as an American Depository Receipt (ADR). An American Depository Receipt is a negotiable instrument issued

¹ Real Goods Trading Corp, 28 Securities Regulations and L Rep (BNA) 850; Securities and Exchange Commission No-Action Letter (25 June 1996).

by a third party depository, usually a United States bank or its foreign affiliate, and it represents a specified number of shares or units of the underlying issuer which are held by the depository on behalf of the American Depository Receipt holders.

US51 Trades in the United States on United States exchanges and markets are affected in the American Depository Receipt and not in the underlying securities. Often, an American Depository Receipt is used so that securities traded in the United States are denominated in United States dollars and can meet the minimum price requirements of the listing exchange or market.¹

Major Exchanges and Markets

New York Stock Exchange

US52 In General. The most prestigious national securities exchange in the United States is the New York Stock Exchange. The New York Stock Exchange provides a liquid, tightly regulated market for the most seasoned of issuers. More than 3,025 of the world's leading companies list on the New York Stock Exchange. Of these, more than 434 non-United States entities are listed, representing 49 countries.² One reason for the prestige of this exchange is its exacting listing requirements. By executing a New York Stock Exchange listing agreement, a company agrees not only to strictly abide by the United States securities law, but also to conform to a demanding series of requirements and obligations which are required to continue to enjoy listing privileges on the New York Stock Exchange.

US53 These requirements go beyond quantitative criteria for initial or continuing listing, such as the value of the company, the public float, and the number of shareholders, and include corporate governance criteria that require the company to take actions that would not otherwise be required or to refrain from actions which the company might otherwise be entitled to take. In addition, the New York Stock Exchange reviews the degree of national interest in the company,

¹ A full description of the use of the American Depository Receipt and its applicability is provided later in this chapter.

² New York Stock Exchange web site, <http://www.nyse.com> (1 April 2001).

its relative position and stability in the industry, and whether it is engaged in an expanding industry with the prospect of at least maintaining its relative position.

US54 Listing on the New York Stock Exchange provides the non-United States company with the opportunity to raise capital efficiently and economically in the United States, to enhance the marketability and liquidity for its shares, to develop a broad base of individual and institutional support and following, to facilitate mergers and acquisitions, and to enhance name recognition of the corporation's products and services.

US55 Non-United States issuers may list on the New York Stock Exchange concurrently with their initial entry into the United States capital markets, whether through an offering of securities or not, or by transferring the listing from another United States exchange or stock market.

US56 Non-United States companies have the option of seeking to qualify for listing with the New York Stock Exchange either by the New York Stock Exchange's standard domestic listing criteria or by special listing standards exclusively reserved for non-United States companies. The criteria for non-United States companies focus on the worldwide distribution of shares and they apply where there is a broad, liquid market for a company's shares in its country of origin.

US57 The criteria for domestic companies focuses more on the United States market as the principal market and the minimum distribution of the issuer's stock within that market. Whatever criterion is used, an applicant company must meet or exceed all of the criteria within the standards under which it seeks to qualify for listing.

US58 The listing requirements and procedures for non-United States entities¹ are as follows:

- Non-United States Company Listing Standards — Round-lot holders (holders of 100 or more shares), 5,000 worldwide; public shares (shares not held by insiders or control persons), 2.5 million worldwide; market value of public

¹ New York Stock Exchange, Listing Standards and Procedures (1999). The Listing Standards for both United States and non-United States Corporations can be found at the New York Stock Exchange web site. <http://www.New York Stock Exchange.com> (1 April 2001).

shares, US \$100 million worldwide; net tangible assets, US \$100 million worldwide; pre-tax income (aggregate for last three years), US \$100 million worldwide; and minimum pre-tax income in each of the two most recent years, US \$25 million worldwide.¹

- United States Company Listing Standards — Alternative 1: round-lot holders, 2,000 United States or total shareholders, 2,200 United States; and minimum average monthly trading volume for the most recent six months, 100,000 shares; or Alternative 2: total shareholders, 500; and minimum average monthly trading volume for the most recent 12 months, 1 million shares.²

US59 A third alternative exists which is intended to provide an opportunity for companies that are valued more on the basis of ‘cash flow’ than reported income to become listed, depending on the outcome of a due diligence review by the New York Stock Exchange. In performing its due diligence analysis, the New York Stock Exchange will consider each company on a case-by-case basis and will examine not only the specifics of the company’s business but also will look to its industry, peer group, and other relevant factors.

US60 Non-Numerical Requirements. Beyond numerical criteria, other factors are considered when determining eligibility for listing. The New York Stock Exchange requires that listed United States companies meet certain criteria with respect to outside directors, audit committee composition, voting rights, and related-party transactions. In general, the New York Stock Exchange will accept

1 If the foreign entity meets all of the financial criteria but, due to the use of bearer shares outside of the United States, has difficulty in demonstrating that it has the required number of shareholders on a worldwide basis, the New York Stock Exchange provides that a New York Stock Exchange member may ‘sponsor’ the applicant and verify the liquidity and depth of the market for a company’s shares.

2 For either Alternative 1 or 2 — minimum public shares, 1.1 million United States; market value of public shares, US \$40 million; net tangible assets, US \$100 million and one of the following: (a) most recent year pre-tax income, US \$2.5 million; each of two preceding years’ pre-tax income, US \$2 million; or (b) aggregate pre-tax income for the last three years, US \$6.5 million; minimum in most recent year pre-tax income, US \$4.5 million (all three years must be profitable); or (c) for companies with not less than US \$500 million in market capitalisation and US \$200 million in revenues in the most recent fiscal year, an aggregate for the three years’ adjusted net income, US \$25 million (each year must report a positive amount).

corporate governance practices of non-United States companies that do not comply with New York Stock Exchange policies to the extent that such practices are not prohibited by the home country law of the non-United States issuer and are accompanied by written certification from independent counsel of the company's country of domicile stating that the company's corporate governance complies with home country law.¹ The following is a summary of these policies.

US61 Corporate Governance Requirements. Corporate governance requirements relate to issues such as outside directors, the audit committee, voting rights, and related-party transactions.

US62 *Outside Directors.* Since 1956, all United States companies listing on the New York Stock Exchange must have a minimum of two outside directors.² For those companies which do not have outside directors at the time their eligibility for listing is approved, the New York Stock Exchange will normally require one outside director to be appointed prior to listing and a second within one year after listing. An outside director is a director who is not:

- An employee, officer, or former officer of the company or a subsidiary or division thereof;
- A relative of a principal executive officer; or
- A person who is an individual member of an organisation acting as an advisor, consultant, or legal counsel who is receiving compensation on a continuing basis from the company in addition to directors' fees.

US63 The New York Stock Exchange encourages discussion with an Exchange representative to clarify any uncertainty with regard to qualification of outside directors.

US64 *Audit Committee.* Each United States company seeking to list on the New York Stock Exchange (and each non-United States company electing to qualify for listing under the United States company listing criteria) must have

1 New York Stock Exchange, Listed Company Manual rule 303.00.

2 General footnote to New York Stock Exchange Listed Company Manual rule 303.01.

an audit committee comprised solely of directors independent of management and free from any relationship that would interfere with the exercise of independent judgment as a committee member.

US65 Audit Committees in the United States were originally established to protect against abnormally ‘cosy’ relationships between the board of directors and the issuer. The Securities and Exchange Commission recently adopted rules to further protect against perceived improprieties and to ‘improve communications through greater disclosure between management, the Board and outside auditors’.¹ The sum and substance of these changes are the following:

- Requires proxy statement disclosure of whether or not the audit committee has: (a) reviewed the audited financial statements with management; (b) discussed the quality of the company’s accounting principals with outside auditors; (c) received evidence as to the independence of the outside auditors; (d) determined if anything has come to its attention that causes it to believe that the audited annual financial reports contain an untrue statement of a material fact or omit to state material facts necessary to make the statements made not misleading;
- Requires proxy statement disclosure of whether or not the audit committee has adopted a written charter (which, if adopted, is to be included in the proxy statement every third year);²
- Requires disclosure of whether audit committee members satisfy the New York Stock Exchange, National Association of Securities Dealers, or American Stock Exchange requirements as to independence;
- Creates a safe harbour that the proxy statement disclosure regarding the audit committee requirements is exempt from certain liabilities under the federal securities laws.³

1 Securities and Exchange Commission Chairman Arthur C Levitt, Speech to the Economic Club of New York, New York City, 18 October 1999; Audit Committee Disclosure. See also Securities Act Release Number 33-7917; Exchange Act Release Number 34-4360 (21 November 2000), Exchange Act Release Number 34-42266 (22 December 1999); 64 Fed Reg 55, 648 (1999).

2 Not surprisingly, the Securities and Exchange Commission has asked for public comment on whether the audit committee charter should be reprinted in full or summarised in plain English.

3 Kreiger, ‘Recent Developments in Audit Committees’, *New York Law Journal*, 2 November 1999, at p 1.7.

US66 In lockstep with these initiatives, the New York Stock Exchange, the National Association of Securities Dealers, and the American Stock Exchange have adopted new rules governing audit committees. These rules include:

- The audit committee is required to adopt formal written charters specifying in detail the scope of the committee's duties;¹ and
- The audit committee must consist of at least three 'independent directors'² — each member of the committee must be financially literate, and at least one member must have accounting experience or financial management expertise,³ and the filer must annually certify that its audit committee is independent and is financially literate.⁴

US67 *Voting Rights.* The New York Stock Exchange rule with respect to shareholder voting rights states that '[v]oting rights of existing shareholders of publicly traded common stock registered under section 12 of the 1934 Act cannot be disparately reduced or restricted through any corporate action or issuance'.

US68 In its review of a company's eligibility for listing, the New York Stock Exchange will evaluate any unusual voting provisions associated with a company's securities.

1 New York Stock Exchange Listed Company Manual rule 303.01(B)(1); National Association of Securities Dealers Manual and Marketplace rules, rule 4350(d); and American Stock Exchange Listings Standards, Policies and Requirements, Part 1, s 121(B).

2 New York Stock Exchange Listed Company Manual rule 303.01(B)(2)(a); National Association of Securities Dealers Manual and Marketplace rules, rule 4350 (d); and American Stock Exchange Listings Standards, Policies and Requirements, Part 1, s 121(B).

3 New York Stock Exchange Listed Company Manual rules 303.01(B)(2)(b), 303.01(B)(2)(c); see also National Association of Securities Dealers Manual and Marketplace rules, rule 4350(d), and American Stock Exchange Listing Standards, Policies and Requirements, Part 1, s 121(B).

4 New York Stock Exchange Listed Company Manual rule 303.02(C); see also National Association of Securities Dealers Manual and Marketplace rules, rule 4350(d), and American Stock Exchange Listing Standards, Policies and Requirements, Part 1, s 121(B).

US69 *Related-Party Transactions.* The New York Stock Exchange believes that the review and oversight of transactions between a company and its officers and directors that might be perceived as conflicts of interest are best left to the discretion of the company.

US70 However, the New York Stock Exchange expects corporations to discharge their responsibility in this area in an appropriate fashion. For this reason, companies applying to list on the New York Stock Exchange will be required to confirm that they will appropriately review and oversee related-party transactions on an ongoing basis. Although no particular method of oversight is dictated, the audit committee or another comparable body would be considered an appropriate forum.

American Stock Exchange

US71 In General. The American Stock Exchange continues to operate as a separate, specialist-based auction market, like the New York Stock Exchange. Historically, the American Stock Exchange was the market for smaller companies than those listed on the New York Stock Exchange but, in recent years, its market and the number of its listed companies have eroded due to the success of the New York Stock Exchange in the fixed, physical location specialist based auction market favoured by 'blue chip' companies, and the success of the NASDAQ in the computer-based trading market favoured by 'technology' companies.

US72 The American Stock Exchange has evolved to become a leader in offering markets for option trading and other derivative products. More than 900 issuers trade on the American Stock Exchange, as well as options on 28 broad-based and sector indexes. The American Stock Exchange also is known for the trading of certain long-term equity anticipation securities (LEAPS) and Exchange Traded Funds (ETFs).¹

¹ American Stock Exchange, Press Release (2 November 1998). Additional information regarding the American Stock Exchange can be found at its web site, <http://www.amex.com> (1 April 2001).

US73 Listing Requirements. To list on the American Stock Exchange, a non-United States company needs to satisfy one of two alternative financial guidelines and one of four distribution guidelines. The listing requirements for non-United States companies are as follows:

- Financial Guidelines — Alternative 1: Pre-tax income, US \$750,000 in latest fiscal year or two of most recent three years; market value of public float, US \$3 million; minimum price, US \$3 per share; and stockholders' equity, US \$4 million.
- Financial Guidelines — Alternative 2: Pre-tax income, not applicable; market value of public float, US \$15 million; minimum price, US \$3 per share; operating history of two years; and stockholders' equity, US \$4 million.
- Distribution Guidelines — Alternative 1: Public float, 500,000 shares;¹ public stockholders in United States, 800; and average daily volume, not applicable.
- Distribution Guidelines — Alternative 2: Public float, 1 million shares; public stockholders in United States, 400; and average daily volume, not applicable.
- Distribution Guidelines — Alternative 3: Public float, 500,000 shares; public stockholders in United States, 400; and average daily volume, 2,000 shares.
- Distribution Guidelines — Alternative 4: Public float, 1 million shares; public stockholders, worldwide 800; and average daily volume, not applicable.

National Association of Security Dealers, Inc

US74 In General. The National Association of Securities Dealers is the largest securities industry self-regulatory organisation in the United States, and it operates subject to oversight from the Securities and Exchange Commission. The National Association of Securities Dealers has two primary functions, namely to:

- Register, regulate, and oversee all of the broker-dealers in the United States; and
- Regulate and operate the over-the-counter market.

US75 In 1996, the National Association of Securities Dealers, Inc, was formally restructured to create two separate, distinct, wholly owned subsidiaries of the

¹ 'Public float' is defined as shares that are not held, directly or indirectly, by any officer or director of the issuer, or by any other person who is the beneficial owner of more than 10 per cent of the total shares outstanding.

National Association of Securities Dealers, Inc. The resulting structure includes National Association of Securities Dealers Regulation, Inc, the entity that is charged with the regulation, registration and oversight of broker-dealers, and the NASDAQ Stock Market, Inc, which is charged with the regulation of the over-the-counter stock markets.

US76 As mentioned above, the NASDAQ Stock Market, Inc, is the largest electronic, screen-based market in the world. It is not a physical market like the New York Stock Exchange, but rather trades occur over computer systems from remote locations. It handles transactions involving over 1 billion shares a day. More than 4,829 companies are listed on NASDAQ, more than any other market.¹ The NASDAQ has two tiers, namely:

- The NASDAQ National Market System for larger companies; and
- The NASDAQ Smallcap Market for smaller, emerging growth companies.

US77 The National Association of Securities Dealers, Inc, also has created NASDAQ International, a trans-Atlantic extension of NASDAQ that operates during normal London and European trading hours, 3:30 pm to 9 am Eastern Time, to provide trading services for NASDAQ National Market System companies, NASDAQ non-United States securities (except Canadian), American Depository Receipts, and equity securities listed on United States securities exchanges. This office also assists non-United States companies in accessing the United States capital markets and in gaining a listing on NASDAQ.

US78 National Market. To qualify for listing on the NASDAQ National Market, a security of a non-United States issuer, or an American Depository Receipt or similar security issued in respect of a security of a non-United States issuer, must either be already registered and traded on another exchange or market pursuant to the 1934 Act² or be a new issue where the offering is conducted on a firm or best-efforts commitment basis. If on a firm-commitment basis, the securities of the issuer will be considered for inclusion on the day that its registration statement is declared effective by the Securities and Exchange Commission.

¹ 1999 National Association of Securities Dealers Annual Report.

² Securities and Exchange Act of 1934, 15 United States Code, s 78l.

US79 If on a best-efforts commitment basis, the securities of the issuer will be considered for inclusion on the closing of the offering. If a new issue, qualification will automatically terminate 120 days after the last day of the issuer's fiscal year during which the issuer's registration statement became effective. The three alternative listing requirements for the NASDAQ National Market,¹ which are applicable both to non-United States and United States companies, are as follows:

- Alternative 1: Net tangible assets, US \$6 million;² pre-tax income, US \$ 1 million in latest fiscal year or two of last three fiscal years; public float, 1.1 million shares; market value of public float, US \$8 million; minimum bid price, US \$5; shareholders (round-lot holders), 400; and market makers, three.³
- Alternative 2: Net tangible assets, US \$18 million; public float, 1.1 million shares; operating history, two years; market value of public float, US \$18 million; minimum bid price, US \$5; shareholders (round-lot holders), 400; and market makers, three.
- Alternative 3: Market capitalisation, US \$75 million; or total assets, US \$75 million; and total revenue, US \$75 million; public float, 1.1 million shares; market value of public float, US \$20 million; minimum bid price, US \$5; shareholders (round-lot holders), 400; and market makers, four.

US80 Corporate Governance. Under any of these three alternatives, a corporation applying for listing must agree to certain corporate governance requirements. The listing requirements can be flexible, given the requirements of the local rules under which the corporation operates.

US81 The National Association of Securities Dealers provides that no provision of its listing requirements 'will be construed to require any [non-United States] issuer to do any act that is contrary to a law, rule, or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile. NASDAQ shall have the ability to provide exemptions from the applicability

1 National Association of Securities Dealers' Manual, Marketplace rules, rules 4300–4400 *et seq.*

2 'Net tangible assets' means total assets, excluding goodwill, minus total liabilities.

3 A NASDAQ 'market maker' is a dealer that, with respect to a security, holds itself out as being willing to buy and sell such security for its own account on a regular and continuous basis, and that is registered as such.

of these provisions as may be necessary or appropriate to carry out this intent'.¹ This rule particularly applies to the corporate governance provisions where corporate behaviour is mandated.

US82 *Distribution of Annual Reports.* Each issuer is required to distribute to shareholders copies of an annual report containing audited financial statements of the company and all of its subsidiaries.

US83 The report is required to be distributed to shareholders a reasonable period of time prior to the company's annual meeting of shareholders. The report also must be filed with NASDAQ at the time it is distributed to shareholders.

US84 *Distribution of Interim Reports.* Each issuer is required to make available copies of quarterly reports, including statements of operating results to shareholders either prior to, or as soon as practicable, following the company's filing of its quarterly report with the Securities and Exchange Commission,² except that 'foreign private issuers'³ do not need to file quarterly reports with the Securities and Exchange Commission and, therefore, do not need to file interim reports.

1 National Association of Securities Dealers' Manual, Marketplace rules, rule 4320.

2 Form 10-Q for domestic issuers.

3 The term 'foreign private issuer' is defined as: any foreign issuer other than a foreign government except an issuer meeting the following conditions: (a) More than 50 per cent of the issuer's outstanding voting securities are directly or indirectly held owned of record by residents of the United States; and (b) Any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 per cent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States. Instructions to paragraph (c)(1): to determine the percentage of outstanding voting securities held by United States residents: (a) use the method of calculating record ownership in rule 12g3-2(a) under the 1934 Act (section 240.12g3-2(a)); (b) unless information provided by the depository demonstrates otherwise, count the holders of American Depositary Receipts as United States holders of the underlying securities; and (c) count shares of voting securities beneficially owned by residents of the United States as reported on reports of beneficial ownership provided to you or filed publicly and based on information otherwise provided to you. (Securities Act Release 7745; Exchange Act Release 41936; International Series Release 1205 (October 1999)). The reference to rule 12g3-2(a) under the 1934 Act (section 240.12g3-2(a)) requires the issuer to 'look through' the record ownership of brokers, dealers, banks or nominees holding securities for the accounts of their customers to determine the residency of those customers' (International Series Release 1205).

US85 *Independent Directors.* Each issuer is required to maintain a minimum of three independent directors on its board of directors.

US86 *Audit Committee.* Each issuer is required to establish and maintain an audit committee, a majority of the members of which must be independent directors.¹

US87 *Shareholder Meetings.* Each issuer is required to hold an annual meeting of shareholders and must provide advance notice of such meeting to NASDAQ.

US88 *Quorum.* Each issuer must provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; however, in no case may such quorum be less than one-third of the outstanding shares of the company's common voting stock.

US89 *Conflicts of Interest.* Each issuer is required to conduct an appropriate review of all related-party transactions on an ongoing basis and to utilise the company's audit committee, or another comparable committee composed of members of the board of directors, for the review of potential conflict of interest situations where appropriate.

US90 *Shareholder Approval.* Each issuer must require shareholder approval of a plan or arrangement under sub-paragraph (A) below or, prior to the issuance of certain securities, under sub-paragraph (B), (C), or (D) below:

(A) when a stock option or purchase plan is to be established or other arrangement made pursuant to which stock may be acquired by officers or directors, except for warrants or rights issued generally to security holders of the company or broadly based plans or arrangements including other employees (eg, employee stock ownership plans);²

1 Like the New York Stock Exchange, companies listing on NASDAQ will be subject to the recently modified regulations regarding audit committees.

2 In a case where the shares are issued to a person not previously employed by the company, as an inducement essential to the individual's entering into an employment contract with the company, shareholder approval will generally not be required. Where the establishment of a plan or arrangement under which the amount of securities which may be issued does not exceed the least of: (a) one per cent of the number of shares of common stock, (b) one per cent of the voting power outstanding, or (c) 25,000 shares, shareholder approval will generally not be required.

(B) when the issuance will result in a change of control of the issuer;

(C) in connection with the acquisition of the stock or assets of another company if: (a) any individual director, officer, or substantial shareholder of the issuer has a five per cent or greater interest (or such persons collectively have a 10 per cent or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction, or series of related transactions, and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of five per cent or more, or (b) where, due to the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, other than a public offering for cash: (i) the common stock has, or will have on issuance, voting power equal to or in excess of 20 per cent of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock, or (ii) the number of shares of common stock to be issued is or will be equal to or in excess of 20 per cent of the number of shares of common stock outstanding before the issuance of the stock or securities; or

(D) in connection with a transaction other than a public offering involving: (a) the sale or issuance by the issuer of common stock, or securities convertible into or exercisable for common stock, at a price less than the greater of book or market value which together with sales by officers, directors, or substantial shareholders of the company, equals 20 per cent or more of common stock or 20 per cent or more of the voting power outstanding before the issuance, or (b) the sale or issuance by the company of common stock, or securities convertible into or exercisable for common stock, equal to 20 per cent or more of the common stock or 20 per cent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock. Exceptions may be made on application to NASDAQ when the delay in securing stockholder approval would seriously jeopardise the financial viability of the enterprise and reliance by the company on this exception is expressly approved by the audit committee or a comparable body of the board of directors.¹

¹ A company relying on this exception must mail to all shareholders not later than 10 days before issuance of the securities a letter alerting them to its omission to seek the shareholder approval that would otherwise be required and indicating that the audit committee of the board or a comparable body has expressly approved the exception.

US91 *Voting Rights.* A company may not:

- Take corporate action to impose any restriction on the voting power of shares of the common stock of the issuer held by a beneficial or record holder based on the number of shares held by such beneficial or record holder;
- Take corporate action to impose any restriction on the voting power of shares of the common stock of the issuer held by a beneficial or record holder based on the length of time such shares have been held by such beneficial or record holder;
- Make any issuance of securities through an exchange offer by the issuer for shares of an outstanding class of the common stock of the issuer, in which the securities issued have voting rights greater than or less than the per share voting rights of any outstanding class of the common stock of the issuer; or
- Make any issuance of securities pursuant to a stock dividend, or any other type of distribution of stock, in which the securities issued have voting rights greater than the per share voting rights of any outstanding class of the common stock of the issuer.

US92 *Listing Agreement.* Each issuer must execute a listing agreement in the form designated by NASDAQ.

US93 *Peer Review of Accountant.* Each issuer must be audited by an independent public accountant that:

- Has received an external quality control review by an independent public accountant that determines whether the auditor's system of quality control is in place and operating effectively and whether established policies and procedures and applicable auditing standards are being followed; or
- Is enrolled in a peer review program and within 18 months receives a peer review that meets acceptable guidelines.

US94 Such guidelines are that:

- The peer review should be comparable to the standards of the American Institute of Certified Public Accountants (AICPA) included in 'Standards for Performing on Peer Reviews', codified in the American Institute of Certified Public Accountants Securities and Exchange Commission Practice s Reference Manual;

- The peer review program should be subject to oversight by an independent body comparable to the organisational structure of the Public Oversight Board as codified in the American Institute of Certified Public Accountants Securities and Exchange Commission Practices Reference Manual; and
- The administering entity and the independent oversight body of the peer review program must, as part of their rules of procedure, require the retention of the peer review working papers for 90 days after acceptance of the peer review report and allow NASDAQ access to those working papers.

US95 *Solicitation of Proxies.* Each issuer is required to solicit proxies and provide proxy statements for all meetings of shareholders and to provide copies of such proxy solicitations to NASDAQ.

US96 For each of the above corporate governance requirements, the non-United States issuer may send a ‘request for exemption’ to the NASDAQ Listing and Qualification Department, requesting an exemption from a specific requirement, if such requirement is not required in the home country of the issuer.¹ The non-United States company is exempt from the federal regulation of proxy solicitation under section 14 of the 1934 Act by virtue of rule 3a12-3(b).²

US97 **NASDAQ SmallCap Market Listing.** To qualify for listing on the NASDAQ SmallCap Market, a security of a non-United States issuer, an American Depositary Receipt, or similar security issued in respect of a security of a non-United States issuer, must either be already registered and traded on another exchange or market pursuant to the 1934 Act³ or be a new issue where the offering is conducted on a firm-commitment or best-efforts commitment basis.

US98 If on a firm-commitment basis, the securities of the issuer will be considered for inclusion on the day that its registration statement is declared effective by the Securities and Exchange Commission. If on a best-efforts commitment basis, the securities of the issuer will be considered for inclusion on the closing of the offering. If a new issue, qualification for listing will

¹ National Association of Securities Dealers’ Manual, Marketplace rules, rule 4460(a).

² 17 Code of Federal Regulations, s 240.3a12-3.

³ Securities and Exchange Act of 1934, 15 United States Code, s 78l(g).

automatically terminate 120 days after the last day of the issuer's fiscal year during which the issuer's registration statement became effective.

US99 The listing requirements for listing on the NASDAQ SmallCap Market¹ are as follows:

- Net tangible assets — US \$4 million; or market capitalisation, US \$50 million; or net income, US \$750,000 in the latest fiscal year or two of the last three fiscal years; and
- Public float — 1 million shares;
- Market value of public float — US \$5 million;
- Minimum bid price: US \$4;
- Shareholders (round-lot holders) — 300; and
- Market makers — three.

US100 In addition, a corporation with an operating history of less than one year must have a market capitalisation of US \$50 million or more.

OTC Bulletin Board

US101 The National Association of Securities Dealers also operates and oversees the OTC Bulletin Board, which is an electronic, screen-based market for securities that are not listed on NASDAQ or any United States stock exchange. The OTC Bulletin Board is an alternative for stocks that cannot meet the listing requirements on an established stock exchange or market or that are very thinly traded. To be listed on the OTC Bulletin Board, a company must be:

- Registered pursuant to the Exchange Act, or otherwise be subject to the requirement to file periodic reports with the Commission; and
- Current in its filings with the Securities and Exchange Commission.

US102 If the company does not make a timely filing, it will be given 30 or 60 day grace period, depending on the type of company, to file the late reports. If the report is still not filed by the end of the grace period, quotations of the company's securities will not be allowed.

¹ National Association of Securities Dealers' Manual, Marketplace rules, rule 4310; National Association of Securities Dealers web site, <http://www.nasdaq.com> (1 April 2001).

US103 The OTC Bulletin Board captures and displays bid and asked quotations and unpriced indications of interest. All priced quotations on domestic stocks are entered by market makers and must be firm for a minimum size, based on the price of the security. All prices for domestic stocks can be continuously updated. For non-United States stocks and American Depository Receipts, quotations can be updated twice a day.

Pink Sheets

US104 Another alternative for securities of an issuer which do not qualify for listing on an exchange or market, but still have an active market interest, is a quote service provided by Pink Sheets LLC ('Pink Sheets'), which was formerly known as the National Quotation Bureau (NQB), to brokers and dealers. A non-United States issuer may list on the Pink Sheets:

- As a result of not qualifying for an exchange or market;
- Through a lack of resources or insolvency; or
- As a result of being de-listed from an exchange or market.

US105 The Pink Sheets originally listed these over-the-counter transactions on a daily basis and were printed on pink paper. However, they are now tracked both electronically and via print products, on a real-time basis. Due to an increase in the number of issuers delisted or dropped by the OTC Bulletin Board, the Pink Sheets have expanded its quotation service and has recently instituted real-time pricing. It is anticipated that these services will bring more liquidity and more transparency to these markets.

Alternative Trading Systems

US106 In addition, as of April 1999, registered broker-dealers may set up private alternative trading systems, rather than registering as a national securities exchange, so long as they comply with Regulation ATS. If the alternative trading system trades less than five per cent of the trading volume in all securities that it trades, it only needs to file with the Securities and Exchange Commission a notice of operation and quarterly statements and:

- Maintain records, including an audit trail of transactions; and
- Refrain from using the words 'exchange', 'stock market', or other similar terms in its name.

US107 On the other hand, an alternative trading system with five per cent or more of the trading volume of any security that chooses to register as a broker-dealer — instead of as an exchange — must be linked to a national market systems securities exchange and comply with the obligations that govern registered exchanges. Furthermore, any alternative trading system registered as a broker-dealer must meet even more stringent requirements concerning its standards and procedures.

US108 Among these recent developments are regulatory challenges resulting from increased use of, and activity by, Electronic Communication Networks (ECNs). These are private trading systems where the ECN matches two subscribers' orders, and charge each participant a fee for actions as their agent in the transaction. While ECNs certainly enhance the market's liquidity, the Securities and Exchange Commission is currently monitoring and contemplating regulation to address fairness issues and other challenges caused by the applicable fees and accessibility of the ECN markets.¹

PORTAL Market

US109 Simultaneously with the adoption of rule 144A,² which provides for the resale of certain restricted securities of large companies to qualified institutional buyers, the Securities and Exchange Commission approved the National Association of Securities Dealers' Private Offering, Resale, and Trading Through Automated Linkages (PORTAL) System.³

US110 PORTAL is a trading system designed to establish automated trading, clearance, and settlement facilities for primary placements and secondary trading of unregistered securities to qualified institutional buyers through the International Securities Clearing Corporation, Depository Trust Company, and Centrale de Livraison de Valeurs Mobilières, SA, Luxembourg. PORTAL also provides facilities for primary placements of rule 144A securities.

¹ Testimony of Securities and Exchange Commission Chairman Arthur Levitt concerning market structure issues currently facing the Securities and Exchange Commission, before the United States Senate Committee on Banking, Housing, and Urban Affairs, 27 October 1999.

² 17 Code of Federal Regulations, s 230.144A.

³ Exchange Act Release Number 27956 (27 April 1990).

Public Offerings by Foreign Issuers

In General

US111 The United States has historically been a strong advocate of international commerce and the unfettered international movement of goods, services, and capital. Now, here is the advocacy more apparent than in the accessibility of the growing United States capital markets to non-United States companies. As evidence, non-United States companies' participation in the United States public market continued to show strong growth in 1999.

US112 During 1999, approximately 120 foreign companies from over 26 countries entered the United States public markets for the first time, resulting in more than US \$244 billion registered by non-United States companies for public offerings. In total, at year-end 1998, there were nearly 1,200 non-United States companies from 57 countries filing reports with the Securities and Exchange Commission.¹

US113 To be a participant in these explosive markets, non-United States companies offering their securities to United States persons are generally subject to United States securities laws in the same manner as their counterpart United States domestic issuers² except that, in certain circumstances, the domestic disclosure requirements have been altered to fit a typical foreign company profile.³

US114 Thus, a non-United States issuer proposing to make a public offering of securities in the United States must register the offering under the 1933 Act,⁴ and market trading must be conducted under the 1934 Act,⁵ but the disclosure requirements have been altered to fit an international context.

US115 A non-United States issuer proposing to make a public offering of securities in the United States must register the offering under the 1933 Act,⁶ and market trading must be conducted under the 1934 Act.⁷

1 1999 Securities and Exchange Commission Annual Report.

2 15 United States Code, s 77b.

3 For example, the non-United States company is exempt by virtue of rule 3a12-3(b) from the proxy solicitation requirements of section 14 of the 1934 Act, 17 Code of Federal Regulations, s 240.3a12-3.

4 Securities Act of 1933, 15 United States Code, s 77f.

5 Securities and Exchange Act of 1934, 15 United States Code, s 778b.

6 15 United States Code, s 77f.

7 15 United States Code, s 778b.

US116 The securities regulatory system in the United States does not register companies; rather, the regulatory system focuses on the type of transaction, regardless of whether it is a private or public transaction, and the actual securities sold or traded. An initial public offering in the United States is a distribution where a once privately owned company transforms itself into a publicly held one by selling its securities to the public. Before selling its securities to the public, the registrant must:

- Register the shares and the distribution by filing a registration statement with the Securities and Exchange Commission in accordance with the rules and regulations of the Securities and Exchange Commission;
- Gain effectiveness for the registration statement; and
- Close the purchase and sale.

US117 Usually, this transaction is conducted through one or more lead underwriters¹ that organise a syndicate of underwriters to sell the securities to the public.

US118 Often, in today's market, there will be a domestic and international offering initiated simultaneously using the same disclosure document. Once an initial public offering has become effective or closed, a trading market in the United States may be commenced by registering such securities under the 1934 Act.² In furtherance of the precepts of registration, the 1934 Act promulgates an on-going duty to periodically disclose certain material business and financial information to the broker-dealer community and the investing public.³

US119 Foreign issuers must comply with the registration provisions of the federal securities laws, including the presentation of financial statements in accordance with United States generally accepted accounting principles ('United States GAAP').

US120 Foreign private issuers with little or no experience in United States capital markets should be aware of the requirements of the public and private

¹ An 'underwriter' is defined as a person who has purchased from a issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. 15 United States Code, s 77b (11).

² 15 United States Code, s 781.

³ 15 United States Code, s 78m.

markets in the United States and the advantages and disadvantages related to becoming a publicly traded company in the United States.

Definition of a Foreign Private Issuer

In General

US121 The Securities and Exchange Commission has provided an integrated disclosure system for ‘foreign private issuers’ that is different from the requirements for domestic issuers. One of the major elements of the recently enacted changes is the amendment to rule 405 under the Securities Act and rule 3b-4 under the Exchange Act to include a revised definition of ‘foreign private issuer’. Due to increased prevalence of offshore nominees and custodial accounts, the Securities and Exchange Commission wants to see a clearer picture of a company’s ownership. As such a ‘foreign private issuer’¹ is now defined as:

. . . any foreign issuer other than a foreign government except an issuer meeting the following conditions: (1) More than 50 per cent of the issuer’s outstanding voting securities are directly owned of record by residents of the United States; and (2) Any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; and (ii) more than 50 per cent of the assets of the issuers are located in the United States; or (iii) the business of the issuer is administered principally in the United States . . .

Instruction to Paragraph (c)(1)

US122 To determine the percentage of outstanding voting securities held by United States residents:

(A) Use the method of calculating record ownership in rule 12g3-2 (a) under the 1934 Act (section 240.12g3-2(a)); (B) Unless information provided by the depository demonstrates otherwise, count the holders of American Depositary Receipts as United States holders of the underlying securities; and (C) Count shares of voting securities beneficially owned by residents of the United States as reported on reports of beneficial

¹ 17 Code of Federal Regulations, s 230.405, or 17 Code of Federal Regulations, s 240.3b-4 (c).

ownership provided to you or filed publicly and based on information otherwise provided to you. (Securities Act Release 7745; Exchange Act Release 41936; International Series Release 1205 (28 September 1998)).

US123 The reference to rule 12g3-2(a) under the 1934 Act (section 240.12g3-2(a)) requires the issuer ‘to “look through” the record ownership of brokers, dealers, banks, or nominees holding securities for the accounts of their customers to determine the residency of those customers’.¹

US124 If an issuer is a foreign private issuer, the United States securities laws prescribe a different set of requirements, generally encompassing the following:

- Interim reporting must be on the basis of the foreign private issuer’s home country and stock exchange practice; quarterly reports are not mandated for foreign private issuers, as opposed to domestic issuers, except that many foreign private issuers nonetheless provide interim information to comply with their trading obligations on stock exchanges or markets.
- Foreign private issuers are exempt from the proxy solicitation requirements of section 14 of the 1934 Act,² and the short swing trading restrictions of section 16 of the 1934 Act,³ and the short swing trading restrictions of section 16 of the 1934 Act applicable to domestic issuers.⁴
- Foreign private issuers are not required to disclose executive compensation on an individual basis, but they may instead disclose on an aggregate if so permitted in a foreign issuer’s home country.⁵

Advantages and Disadvantages of Going Public in the United States

Advantages

US125 Access to Capital. One of the main advantages of going public in the United States is access to capital at a potentially attractive evaluation or multiple of earnings based on the type of company, its historical earnings and growth, and its future business plan.

1 International Series Release 1205.

2 United States Code, s 78n.

3 15 United States Code, s 78p.

4 17 Code of Federal Regulations, s 240.3a12-3 (B).

5 Item 6B of Form 20-F.

US126 An initial public equity offering can bring considerable proceeds to a company. Subsequently, the public company can return to the market for additional capital through secondary equity offerings.

US127 Listing. In addition, a public offering is one method to provide for the listing of the securities of a non-United States company on a stock exchange or market. The creation of a public market is intended to result in increased liquidity of the holdings of the principal owners, as well as minority shareholders, allowing a sale of shares to quickly be converted to cash.

US128 This is especially true for non-United States issuers who may value the ability to have liquidity outside of their home market in United States dollars.

US129 New Currency. A public offering also results in the establishment of a new currency in the company, which represents the market's perception of the company's value. A company then has increased flexibility to facilitate future financing and merger and acquisition possibilities.

US130 The company whose stock is publicly traded may be in a better position to acquire other companies through a business combination transaction using its own shares as consideration, in lieu of cash, for the shares of the target company.

US131 Sale of Shares. In addition, the company, with the co-operation of the issuer, founders, directors, and officers, may be able to sell its shares, which were acquired in private transactions, as 'selling stockholders' at either the initial public offering stage or in subsequent offerings.

US132 Moreover, publicly traded stock, as opposed to private company equity interests, may provide shareholders with greater liquidity on death.

US133 Once the public market has been created by the initial primary offering, existing shareholders are able to sell their shares in the liquid trading market subject to Commission rules on sales of restricted securities.¹

¹ 17 Code of Federal Regulations, s 240.144.

US134 Stock Options. In addition, an issuer may be in a better position to attract employees by offering stock options and an employee stock ownership plan when the underlying stock is publicly traded.

US135 Prestige. Another possible positive by-product of going public in the United States is that the company gains prestige and publicity among the general investing public, thus giving the issuer a more favourable image, increasing good will, and perhaps putting it in a competitive advantage over a privately held competitor who is not required to disclose information to the public. Consumers are able to 'own' the company whose products and services they use.

Disadvantages

US136 Compliance. However, the privilege of access to United States public markets and use of United States markets and exchanges brings with it the obligation to comply with the United States securities laws. Foreign issuers coming into United States markets should appreciate the fact that the Securities and Exchange Commission takes the enforcement of these laws very seriously.

US137 The activism of the Securities and Exchange Commission in promoting fair and full disclosure of information and enforcing penalties and sanctions against fraudulent conduct is a very significant factor in creating investor confidence in United States markets.

US138 Disclosure. Full public disclosure is one of the main burdens of going public. On the effectiveness of its initial registration statement with the Securities and Exchange Commission, the issuer becomes subject to the annual and periodic reporting requirements and other requirements of the 1934 Act. The disclosure, accounting, and reporting requirements imposed by the Securities and Exchange Commission are far more stringent than those of other nations.¹

¹ Schimkat, 'The Securities and Exchange Commission's Proposed Regulations of Foreign Securities Issued in the United States', 60 *Fordham L Rev* (1992), at p S203.

US139 In addition, as discussed above, the stock exchanges and markets require immediate public disclosure of ‘any significant event that could affect an investor’s decision to buy, sell, or hold the company’s stock’.¹

US140 The initial prospectus and subsequent Commission filings will reveal a significant amount of material business and financial information about the company that would not be available about a private company. This information provides competitors with a view of the company that they would not otherwise have. Included are descriptions of the issuer’s business, business strategies, material contracts, and information on every business subsidiary. This disclosure, including proposed corporate actions, will be subject to the scrutiny of the investment community, shareholders, and security regulators.

US141 Inaccurate or selective disclosure may be a source of litigation. In fact, this topic has become a ‘hot button’ item for Securities and Exchange Commission rule making, as evidenced by the recent enactment of Regulation FD (Fair Disclosure) which imposes new restrictions on the disclosure of material non-public information.² Another result of an offering is the immediate dilution of an existing shareholder’s holdings. For those shareholders (or employees or directors) that have invested their time, effort, and money into a growing company, a public offering will dilute or reduce their ownership interest.

US142 Costs. In addition, offering costs required for a public offering of securities — underwriters, legal, accounting, printing, transfer agents, stock exchange listing, and state blue sky fees — may be substantial and will reduce the proceeds of the offering to the company. The company runs the risk that the offering will not be consummated, causing the company to incur all the fees without any guarantee of a result.

US143 Compliance with the reporting requirements under the 1934 Act will be a significant yearly administrative cost and an ongoing onerous task. The task of registration and periodic reports will require a substantial amount of management’s time and effort.³

1 Hoyns and Kanter, ‘Deciding Whether to Go Public’, *PLI, How to Prepare an Initial Public Offering* (1999) at p 15.

2 17 Code of Federal Regulations, ss 243.100–243.103.

3 Hoyns and Kanter, ‘Deciding Whether to Go Public’, *PLI, How to Prepare an Initial Public Offering* (1999) at p 17.

US144 Management. Once an issuer has offered its shares to the public, the relationship between the company's managers, directors, and controlling shareholders to its shareholders is altered.

US145 Having publicly traded securities changes the focus of the company, which must thereafter be continually focused on relationships with its shareholders and the public perception of the company, including the disclosure of announcements and responding to the inquiries of analysts. As a result of the pressures imposed by market forces, management of a publicly traded company may feel pressure to focus on short-term maximisation of profits at the expense of developing long-term goals.

US146 Litigation Risk. Being a publicly traded company also subjects the company to increased litigation risk. The Securities and Exchange Commission has significant enforcement powers to deter fraudulent behaviour and to enforce compliance with United States law.

US147 In addition, United States law provides for private rights of action to enforce the regulatory system. As a result, the potential for litigation may influence role in the actions of a publicly traded company.

US148 Liquidating Assets. Although an insider's investment in a public company will be more liquid than if the company were still private, control over liquidating that asset may be limited. One may not trade shares when in possession of non-public material information. In addition, there are periods when shares may not be traded due to possession of non-public information, such as at the time of earnings announcements, and periods when shares purchased in the public market may not be resold.

US149 Selling by high-ranking insiders also can adversely affect market confidence in a company while buying sends a positive signal. Stock issued when the company was private may still be 'restricted' under Commission rules, even after the public offering, and thus subject to sale restrictions.¹

¹ 17 Code of Federal Regulations, s 240.144.

US150 Insider Trading. In recognition of the potential for abuse by people with access to non-public material information, the Securities and Exchange Commission has recently enacted Regulation FD and rules 10b5-1 and 10b5-2.

US151 In response to the growing practice of issuers disclosing important non-public information, such as earnings warnings, to securities analysts or institutional investors before making this information to the general public, the Securities and Exchange Commission enacted Regulation FD. Regulation FD provides that when an issuer, or a person acting on behalf of an issuer, discloses material non-public information to a selective audience (eg, analysts and selective institutional investors), it must make public disclosure of that information, generally by making a filing on Form 8-K.¹

US152 Rule 10b5-1 of the Exchange Act² is intended to clarify the issue of when insider trading liability arises in connection with a trader's 'use' or 'knowing possession' of material non-public information. This rule provides that a person trades 'on the basis of' material non-public information when the person purchases or sells securities while aware of the information.

US153 However, the rule also sets forth several affirmative defences that permit persons to trade in certain circumstances where it is clear that the non-public information was not a factor in the decision to trade.³

US154 Rule 10b5-2 of the Exchange Act⁴ addresses the issue of when a breach of a family or other non-business relationship may give rise to liability under the misappropriation theory of insider trading. This rule sets forth three non-exclusive bases for determining that a duty of trust or confidence was owed by a person receiving information, and it will provide greater certainty and clarity on this unsettled issue.⁵

1 Securities Release Number 33-7881; Exchange Act Release Number 34-43154 (15 August 2000).

2 17 Code of Federal Regulations, s 240.10b5-1.

3 Securities Release Number 33-7881; Exchange Act Release Number 34-43154 (15 August 2000).

4 17 Code of Federal Regulations, s 240.10b5-2.

5 Securities Release Number 33-7881; Exchange Act Release Number 34-43154 (15 August 2000).

Non-United States Issuer Public Offerings in the United States

In General

US155 Non-United States private issuers affecting an initial public offering in the United States must register the offering pursuant to the registration requirements of section 5 of the 1933 Act. Under section 5 of the 1933 Act, it is illegal to offer or sell securities in the United States without a registration statement declared effective by the Securities and Exchange Commission or pursuant to an exemption from registration.

US156 Registration is intended to provide adequate and accurate disclosure of material facts concerning the company and the securities it proposes to sell, so that investors may make a realistic appraisal of the merits of the investment and make an informed investment decision. The Securities and Exchange Commission does not ‘approve’ or ‘disapprove’ the offering or exercise any investment judgment on behalf of investors. Any company may register its securities before the Securities and Exchange Commission — no matter the merits of the company, its management, and its prospects.

US157 To this end, the Securities and Exchange Commission mandates registration forms for different types of companies, and it sets compulsory and extensive disclosure requirements and standards. The registration statement includes a prospectus, which is the document that will be provided directly to investors. All registration statements and prospectuses filed with the Securities and Exchange Commission are public documents and are available for inspection and copying at the offices of the Securities and Exchange Commission or through EDGAR, the on-line database of reporting companies and their filings.¹

Registration Forms

US158 In General. Currently, there are four registration forms (F-1, F-2, F-3, and F-4) that can be used to register the securities of a foreign private issuer for a public offering in the United States under the Securities Act. They essentially parallel Registration Forms S-1 through S-4, which are used by United States

¹ EDGAR, at the Securities and Exchange Commission web site <http://www.sec.gov/edgar>.

companies. In addition, Form F-6 is available to register American Depositary Receipts of non-United States issuers (see text, below).

US159 Certain recent revisions effecting international disclosure standards, specifically those modifications to Form 20-F, which governs certain registration requirements, have impacted the application and caused a revision of those forms used for registration under the 1933 Act.

US160 Effective Dates and Transition Periods. In light of the recent revisions, the Securities and Exchange Commission disallowed any ‘grandfathered’ exemptions to these revised rules which became effective on 30 September 2000, with certain exemptions.¹ In some cases, as explained below, the date at which a registrant will have to comply with a revised form will depend on that registrant’s fiscal year end.

US161 Registration Statements Filed on Form F-1, Form F-4, or Form 20-F. Registrants (those non-United States entities that have registered with the Securities and Exchange Commission) must use revised Form F-1 and revised Form 20-F for registration statements first filed on or after 30 September 2000.

US162 Registrants that are not eligible to incorporate Form F-4 information by reference to a previously filed annual report on Form 20-F also must use revised Form F-4 for registration statements filed on or after 30 September 2000.

US163 Registration Statements Filed on Forms F-2 and F-3 and Form F-4 if It Permits Incorporation by Reference. Forms F-2, F-3, and Form F-4 permit a registrant to satisfy form requirements by incorporating information from an annual report on Form 20-F. Form F-4 also permits the registrant to incorporate information about the other party to a business combination by referring to that company’s annual report.

US164 The revised Forms F-2, F-3, and F-4 do not provide for incorporation of information by reference to ‘old’ Form 20-F. Accordingly, the revisions to Forms F-2 and F-3 will be effective for registration statements and post-effective

¹ Securities Act Release Number 7745, Exchange Act Release Number 41936, International Series Release Number 1205 (28 September 1999).

amendments filed any time after a registrant is required to file its first annual report on revised Form 20-F. In cases where a Form F-4 permits information about either party to the business combination to be incorporated by reference to an annual report on Form 20-F, the revisions to Form F-4 will be effective for registration statements and post-effective reference is required to file its first annual report on Form 20-F.

US165 Annual Reports Filed on Form 20-F. Revised Form 20-F must be used for annual or transition reports filed with respect to fiscal years ending on or after 30 September 2000.

US166 The following information applies to situations where the registrants make the transition from the old version of a form to the revised version:

- Pre-effective amendments — When, on 30 September 2000, a foreign private issuer has on file at the Securities and Exchange Commission a registration statement on Form F-1, a Form F-4 that does not permit incorporation by reference, or Form 20-F and that registration statement has not been declared effective, the issuer may continue to file pre-effective amendments to that registration statement after 30 September 2000 without modifying those pre-effective amendments to reflect the revisions. This position does not apply to pre-effective amendments to registration statements on Form F-2, Form F-3, or a Form F-4 that permit incorporation by reference because registrants will have a lengthy transition period and experience preparing an annual report on revised Form 20-F before they must comply with the revisions to those Securities Act registration statements.
- Post-effective amendments — The revisions to these registration statement forms apply to post-effective amendments filed on or after the effective date given above for a particular form if the post-effective amendment is to include the registrant's latest audited financial statements or to update the prospectus under section 10(a)(3).
- Registration statements and post-effective amendments filed under rule 462(b) and (c) — Registration statements and post-effective amendments filed under rule 462(b) and (c) are effective on filing with the Securities and Exchange Commission. These registration statements and amendments must comply with the registration statement revisions only if the registrant first filed the underlying registration statement on or after the effective date given above for a particular form.

- Prospectus supplements — The revisions to the newly adopted registration statement forms apply to prospectus supplements filed on or after the effective date given above for a particular form. If an issuer filed a base prospectus under rule 415(a)(1)(x) before it was required to comply with revised Form F-3, that base prospectus does not need to be amended, even though subsequent prospectus supplements must comply with the revised form.

Description of Registration Forms

US167 Form F-1. Form F-1 is the basic registration form for public offerings by a foreign private issuer. Forms F-2, F-3, and F-4 are mainly used by non-United States companies to register secondary offerings of securities after the company has registered one or more of its classes of securities and has issued periodic reports pursuant to the 1934 Act. Form F-1 has the same information requirements as Forms F-2 and F-3, except that all information must be included in the document rather than incorporated by reference, thus resulting in a larger, more extensive document.¹

US168 The majority of first-time foreign private issuer registrants utilise the registration statement on Form F-1, since the issuers generally do not qualify for the other forms due to a lack of history as mandated by the reporting obligations of the 1934 Act. The disclosure requirements under Form F-1 are very similar to the disclosure obligations of a United States issuer on Form S-1. Information required under Form F-1 includes:

- Description of the securities to be offered;
- Pending legal proceedings;
- Risk factors;
- Use of proceeds;
- Determination of offering price;
- Dilution of selling security holders;
- Plan of distribution;
- General information with respect to the registrant;

¹ 2 *Fed Sec L Rep* (CCH), paras 6952 and 6062.

- Identity of directors and officers and their remuneration as a group;¹ and
- Audited financial statements prepared under, or reconciled with, United States GAAP.²

US169 Unlike its Form S-1 counterpart, Form F-1 currently permits more limited disclosure in certain areas, including disclosure of the compensation and stock ownership of directors and management and transactions between the issuer and its directors and management.³ In addition, certain disclosure requirements of Form F-1 are unique to the foreign private issuer registering a public offering. These include information regarding:

- The nature and extent of the principal non-United States trading market for the issuer's securities;
- Governmental regulations applicable to the issuer which restrict the import or export of capital or affect the remittance of dividends, interest, or other payments to security holders;
- Limitations on the right to hold or vote securities applicable to persons who are not citizens or residents of the issuer's home country;
- Taxes applicable to United States security holders under the laws of the country in which the issuer is organised and any applicable tax treaty; and
- Exchange rates between United States dollars and the home country currency.⁴

US170 Form F-2. Form F-2, which may be used to register securities to be offered in a transaction other than an exchange offer for securities of another person, is available for a foreign private issuer that:

- Has been subject to 1934 Act reporting obligations for at least 36 months and has timely filed all required 1934 Act reports during the preceding 12 months; or

1 Generally, compare to Form S-1. Form S-1, which is used for domestic issuers, requires remuneration to be listed per director and officer in addition to in the aggregate; 17 Code of Federal Regulations, s 229.701.

2 Form F-1, 17 Code of Federal Regulations, s 239.31.

3 Form F-1, 17 Code of Federal Regulation, s 239.31. However, the recently adopted rules may impact on the issuer's disclosure regarding compensation and stock ownership. Securities Act Release Number 7745, Exchange Act Release Number 41936, International Series Release Number 1205 (28 September 1999).

4 Form F-1, 17 Code of Federal Regulations, s 239.31.

- Is subject to 1934 Act reporting obligations and has filed at least one annual report; or
- Has timely filed required 1934 Act reports during the last 12 months; and
- Has at least US \$75 million in voting stock held by non-affiliates, or is registering non-convertible investment grade debt or preferred securities, or has been subject to 1934 Act reporting obligations for at least 12 months and is registering securities to be offered on exercise of outstanding transferable warrants or rights granted pro rata by the issuer, pursuant to a dividend or interest re-investment plan or, on conversion of outstanding securities, has had no material default on loans or long-term leases or failure to pay a sinking fund instalment or dividend on preferred stock since the end of the last fiscal year covered by certified financial statements in its 1934 Act reports, and no subsidiary of the issuer has had such a default.¹

US171 Form F-2 requires similar information to the Form F-1. The difference is that the periodic reports must be delivered with the Form F-1 prospectus, while such documents may be incorporated by reference in the Form F-2.

US172 Form F-3. Form F-3, used primarily for non-convertible debt offerings, may be used if the registrant's latest annual report filed with the Securities and Exchange Commission contains financial statements with full reconciliation to United States GAAP, and it is available with a reconciliation if the securities are non-convertible investment grade securities or are to be offered:

- In secondary offerings;
- On exercise of certain outstanding transferable warrants;
- On exercise of rights granted pro rata by the issuer to existing holders of such class;
- Pursuant to a dividend or interest re-investment plan; or
- On conversion of outstanding convertible securities.²

US173 To be eligible to use Form F-3, the issuer must have:

- Securities registered under the 1934 Act, section 12(b) or section 12(g), or be required to file reports under the 1934 Act, section 15(d), and have filed at least one annual report;

¹ Form F-2; 17 Code of Federal Regulations, s 239.32.

² Form F-3; 17 Code of Federal Regulations, s 239.33.

- Been subject to the 1934 Act reporting obligations and filed all required materials on a timely basis for the last 12 months;
- Had no material default on loans or long-term leases or failure to pay a sinking fund instalment or dividend on preferred stock since the end of the last fiscal year covered by certified financial statements in its 1934 Act reports, and no subsidiary of the issuer may have had such a default; and
- Common stock held by non-affiliates with a market value of at least US \$75 million, unless it is registering non-convertible investment grade securities to be offered for cash.¹

US174 An issuer using Form F-3 must provide a variety of information, including that relating to:

- The terms of the offering, including the use of proceeds;
- The latest and future Exchange Act annual reports and, if appropriate, reports on Form 6-K all of which are incorporated by reference;
- Any material changes in its affairs since the latest annual report; and
- The financial statements of any business acquired or to be acquired.

US175 Employing the same approach as a United States issuer's Form S-3, Form F-3 incorporates by reference the registrant's latest Form 20-F (see text, below) and otherwise generally requires only transaction-related data.²

US176 Form F-4. Form F-4 is available for business combination transactions involving foreign private issuers.³

US177 Other Forms. Forms F-7, F-8, F-9, F-10, and F-80 contain the abbreviated disclosure requirements available to qualifying non-United States companies under the multi-jurisdictional disclosure system.⁴

¹ Form F-3; 17 Code of Federal Regulations, s 239.33.

² Form F-3; 17 Code of Federal Regulations, s 239.33.

³ Form F-4; 17 Code of Federal Regulations, s 239.34.

⁴ A full discussion of the multi-jurisdictional disclosure system and Canadian companies is provided later in this chapter.

American Depository Receipts

In General

US178 Foreign private issuers raising capital in the United States markets frequently elect to effect the offering utilising American Depository Receipts.¹ As previously described, an American Depository Receipt is a negotiable instrument issued by a third-party depository, usually a United States bank or its non-United States affiliate, and it represents a specified number of securities of the underlying issuer which are held by the depository on behalf of the American Depository Receipt holders.

US179 Trades are typically affected in the American Depository Receipts themselves and not in the underlying securities. American Depository Receipts have been developed to alleviate certain legal restrictions and practical problems related to the trading in the underlying issuer of non-United States securities.

US180 First, the American Depository Receipt is transferable on the books of the depository bank without the need to affect a transfer of the underlying securities on the record books of the issuer. This allows quicker processing of transactions, can eliminate transfer taxes, and can reduce any practical problems with respect to non-United States exchange controls. In addition, the registration of American Depository Receipt holdings eliminates problems associated with non-United States equity securities, such as legal requirements that effectively restrict the ability of holders to vote shares.²

US181 The depository bank acts as the issuer's agent, notifying American Depository Receipt holders of dividend distributions, paying dividends to the American Depository Receipt holders (after converting the dividends to United States currency), and providing to the American Depository Receipt holders other information provided by the issuer to its shareholders, and voting on behalf of the American Depository Receipt holders.

US182 American Depository Receipts may be traded on a United States stock exchange or NASDAQ if registered pursuant to section 12 of the 1934 Act and

¹ American Depository Receipts are defined at 17 Code of Federal Regulations, s 230.405.

² Zeprun, 'United States Public Offerings and Periodic Reporting by Foreign Issuers', 1018 *PLI, Corporate Finance* (1997) 695, at p 704.

if they are current with their Securities and Exchange Commission filings. American Depositary Receipts also may trade on the OTC Bulletin Board and Pink Sheets, assuming again that they are current with their Securities and Exchange Commission filings.

US183 In most cases, an American Depositary Receipt is a superior mechanism for trading the securities of non-United States issuers for the following reasons:

- The American Depositary Receipt form of registration is more familiar to the United States investment community;
- The American Depositary Receipt is generally easier for United States investors to understand rather than having to deal with the alternative of a foreign share certificate, which may be denominated in a foreign currency or may be in bearer form;
- The American Depositary Receipt arrangement enhances transferability of stock certificates by avoiding the legal mandate of multiple jurisdictions, some of which may require an execution of a deed and an acknowledgment before a notary public to transfer securities, and/or might impose stamp or other transfer taxes on share transfers; and
- The American Depositary Receipt can be issued in any ratio, such as one American Depositary Receipt equals three underlying shares, which could be used to increase the price level of the shares to customary levels of equivalent United States securities or to satisfy minimum price requirements of a United States exchange or market.

Types of American Depositary Receipts

US184 In General. American Depositary Receipts generally take two forms, ie, 'unsponsored' and 'sponsored'.

US185 An 'unsponsored' American Depositary Receipt is typically created by a depositary bank acting on its own initiative in response to investor interest in a non-United States security. The bank establishes the arrangement, generally with the knowledge, but not the active co-operation, of the non-United States issuer.

US186 Dividend distribution fees and other administrative costs are borne by the American Depositary Receipt holders through the bank's retention of a portion of the dividend. The depositary is required to file a registration

statement on the relatively simple Form F-6¹ and then may accept deposits of the issuer's securities and commence issuance of receipts against those deposits.

US187 A 'sponsored' American Depositary Receipt is created with the consent and assistance of the issuer of the underlying securities. The issuer typically enters into a deposit agreement with the depositary bank, setting forth the rights and obligations of the issuer, the depositary bank, and the holders of American Depositary Receipts. The issuer will also sign the F-6 registration statement.² In a sponsored arrangement, the issuer typically bears the fees of the depositary.

US188 There are three levels of sponsored American Depositary Receipts, each requiring different registration and reporting procedures pursuant to the 1933 Act and the 1934 Act.

US189 *Level I American Depositary Receipts.* Level I American Depositary Receipts trade on the OTC Bulletin Board and Pink Sheets, and they do not require the non-United States issuer to comply with United States GAAP or full Commission disclosure requirements, based on the exemption created by rule 12g3-2(c), provided that, to be quoted on the OTC Bulletin Board, the non-United States issuer is registered and current with its filing requirements.

US190 Since Level I American Depositary Receipts are not registered under section 12 of the 1934 Act, the issuer is prohibited from raising capital. The issuer of the American Depositary Receipt must file on Form F-6, and the American Depositary Receipt's underlying security must be registered or exempt from registration under the 1934 Act.

US191 *Level II American Depositary Receipts.* Level II American Depositary Receipts are registered under section 12 of the 1934 Act, and thus are eligible to be listed on an exchange or market, but have not been offered to United States investors in a public offering. Level II registration requires filing on Form F-6 as well as on Form 20-F.

US192 *Level III American Depositary Receipts.* The Level III American Depositary Receipt requires detailed disclosure about both the issuer and the securities

¹ 17 Code of Federal Regulations, s 239.36.

² 17 Code of Federal Regulations, s 239.36.

being offered to the public but, unlike a Level II American Depositary Receipt, registration of a Level III American Depositary Receipt permits an issuer to raise capital through a public offering to United States investors as well as permitting the listing of the American Depositary Receipts on a national exchange or market.

Registration of American Depositary Receipts

US193 Form F-6 may be used to register the shares evidenced by American Depositary Receipts issued against the deposit of the securities of a non-United States issuer, and it may be used only if the issuer is filing periodic reports with the Securities and Exchange Commission under the 1934 Act or the deposited securities are exempt from such reporting by rule 12g3-2(b),¹ if the deposited securities are registered under the 1933 Act or exempt from such registration and if the American Depositary Receipt holder is entitled to withdraw the deposited securities at any time, subject only to temporary delays for specified, limited reasons.

US194 A main advantage of an American Depositary Receipt is the relative simplicity of Form F-6 and that, pursuant to rule 15d-3,² annual and other reports are not required as a result of registering American Depositary Receipts on Form F-6. American Depositary Receipts also are exempt from registration under section 12(g) of the 1934 Act, pursuant to rule 12g3-2(c).³

US195 To become listed on a United States exchange or market, American Depositary Receipts must be registered pursuant to section 12 of the 1934 Act,⁴ and a registration statement and annual reports must be filed on Form 20-F. Thus, a number of companies decide not to have their American Depositary Receipts listed on an exchange or market. Instead they are listed as Level I American Depositary Receipts, trading on the Pink Sheets or the OTC Bulletin Board services that provide limited quotation or transaction information but, in the case of the OTC Bulletin Board, still require the issuer to currently file

1 17 Code of Federal Regulations, s 240.12g3-2(b).

2 17 Code of Federal Regulations, s 240.15d-3.

3 17 Code of Federal Regulations, s 240.12g3-2(c).

4 Securities and Exchange Act of 1934, 15 United States Code, s 781.

reports with the Securities and Exchange Commission pursuant to section 13 or section 15(d) of the Exchange Act.

US196 In July 1997, the Securities and Exchange Commission adopted rule 12a-8 to exempt American Depository Receipts that are listed on a national securities exchange and registered on Form F-6 from the registration requirements of section 12(b) of the 1934 Act.¹ Nevertheless, the section 12 registration requirements still apply to the class of securities underlying the American Depository Receipts.²

Financial Statements

US197 In General. The Securities and Exchange Commission, through the activities of the Office of the Chief Accountant and private sector groups such as the Financial Accounting Standards Board and the American Institute of Certified Public Accountants, establishes and maintains stringent accounting standards for companies that avail themselves of the United States capital markets and exchanges.³

US198 The Securities and Exchange Commission has recently adopted significant revisions to rules and regulations governing financial disclosure for new non-United States issuers.

US199 Financial Statement Disclosure under Revised United States Disclosure Requirements. The International Organisation of Securities Commissions, of which the Securities and Exchange Commission is a member, developed

1 17 Code of Federal Regulations, s 240.12a-8; Securities Act Release Number 7431 (18 July 1997).

2 17 Code of Federal Regulations, s 240.12a-8; Securities Act Release Number 7431 (18 July 1997).

3 In connection with recent revisions to the rules and regulations governing financial disclosure that are discussed in detail later in this chapter, the Securities and Exchange Commission has issued a recent concept release seeking comments on the necessary elements of an effective, high-quality global financial-reporting framework, specifically, through the work of the International Accounting Standards Committee. For more information regarding these proposed issues, see Securities and Exchange Commission Concept Release, Securities Act Release 7801; Exchange Act Release 42430; International Series Release 1215 (16 February 2000).

international disclosure standards that facilitate crossborder capital raising and listing by letting companies comply with one set of non-financial disclosure requirements for offerings in several jurisdictions.

US200 The result of these efforts by International Organisation of Securities Commissions is a compilation of international disclosure standards, envisioned as an ‘international passport’ to the world’s capital markets.¹ The International Organisation of Securities Commissions standards were endorsed by International Organisation of Securities Commissions in September 1998. These standards are the basis of the rulemaking revisions currently enacted by the Securities and Exchange Commission.²

US201 A major facet of the Securities and Exchange Commission’s recent revision is to modify and harmonise international disclosure standards by deleting rule 3-19 of Regulation S-X, replacing it with a new item 8 on Form 20-F. This provision will reduce the current permitted age of reconciled financial statements for foreign private issuers to conform to the proposed International Organisation of Securities Commissions standards.³

US202 As mentioned above, the Securities and Exchange Commission has enacted new rules and regulations that significantly change the permitted age of financial statements. The new item 8 of Form 20-F will now mandate that audited financial statements will be no older than 15 months at ‘the time of the offering or listing’, which means the effective date of the registration statement, rather than the 18 months previously permitted by rule 3-19. For those issuers effecting registration under an initial public offering,⁴ the audited financial statements must also be of a date not older than 12 months at the time the offering document is filed with the Securities and Exchange Commission.⁵

1 Securities Act Release 7637; Exchange Act Release 41014; International Series Release 1182 (4 February 1999).

2 Securities Act Release 7637; Exchange Act Release 41014; International Series Release 1182 (4 February 1999).

3 Securities Act Release 7637; Exchange Act Release 41014; International Series Release 1182 (4 February 1999).

4 This revised strict standard is not applicable to issuers that are publicly traded in their home country.

5 Securities Act Release Number 7745, Exchange Act Release Number 41936; International Series Release Number 1205 (28 September 1999).

State Blue Sky Requirements

US203 Non-United States issuers effecting an offering in the United States must also comply with the securities laws of the individual states in which the offering is conducted. Generally, state securities laws, or ‘blue sky’ laws, will be complied with by virtue of registration of the offering under the federal securities laws, provided that appropriate notices are filed in the various states.¹

US204 Following the amendment of certain aspects of the United States federal securities law under the National Securities Markets Improvement Act of 1996,² a security which trades on the New York Stock Exchange, American Stock Exchange, or the NASDAQ National Market is generally exempted from certain laws of the individual states.

Registration Process

US205 In General. Once a company determines to register its shares with the Securities and Exchange Commission, to list the company’s securities on the United States stock markets, and/or to raise capital in the United States through an initial public offering, the company should assemble a team of experts to assist with the preparation of a registration statement.

US206 For initial public offerings, the non-United States issuer needs to select an investment banker experienced in this area. The company will formalise its relationship with the underwriter through a ‘letter of intent’ which outlines fees, ranges for stock price and number of shares, and certain other conditions.

US207 Legal counsel for an entity undertaking an initial public offering should be familiar with the underwriting process and should be accustomed to dealing with the Securities and Exchange Commission, the National Association of Securities Dealers, and the state securities commissions regarding the prospectus

1 An exception to this exemption from state securities laws is an offering that is exempt from registration pursuant to section 3(a)(10) of the Securities Act. To address a legislative anomaly, securities offered pursuant to this section are no longer deemed as ‘covered securities’ and as such the securities are not privy to the convenience of the National Securities Markets Improvement Act. Revised Staff Legal Bulletin Number 3 (CF), 20 October 1999.

2 National Securities Markets Improvement Act of 1996, Public Law Number 104-290 (1996).

submission process. The accountants should be certified public accountants whose work conforms to Securities and Exchange Commission Accounting Principles and United States GAAP.

US208 Prospectus. As mentioned above, the prospectus is the key document of the registration document. The prospectus is both a disclosure document, by law, and a selling document, by custom, since it is the only information that the law allows to be disseminated about the offering. Usually, counsel is primarily responsible for drafting the narrative part of the prospectus, while the accounting firm will prepare the financial statements and the investment banker will supply the underwriting details.

US209 Typically, the registration statement goes through many drafts and is extensively reviewed for its accuracy prior to filing with the Securities and Exchange Commission. During this process, counsel typically reviews information regarding the company and its business, its material contracts, its supply and customer relationships, and its management, compensation arrangements, and related-party transactions. Often, counsel will visit the client to review, first hand, its operations and properties. After a registration statement is drafted, it is then reviewed by the underwriter and its counsel.

US210 In an effort to make disclosure more clear, concise, and understandable for investors, the Securities and Exchange Commission has recently adopted a 'Plain English' rule. To avoid extensive comments from the Securities and Exchange Commission, which results in a delaying of the Registration Statement being declared effective, issuers should draft the prospectus with an aim towards compliance with the Plain English mandate.¹

US211 Underwriters occupy a unique position in United States securities law, and they must perform 'due diligence' on the company to meet their obligations under the United States securities law.

¹ 7 Code of Federal Regulations, s 230.421; Securities Act Release Number 7497; Exchange Act Release Number 39593; International Series Release Number 1113 (22 January 1998). More information regarding the plain English rule is available in the Securities and Exchange Commission's *A Plain English Handbook — How to Create Clear Securities and Exchange Commission Disclosure Documents*, which is available at the Securities and Exchange Commission's web site (www.sec.gov) or by calling 1-800-SEC-0330.

US212 Once the company, its counsel, accountants, and advisors are satisfied with the registration statement, and the underwriter and its counsel are satisfied as well, the registration statement is filed with the Securities and Exchange Commission and the appropriate fee paid.

US213 Commission Role. The Securities and Exchange Commission's role in the regulation of prospectuses focuses on disclosure. Within the Securities and Exchange Commission, the Division of Corporation Finance reviews the registration statement when it is filed for the accuracy and adequacy of all material facts — information that would affect investment decisions and compliance with the Securities and Exchange Commission's rules and forms. Unlike United States issuers, the Securities and Exchange Commission's Office of Corporate Finance, Division of International Corporate Finance, is willing to review, on a confidential basis, the disclosure documents of the non-United States issuers in draft form on a confidential non-public basis, if requested by the non-United States issuer.

US214 When possible, the Division will provide solutions and comments to the documents, prior to actual filing. The Securities and Exchange Commission has stated that it will, on a day-to-day basis, find solutions to problems non-United States issuers have with registering under the federal securities laws, including rule-making initiatives and meeting with non-United States issuers.¹

US215 The registration statement must be reviewed, cleared, and declared effective by the Securities and Exchange Commission before sales can be confirmed. It is unlawful to sell securities until the registration statement has been declared effective.² To facilitate crossborder offerings and listings, and recognising the particular difficulties of coordinating time schedules for cross-border offerings, the Securities and Exchange Commission staff review process has been tailored to accommodate the special scheduling demands for such offerings.

US216 Generally, first comments are received within 30 days of submission. The Securities and Exchange Commission will respond formally to the registration

¹ Kosnick, 'The Role of the Securities and Exchange Commission in Evaluating Foreign Issuers Coming to United States Markets', 17 *Fordham Int'l LJ* S97, at pp S108–110 (1994).

² 15 United States Code, s 77e(1).

statement with a 'comment letter', specifying any deficiencies that need to be addressed. The company, in turn, files a letter with the Securities and Exchange Commission responding to requests for information and describing proposed amendments to the prospectus.

US217 Distribution. After the 'preliminary prospectus' (commonly referred to as a 'red herring' because of the red ink printed on the cover, stating that it is not a final prospectus and cannot be used to effect sales) has been filed with the Securities and Exchange Commission as part of the registration statement, it may be distributed for circulation among potential investors. The underwriter will then assemble a syndicate, consisting of additional investment bankers who will place portions of the offering to achieve the desired distribution.

US218 The lead underwriter will begin to accumulate indications of interest solicited through its efforts, as well as the syndicate's, from institutions and brokers that have approached their clients. This gives assurance that the offering is viable and helps to determine the final number of shares to be offered and the allocations to each investor.

US219 The investment banker and the company will then design and perform the 'road show', a series of meetings with potential investors and analysts in various cities. The road show consists of a fairly elaborate formal presentation on the company's operations, financial condition, performance, markets, and products, delivered by the company's top executives, who are then available for questions.¹

US220 National Association of Securities Dealers Filing. Contemporaneously with filing with the Securities and Exchange Commission, the registration statement also is filed with the National Association of Securities Dealers, which reviews the underwriting compensation and offering terms. The National Association of Securities Dealers regulates the actions of broker-dealers, including underwriters, and must approve the compensation arrangements prior to the registration statement being declared effective.

¹ National Association of Securities Dealers Publications, *Going Public*, located at the NASDAQ web site, <http://www.nasdaq.com>.

US221 While the Securities and Exchange Commission's review focuses on proper disclosure, the National Association of Securities Dealers review focuses on the fairness of underwriting compensation, terms, and arrangements. The National Association of Securities Dealers review is conducted by its Corporate Financing Department according to the National Association of Securities Dealers Corporate Financing Rules and Code of Procedure.¹

US222 Final Version of Prospectus. After first comments are received from the Securities and Exchange Commission, the issuer will respond to the Securities and Exchange Commission and, if required, amend the registration statement by providing amendments to the Securities and Exchange Commission.

US223 Once the staff of the Securities and Exchange Commission believes that the registration conforms to the requirements of the applicable form, the Securities and Exchange Commission will declare the statement effective. The final version of the prospectus can now be printed, and delivered to prospective investors, and the registered securities may be sold.

Integration of Public and Private Offerings

US224 In General. A fundamental issue in securities regulation is the idea of integration. The issue of integration is seminal in determining whether multiple securities transactions should be considered as part of the same offering.

US225 The integration doctrine prevents an issuer from artificially aggregating multiple offerings into one transaction so as to avoid proper separate registration.

US226 Abandoned Registered Offering. The integration issue is salient when an issuer has decided to switch between a public offering and a private offering when changing market or business conditions dictate such a switch. The manifestation of this problem is when an issuer files a registration statement for a public offering, which the Securities and Exchange Commission historically has deemed to be a general solicitation and subsequently decides to conduct a private offering.

¹ National Association of Securities Dealers Publications, *Going Public*, located at the NASDAQ web site <http://www.nasdaq.com>.

US227 Because the filing of the registration statement has historically been deemed as a general solicitation by the Securities and Exchange Commission that would be integrated into the proposed private offering, the private offering exemption would likely be unavailable to the issuer.¹

US228 Abandoned Private Offering. In the event that an issuer commences a private offering (but does not sell any securities in this private offering) prior to a registered offering, but then decides to file a registration statement, it is likely that these offerings could be integrated thereby causing a potential violation of section 5(c), which is more commonly known as ‘gun jumping’.

US229 To provide clarification on this issue, the Securities and Exchange Commission has adopted new rule 155² which provides a safe harbour, based on compliance with certain conditions, for a registered offering following an abandoned private offering or, conversely, a private offering following an abandoned (or failed) registered offering, without integrating the registered and private offerings in either case.³

Private Placements by Non-United States Issuers

Exemptions Available to Non-United States Issuers

Exemption from Registration

US230 Section 5(a) of the 1933 Act provides that it is unlawful for a person or entity to use the mails or any means or instrumentality of interstate commerce to sell unregistered securities, whether the issuer is a United States or a non-United States person or entity.⁴ However, there is a series of statutory provisions, rules, and interpretations that exempt certain transactions from section 5(a), a number of which are available to non-United States issuers offering and selling securities within the United States.⁵

1 Securities Release Number 33-7943 (26 January 2001).

2 17 Code of Federal Regulations, s 230.155.

3 Securities Release Number 33-7943 (26 January 2001).

4 Securities Act of 1933, 15 United States Code, s 77e (a).

5 Securities Act of 1933, 15 United States Code, s 77d.

US231 These exemptions relate only to the specified transaction and not to any future sale or transfer. As a result, the resale of the securities must be reviewed on a transaction-by-transaction basis and an exemption found for each resale or transfer. Securities sold in exempt transactions are generally deemed restricted securities, which may be resold only if registered or if another exemption is available.

Certain Exemptions Not Available to Non-United States Issuers

US232 Certain exemptions available for domestic entities are not available for non-United States issuers offering and selling securities within the United States. The first of these is the intrastate exemption set forth in section 3(a)(11) of the 1933 Act. This exemption from registration is available to an issuer organised under the laws of a state or territory of the United States and doing business in that same state or territory.¹

US233 Similarly, Regulation A, promulgated under section 3(b) of the 1933 Act,² which provides for a conditional exemption from registration for public offerings not exceeding US \$5 million, will not be available to most non-United States issuers because its use is limited to issuers organised under the laws of the United States or Canada.³

Exemptions Applicable to Non-United States Issuers

US234 In General. The 1933 Act provides statutory authority for exemptions from the registration requirements under section 5. Section 3(a)(10) provides an exemption when securities are issued under a plan of exchange approved by a court or another governmental authority. Section 3(b) provides authority for the Securities and Exchange Commission to exempt transactions where registration is deemed not necessary because of the small amount contemplated by the offering, under US \$5 million in value, or by the limited character of the offering.⁴

1 Securities Act of 1933, 15 United States Code, s 77c(a)(11).

2 Securities Act of 1933, 17 Code of Federal Regulations, ss 230.251–230.263, promulgated under 15 United States Code, s 77c(b).

3 17 Code of Federal Regulations, s 230.251(a)(1).

4 Securities Act of 1933, 15 United States Code, s 77c(b).

Section 4(2) exempts transactions by an issuer not involving a public offering.¹ Section 4(6) exempts transactions with accredited investors.²

US235 This patchwork of exemptions in the statute, and the rules and regulations promulgated by the Securities and Exchange Commission thereunder, form the basis for the exemption of certain limited offerings from the registration provisions of the 1933 Act.

US236 Central to the notion of exempt transactions is the concept of integration. If an issuer could selectively sell securities under one or more exemptions in a concerted scheme to evade the registration requirements or in contravention of any particular exemption, the objectives of the regulatory framework would not be met. The Securities and Exchange Commission has identified certain factors to determine whether the various offerings should be integrated, including whether the offerings represent a single plan of financing, are the same class of securities, are made at or about the same time, involve the same consideration, or are being made for the same general purpose. Each transaction and the history of the issuer needs to be reviewed to determine whether any or all of the offerings are integrated for United States securities law purposes.³

US237 Regulation D Exemptions. In 1982, the Securities and Exchange Commission adopted Regulation D under the Securities Act to clarify certain statutory exemptions available for the sale of securities by issuers on a private basis.⁴ Among other things, these rules clarify the disclosure obligations for certain types of limited offerings, and they set forth clear criteria for integration of previous offerings. There are three exemptions under Regulation D, rules 504, 505, and 506, all of which may be used by non-United States issuers, as follows.

US238 Rule 504 Exemption. Rule 504 provides for an exemption from registration pursuant to section 3(b) of the 1933 Act.⁵ This exemption from registration will apply to an offer of securities not exceeding US \$1 million during any 12-month

1 Securities Act of 1933, 15 United States Code, s 77d(2).

2 Securities Act of 1933, 15 United States Code, s 77d (6).

3 17 Code of Federal Regulations, s 230.502(a).

4 17 Code of Federal Regulations, ss 230.500 *et seq.*

5 17 Code of Federal Regulations, s 230.504(a).

period. The exemption is available to any issuer, including a non-United States issuer, so long as it is not subject to the reporting requirements of sections 13 or 15(d) of the 1934 Act and is not an investment company.¹ However, rule 504 is not available for a 'blank check offering' by a development stage company. A blank check offering is an offering where no specific business plan or purpose exists or where a business plan exists to engage in a merger or acquisition with an unidentified company or companies.²

US239 Since 1992, when it was last revised, the most attractive aspect of this exemption was the ability to conduct offerings to an unlimited number of investors without regard to their accreditation and the permitted use of general solicitation and advertising to market the offering.³ However, due to excessive abuse of this exemption and its unique 'freely tradable' characteristics, effective 7 April 1999, the Securities and Exchange Commission revised rule 504 to protect against these abuses.

US240 As such, rule 504 has been modified so that the only circumstances where general solicitation and the freely tradable securities are now permitted is when an offering has been registered under state law requiring public filing and delivery of a disclosure document to investors before sale, or if an offering has been exempted under state law permitting general solicitation and advertising so long as sales are made only to accredited investors.⁴ In the event that an offering under rule 504 does not qualify under either one of the above listed exceptions, it may not be made by any general solicitation or advertisement and the securities purchased thereunder will be deemed 'restricted securities',⁵ as discussed below.

US241 Notwithstanding the foregoing, the issuer should be aware that, whether or not disclosure requirements exist, the issuer is still subject to the antifraud provisions of the 1933 Act, which may cause the issuer to provide full and complete disclosure in any event.⁶

1 17 Code of Federal Regulations, ss 230.504(a)(1) and 230.504(a)(2).

2 17 Code of Federal Regulations, s 230.504(a)(3).

3 Hayes, 'Private Placements-Recent Developments and Current Issues', 1084 *PLI*, 30th *Annual Institute on Securities Regulation* (1998) 501, at p 526.

4 Securities Act Release Number 7644 (26 February 1999).

5 17 Code of Federal Regulations, ss 230.502(c) and (d).

6 17 Code of Federal Regulations, s 230.503(a).

US242 *Rule 505 and Rule 506 Exemptions.* Rules 505 and 506 are similar to rule 504, but they permit larger amounts to be offered, subject to stricter requirements. Rule 505 provides an exemption from registration pursuant to section 3(b) of the 1933 Act, and rule 506 provides an exemption under section 4(2) of the 1933 Act. Rule 505 allows an issuer to offer up to US \$5 million during a 12-month period.¹ In contrast, rule 506 sets no limitation on the amount that may be offered.²

US243 Another restriction is that the number of purchasers in a rule 505 or rule 506 offering is limited to 35 non-accredited investors.³ For purposes of this numerical limit, a corporation, partnership, or other entity will be deemed to be one purchaser, so long as it was not organised for the purpose of purchasing the securities in question.⁴

US244 In addition, a person and his relative, spouse, or spouse's relative will be deemed to be one investor if they have the same principal residence.⁵ Nor does the numerical limit include persons qualifying as 'accredited investors'.⁶ The term 'accredited investor' includes:

- Certain financial and investment institutions;
- The directors, officers, and general partners of the issuer; and
- Persons with a net worth, either individually or jointly with a spouse, of US \$1 million or an individual income of US \$200,000, or US \$300,000 joint income with a spouse, during the two most recent years, if he expects to reach the same income level in the current year.⁷

US245 It should be noted that, for purposes of rule 506, all non-accredited investors must possess sufficient knowledge and expertise in financial and business matters so that they are capable of evaluating the merits and risks of the prospective investment.⁸ Rule 505 contains no such requirement.

1 17 Code of Federal Regulations, s 230.505(b)(2)(i).

2 17 Code of Federal Regulations, s 230.506.

3 17 Code of Federal Regulations, s 230.505(b)(2)(ii); 17 Code of Federal Regulations, s 230.506(b)(2)(i).

4 17 Code of Federal Regulations, s 230.501(e)(2).

5 17 Code of Federal Regulations, s 230.501(e)(1).

6 17 Code of Federal Regulations, s 230.501(e)(1)(iv).

7 17 Code of Federal Regulations, s 230.501(a).

8 17 Code of Federal Regulations, s 230.506(b)(2)(ii).

US246 Rule 505 and 506 offerings may be made by any issuer, including non-United States issuers, except, in the case of a rule 505 offering, investment companies and companies meeting certain disqualification, or ‘bad boy’, provisions for previous improper conduct.¹ Unlike rule 504, neither type of offering, however, may be made by any general solicitation or advertisement under any circumstances.

US247 Unlike rule 504, rules 505 and 506 require that certain disclosure be given to offerees within a reasonable amount of time prior to the sale of the securities in question.² While such disclosure is only required to be given to non-accredited investors, it is advisable to give disclosure to all potential investors, even if accredited.³ The disclosure document generally takes the form of a ‘private placement memorandum’ that includes information required in rule 502(b)(2). In the case of a reporting issuer, the disclosure requirements may be primarily fulfilled by delivering certain of its 1934 Act filings to the offerees.

US248 As to non-reporting issuers, the non-financial information to be included in the private placement memorandum must be the same kind of information required in Part II of Form 1-A, if the issuer is eligible to use Regulation A, or that required in Part I of a registration statement filed under the 1933 Act on the form that the issuer would be entitled to use for such a statement.⁴ As discussed above, most non-United States issuers are not eligible to use Regulation A, since it is available only to United States and Canadian issuers.

US249 Thus, the non-financial information required will be that required in Part I of the registration statement form available to the non-United States issuer, such as Form F-1.⁵ Similarly, the financial information that must be included in a private placement memorandum will be that required on the applicable registration statement except that, in general, only a balance sheet dated within 120 days of the start of the offering need be certified by an accountant.

US250 Finally, in offering securities under rules 505 or 506, prior to a purchase, the issuer must give each purchaser a reasonable amount of time to ask questions

1 17 Code of Federal Regulations, s 230.505(b)(2) (iii).

2 17 Code of Federal Regulations, s 230.502(b)(1).

3 17 Code of Federal Regulations, s 230.502(b)(1).

4 17 Code of Federal Regulations, s 230.502(b)(2)(i)(A).

5 17 Code of Federal Regulations, s 230.502(b)(2)(i)(C).

and receive answers from the issuer's representatives and to obtain additional information. The additional information may be that which the issuer already possesses or which can be acquired without unreasonable effort or expense to verify the accuracy of the information provided.¹

US251 Although United States securities law provides that certain transactions are exempt from registration and, in certain circumstances, does not mandate specific disclosure requirements, these transactions are still subject to the antifraud provisions of the United States securities laws which provide for civil liability for misleading statements made, or material information omitted, in the offer and sale of securities.²

US252 Section 4(6) Exemption. Another exemption from the registration requirements of section 5(a) is set forth in section 4(6) of the 1933 Act.³

US253 This exemption from registration is similar to that set forth in rule 505 in that it is available for offers not exceeding US \$5 million and requires the filing of Form D with the Securities and Exchange Commission. Section 4(6) contains no numerical limit on offerees, but offers and sales may be made to accredited investors only. In addition, no general solicitation or advertisement may be made.

US254 Filing Requirements. Although the Regulation D and section 4(6) exemptions permit an offer without meeting the registration requirements of section 5(a), issuers taking advantage of such exemptions from registration must still file a document, Form D, with the Securities and Exchange Commission although, for purposes of Regulation D, such filing is not a condition to the availability of an exemption.

US255 Pursuant to rule 503, five copies of Form D, one of which must be manually executed, must be filed with the Securities and Exchange Commission within 15 days after the first sale of the securities in question.⁴ However, once a Form D is filed, generally, there will be no further periodic filings required.

¹ 17 Code of Federal Regulations, s 230.502(b)(2)(v).

² 17 Code of Federal Regulations, s 240.10b-5.

³ Securities Act of 1933, 15 United States Code, s 77d(6).

⁴ 17 Code of Federal Regulations, s 230.503(a) and (b).

US256 Section 3(a)(10). Another available limited exemption is found under section 3(a)(10) of the Securities Act. This exemption is available for offers and sales of securities in specific exchange transactions. To rely on this exemption, the following are required:

- The subject securities must be issued in exchange for securities, claims, or property (not cash); and
- The terms and conditions of the transaction must be adjudicated to be fair pursuant to an open, duly noticed, and authorised hearing before a governmental authority or court.¹

US257 The attractiveness of this option for non-United States issuers is that the Securities and Exchange Commission has interpreted the term ‘court’ to include courts from foreign jurisdictions that meet certain requirements.²

US258 The section 3(a)(10) exemption is available without any action by the Securities and Exchange Commission.³ If an issuer is unsure as to whether or not this exemption is available, they can request (before the fairness hearing) a ‘no-action’ position from the Securities and Exchange Commission. Issuers should note that securities issued pursuant to a section 3(a)(10) exemption are not ‘covered securities’ as contemplated by the National Securities Markets Improvement Act and, as such, they may be subject to various blue sky regulations.⁴

Restrictions on Transfer

US259 Securities sold under rules 504, 505, or 506 or under section 4(6) are deemed to be restricted securities.⁵ As such, the securities may be resold only if they are registered or an exemption applies.

US260 As restricted securities, such shares may not be resold unless they are registered or sold under an exemption from registration. The ‘safe harbour’ exemption set forth in rule 144 provides guidance as to when and how restricted securities can be resold in a transaction exempt from the registration requirements

1 Securities Act of 1933, 15 United States Code, s 77c(a)(10).

2 Revised Staff Legal Bulletin Number 3 (CF) — Section 3(a)(10) (20 October 1999).

3 Revised Staff Legal Bulletin Number 3 (CF) — Section 3(a)(10) (20 October 1999).

4 Revised Staff Legal Bulletin Number 3 (CF) — Section 3(a)(10) (20 October 1999).

5 17 Code of Federal Regulations, s 230.502(d).

of the United States securities laws.¹ Rule 144 provides that, after restricted securities have been held by a purchaser for more than one year, they may be resold if certain requirements are met, namely:

- There must be available adequate current public information with respect to the issuer of the securities;²
- The purchaser may resell only an amount equal to a small percentage of the total outstanding securities of the same class — in general, one per cent — during a three-month period;³
- Such sales must be made in a brokers' transaction or through a market maker;⁴ and
- If the amount of the securities to be resold by the purchaser during the three-month period exceeds 500 shares or has an aggregate purchase price in excess of US \$10,000, the purchaser must file three copies of a notice on Form 144 with the Securities and Exchange Commission and, if the securities are admitted to trading on any national securities exchange, one copy must be filed with the exchange.⁵

US261 However, if the purchaser desiring to resell the securities is not an affiliate of the issuer — generally, an officer, director, or 10 per cent shareholder — and has held the securities for more than two years, these restrictions will not apply.⁶

Rule 144A Restricted Securities

US262 Rule 144A provides a non-exclusive safe harbour exemption from the registration requirements of the 1933 Act for certain resales of restricted securities to certain sophisticated institutional investors, referred to as 'qualified institutional buyers'. Rule 144A defines qualified institutional buyers as institutions that in the aggregate own and invest on a discretionary basis at least US \$100 million in securities.⁷

1 17 Code of Federal Regulations, s 230.144.

2 17 Code of Federal Regulations, s 230.144(c).

3 17 Code of Federal Regulations, s 230.144(e).

4 17 Code of Federal Regulations, s 230.144(f).

5 17 Code of Federal Regulations, s 230.144(h).

6 17 Code of Federal Regulations, s 230.144(k).

7 Securities Act Release Number 6862 (23 April 1990).

US263 Rule 144A imposes a ‘reasonable belief’ standard on sellers with respect to the status of buyers as qualified institutional buyers.¹ Rule 144A also imposes an information requirement where the issuer of the securities to be resold in reliance on rule 144A is neither a 1934 Act reporting company nor exempt from reporting requirements pursuant to rule 12g3-2(b). The required information includes:

- A brief statement of the nature of the business of the issuer and the products and services it offers; and
- The issuer’s most recent balance sheet and profit-and-loss and retained-earnings statements and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation.

US264 The financial statements should be audited to the extent reasonably available. However, non-United States issuers who furnish the Securities and Exchange Commission with financial and business information already made public in their home countries pursuant to rule 12g3-2(b) need not comply with this requirement.

US265 If a market for rule 144A securities develops, often the number of United States security holders will increase, subjecting many non-United States issuers to the registration and periodic reporting requirements of the 1934 Act. A rule 144A offering of American Depositary Receipts or ordinary shares does not preclude an issuer from subsequently registering the securities with the Securities and Exchange Commission and applying for an exchange or NASDAQ listing. For example, the following non-United States issuers, after conducting rule 144A transactions, entered the United States public market for the first time:

- Telefonos de Mexico;
- Petro-Canada;
- Vitro;
- Micro Focus Group; and
- Enterprise Oil.²

¹ 17 Code of Federal Regulations, s 230.144A.

² Jensen, ‘The Attractions of the United States Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the United States Markets: From A Legal Perspective’, 17 *Fordham Int LJ* (1994), ss 25 and 37.

Investment Outside the United States and Cross Border Transactions

In General

US266 In 1990, the Securities and Exchange Commission adopted Regulation S to clarify the extraterritorial application of the registration provisions of United States securities laws.¹ Under Regulation S, any offer or sale of a security that is deemed to occur within the United States is subject to the registration provisions of United States securities laws, while any offer or sale of a security that is not deemed to occur within the United States is not subject to the registration provisions of United States securities laws.²

US267 Regulation S is not an exemption from registration under United States securities laws; rather, it provides that offers and sales occurring outside of the United States are not subject to the registration requirements of United States securities laws. Regulation S speaks only to the registration provisions of United States securities law, and it does not limit or otherwise restrict application of the antifraud provisions of United States securities laws.³

US268 In addition to setting forth the foregoing general principle regarding territorial application of the registration provisions of United States securities laws, Regulation S provides three categories of non-exclusive⁴ 'safe harbours'⁵ for specified securities transactions. Offers and sales of securities in transactions which meet all of the conditions of any one of the three categories of non-exclusive safe harbours are deemed to occur outside the United States and, therefore, are not subject to the registration requirements of United States securities laws.

US269 The safe harbours may be utilised for initial issuances of securities by an issuer, a distributor, or any of their respective affiliates or persons acting on their behalf and may be utilised for resale transactions by such persons.⁶ Regulation S also provides a non-exclusive safe harbour for resale transactions by persons other than an issuer, a distributor, any of their respective affiliates

1 Securities Act Release Number 6863 (24 April 1990).

2 17 Code of Federal Regulations, s 230.901.

3 17 Code of Federal Regulations, s 230.900, Preliminary Note 1.

4 Code of Federal Regulations, s 230.900, Preliminary Note 5.

5 17 Code of Federal Regulations, s 230.903(b)(1)–(b)(3).

6 17 Code of Federal Regulations, s 230.903(a).

(except officers or directors who are affiliates solely by virtue of holding such position), or persons acting on their behalf.¹

US270 Equity securities of a United States ‘domestic issuer’ issued in a transaction which relies on Regulation S to avoid registration under United States securities laws are deemed ‘restricted securities’ under United States securities laws and may only be resold in a transaction which complies with the registration requirements of United States securities laws or an exemption therefrom, or in a transaction occurring outside the United States in accordance with Regulation S.²

US271 Regulation S is not available for any transaction that, although in technical compliance with the provisions of Regulation S, is part of a plan or scheme to evade the registration provisions of United States securities laws.³ In this regard, subsequent to the adoption of Regulation S in 1990, the Securities and Exchange Commission issued an interpretative release, which identified practices occurring in the context of Regulation S to be abuses.⁴ Ultimately, in February 1998, the concerns of the Securities and Exchange Commission expressed in that interpretative release resulted in amendments to Regulation S designed to halt such abuses.⁵

General Principle

US272 Regulation S provides that no offer or sale of a security which occurs outside of the United States will be subject to the registration requirements of United States securities laws.⁶ The need for Regulation S stems from the broad extraterritorial reach of the registration provisions of United States securities laws. In the absence of Regulation S, or a comparable administrative interpretation of the provisions of United States securities laws, which require the registration of securities,⁷ such provisions literally apply to any

1 17 Code of Federal Regulations, s 230.904.

2 Code of Federal Regulations, s 230.905.

3 17 Code of Federal Regulations, s 230.900, Preliminary Note 2.

4 Securities Act Release Number 7190 (27 June 1995).

5 Securities Act Release Number 7505 (17 February 1998).

6 17 Code of Federal Regulations, s 230.901.

7 Securities Act of 1933, 15 United States Code, s 77e.

offer or sale of a security involving any communication between the United States and any other country.¹

US273 Regulation S provides safe harbours for specified issuance and resale transactions so that these transactions will be deemed to occur outside the US. These safe harbours are non-exclusive. As a result, transactions not in compliance with a safe harbour may still be deemed to occur outside the United States for purposes of United States securities laws and rule 901.

US274 Due to the lack of guidance on the issue of when offers or sales of a security are deemed to occur outside of the United States in instances where a safe harbour provided by Regulation S is not utilised, rule 901 may be helpful in instances where non-United States issuers may inadvertently or unknowingly trigger the jurisdictional reach of United States securities laws in a transaction that arguably has not occurred in the United States. Otherwise, a Regulation S safe harbour is effectively the only way to ensure availability of the jurisdictional exclusion from application of the registration requirements of United States securities laws.

Safe Harbours for Transactions by Issuers, Distributors, or Affiliates

In General

US275 In General. Regulation S provides three categories of safe harbours for use in transactions by an issuer, a distributor, or any of their respective affiliates or persons acting on their behalf. These safe harbours may be used for transactions in which securities are issued and subsequently resold by such persons.

US276 All three safe harbours require compliance with two general conditions, ie, an offshore transaction with no directed selling efforts, as well as the more specific conditions for each category.

US277 General Conditions. Regulation S requires that the offer or sale be made in an ‘offshore transaction’. For purposes of the three safe harbour categories of Regulation S, an offer or sale of securities is made in an offshore transaction if:

- The offer is not made to a person in the United States; and

¹ Securities Act of 1933, 15 United States Code, s 77b(7).

- Either the buyer is outside the United States at the time the buy order is originated, or the seller and any persons acting on its behalf reasonably believe the buyer is outside the United States or the transaction is executed on an established non-United States securities exchange located outside the United States.¹

US278 Offers and sales which are specifically targeted at identifiable groups of United States citizens residing abroad, such as United States military personnel, are not deemed to be made in an offshore transaction.² However, offers and sales to certain international organisations, such as the International Monetary Fund and the United Nations, and their affiliates are excluded from the definition of United States persons and will be deemed to be made in an offshore transaction.³

US279 In addition, offers and sales to persons holding discretionary or similar accounts (other than an estate or trust) held for the benefit of a non-United States person by a dealer or other professional fiduciary organised, incorporated, or resident in the United States also are deemed to be made in an offshore transaction.⁴

US280 Regulation S requires that no ‘directed selling efforts’ be made in the United States by the issuer, distributor, or any of their respective affiliates or persons acting on their behalf with respect to the offer or sale.⁵ ‘Directed selling efforts’ is defined as any activity undertaken for the purpose, or which can reasonably be expected to have the effect, of conditioning the United States market for such securities.⁶ Directed selling efforts include advertisements placed in a publication with a general circulation in the United States,⁷ but they do not include:

- Advertisements required to be published by law, provided the advertisement contains no more information than legally required and contains a statement regarding the restricted nature of such securities pursuant to United States securities laws;

1 17 Code of Federal Regulations, s 230.902(h)(1).

2 17 Code of Federal Regulations, s 230.902 (h)(2).

3 17 Code of Federal Regulations, s 230.902(h)(3); 17 Code of Federal Regulations, s 230.902(k)(2)(vi).

4 17 Code of Federal Regulations, s 230.902(h)(3); 17 Code of Federal Regulations, s 230.902(k)(2)(i).

5 17 Code of Federal Regulations, s 230.903(a)(2).

6 17 Code of Federal Regulations, s 230.902(c)(1).

7 17 Code of Federal Regulations, s 230.902(c)(2).

- Contact with persons excluded from the definition of a United States person;¹
- A tombstone advertisement in a publication with a general circulation in the United States, provided such publication has less than 20 per cent of its circulation in the United States, such advertisement contains a statement regarding the restricted nature of such securities pursuant to United States securities laws, and such advertisement contains only certain limited information about the offering;²
- *Bona fide* visits by prospective investors to the issuer's United States facilities;
- Distribution in the United States of a non-United States broker-dealer's price quotations by a third-party system that distributes such quotes primarily outside the United States, provided transactions cannot be executed through such system with persons in the United States and no impermissible contacts may be initiated with 'United States persons' or persons in the United States;³
- Publication by the issuer of a notice containing only certain limited information;⁴ and
- Providing journalists with access to press conferences held outside the United States, meetings with the issuer or selling shareholder representatives held outside the United States, or written press-related materials released outside the United States, at or in which a present or proposed offering is discussed, if certain other requirements also are satisfied.⁵

1 17 Code of Federal Regulations, s 230.902(c)(3). For purposes of Regulation S, a United States person is defined as: (a) any natural person resident in the United States; (b) any partnership or corporation organised or incorporated under the laws of the United States; (c) any estate of which any executor or administrator is a United States person; (d) any trust of which any trustee is a United States person; (e) any agency or branch of a non-United States entity located in the United States; (f) any non-discretionary or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit of a United States person; (g) any discretionary or similar account (other than an estate or trust) held by a dealer or other fiduciary organised, incorporated, or resident (if an individual) in the United States; and (h) any partnership or corporation organised or incorporated under laws of any jurisdiction other than the United States and formed by a United States person to invest in securities not registered under United States securities law, unless organised and owned by accredited investors who are not natural persons, estates, or trusts; 17 Code of Federal Regulations, s 230.902(o)(1).

2 17 Code of Federal Regulations, s 230.902(c)(3)(iii)(C).

3 17 Code of Federal Regulations, s 230.902(c)(3)(v)(B).

4 17 Code of Federal Regulations, s 230.902(c)(3)(vi).

5 17 Code of Federal Regulations, s 230.902(c)(3)(vii).

Specific Conditions

US281 Category 1. The Category 1 safe harbour¹ is available for transactions in the following securities, without having to meet any conditions, other than the offer and sale being made in an offshore transaction and no directed selling efforts are made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing:

- Securities issued by an issuer that is not a domestic issuer² which reasonably believes at commencement of the offering that there is no ‘substantial United States market interest’³ in the class or type of securities offered or sold [or issuable on exercise or conversion of the class or type of securities offered or sold], and securities of an issuer that is not a domestic issuer which are offered and sold in an offering that is directed into a single country other than the United States to the residents thereof in accordance with the laws and customary practices of such country;

1 17 Code of Federal Regulations, s 230.903(b)(1).

2 For purposes of Regulation S, a United States ‘domestic issuer’ is defined as any issuer other than a non-United States government or non-United States issuer, except a non-United States issuer meeting the following conditions: (a) more than 50 per cent of its outstanding voting securities are held of record directly or indirectly by United States residents; and (b) the majority of its directors or executive officers are United States citizens or residents, more than 50 per cent of its assets are located in the United States, or its business is administered principally in the United States. 17 Code of Federal Regulations, s 230.902(e).

3 For purposes of Regulation S, ‘substantial United States market interest’ exists with respect to a class of equity securities if: (a) securities exchanges and quotation systems in the United States, in the aggregate, constituted the single largest market for such securities for the prior fiscal year or period since the issuer’s inception (if there is no prior fiscal year); or (b) 20 per cent or more of all trading in such securities took place in, on, or through securities exchanges and quotations systems in the United States and less than 55 per cent of all trading in such securities took place in, on, or through securities markets of a single country other than the United States (17 Code of Federal Regulations s 230.902(j)(1)). For purposes of Regulation S, ‘substantial United States market interest’ exists with respect to an issuer’s debt securities, other than certain exempt securities (17 Code of Federal Regulations, s 230.902 (j) (3)) if: (a) its debt securities are held of record by 300 or more ‘United States persons’; (b) US \$1 billion or more of its debt securities are held of record by ‘United States persons’; and (c) 20 per cent or more of its debt securities are held of record by ‘United States persons’. 17 Code of Federal Regulations, s 230.902 (j) (2).

- Non-convertible debt securities of a domestic issuer which are offered and sold in an offering that is directed into a single country other than the United States to the residents thereof in accordance with the laws and customary practices of such country, provided that such securities are non-United States dollar-denominated and are not convertible into United States dollar-denominated or linked to United States dollars (other than through ordinary commercial currency or interest-rate swap transactions) in a manner that in effect makes them United States dollar-denominated securities;
- Securities which are backed by the full faith and credit of a government other than the United States; and
- Securities which are offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the laws and customary practices of a country other than the United States, provided such securities are issued as compensation for *bona fide* services rendered in connection with the business of such issuer or its affiliates and not in connection with the offer and sale of securities, interests in the plan are not transferable other than on the death of the holder thereof, the issuer takes steps to preclude the offer and sale of interests in the plan or securities under the plan to United States residents other than employees on temporary assignment in the United States, and the plan documentation contains a statement regarding the restricted nature of such securities pursuant to United States securities laws.

US282 Category 2. The Category 2 safe harbour¹ is available for transactions in securities not eligible for the Category 1 safe harbour and that are equity securities of a ‘reporting issuer’² that is not a United States domestic issuer, debt securities of a reporting issuer, or debt securities of a non-reporting issuer

¹ 17 Code of Federal Regulations, s 230.903(b)(2).

² For purposes of Regulation S, a ‘reporting issuer’ is defined as an issuer, other than an investment company, that: (a) has a class of securities registered under United States securities laws or that is required to file periodic reports with the United States Securities and Exchange Commission; and (b) has filed all reports and other material required to be filed with the Securities and Exchange Commission for a period of at least 12 months (or such shorter period that the issuer was subject to such filing requirement) immediately preceding the offer or sale of securities made in reliance on Regulation S 17 Code of Federal Regulations, s 230.902(i).

that is not a United States domestic issuer, provided they comply with all of the following conditions in addition to the two general conditions of rule 903(a)(1) and (a)(2), namely:

- ‘Offering restrictions’¹ are implemented;
- The offer or sale, if made during a 40-day distribution compliance period,² is such that (a) each warrant bears a legend regarding the restricted nature of the warrant and securities issuable on exercise pursuant to United States securities laws and disclosing that the warrant may not be exercised by or on behalf of a United States person except in compliance with the registration requirements of United States securities laws or pursuant to an exemption therefrom, (b) each person exercising a warrant provides written certification

1 For purposes of Regulation S, offering restrictions are implemented if: (a) each distributor agrees in writing that all offers and sales during the applicable distribution compliance period will be made only in accordance with Regulation S, the registration requirements of United States securities laws, or an exemption therefrom and, with respect to offers and sales of equity securities of United States domestic issuers, not to engage in hedging transactions during the applicable ‘distribution compliance period’ except in compliance with United States securities laws; (b) all offering materials and documents (other than press releases) used during the applicable distribution compliance period include a statement regarding the restricted nature of such securities pursuant to United States securities laws and, with respect to offers and sales of equity securities of domestic issuers, include a statement that hedging transactions may not be conducted except in compliance with United States securities laws and such statements appear on the cover or inside cover of the prospectus or offering circular, in the underwritings of the prospectus or offering circular, and in any advertisements. 17 Code of Federal Regulations, s 230.902(g).

2 For purposes of Regulation S, the distribution compliance period is the period that begins the later of the date the securities were first offered to persons other than distributors or the date of closing of the offering and continues until the end of the relevant time period, except that: (a) all offers and sales by a distributor of an unsold allotment are deemed made during the distribution compliance period; (b) in a continuous offering, the distribution compliance period commences on completion of the distribution, as determined and certified by the managing underwriter; (c) in a continuous offering of identifiable tranches of non-convertible debt securities, the distribution compliance period for securities in a tranche commences on completion of the distribution of such tranche, as determined and certified by the managing underwriter; and (d) in a continuous offering of securities to be acquired on the exercise of warrants, the distribution compliance period commences on completion of the distribution of the warrants, as determined and certified by the managing underwriter if the requirements are satisfied. 17 Code of Federal Regulations, s 230.903(b)(5).

that it is not a United States person and that the warrant is not being exercised on behalf of a United States person or provides a written opinion of legal counsel that the warrant and securities issuable on exercise are in compliance with the registration requirements of United States securities laws or exempt therefrom, and (c) procedures have been implemented to ensure that the warrants may not be exercised within the United States and that the securities issuable on exercise may not be delivered within the United States, other than in a transaction which qualifies as an offshore transaction unless, in compliance with the registration requirements of United States securities laws or pursuant to an exemption therefrom,¹ it is not made to a United States person or for the account or benefit of a United States person (other than a distributor); and

- Each distributor selling securities during a 40-day distribution compliance period to a distributor, dealer, or person receiving compensation in respect of the securities sold sends a notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales applicable to a ‘distributor’.²

US283 Category 3. The Category 3 safe harbour³ is available for transactions in securities not eligible for the Category 1 or Category 2 safe harbours, provided that the offer and sale are being made in an offshore transaction and that no directed selling efforts are made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing, and they comply with all of the following conditions:

- Offering restrictions are implemented;
- In the case of debt securities, the offer or sale, if made during a 40-day distribution compliance period, is not made to a United States person or for the account or benefit of a United States person (other than a distributor) and the securities are represented during the 40-day distribution compliance

1 17 Code of Federal Regulations, s 230.902(f).

2 For purposes of Regulation S, a distributor is defined as any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold. 17 Code of Federal Regulations, s 230.902(d).

3 17 Code of Federal Regulations, s 230.903(b)(3).

- period by a temporary global security and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-United States person or a United States person who acquired such securities in a transaction not requiring registration under United States securities laws;
- In the case of equity securities, the offer or sale, if made during a one-year distribution compliance period, is not made to a United States person or for the account or benefit of a United States person (other than a distributor), and the offer or sale, if made during a one-year distribution compliance period, is made in compliance with the following conditions: (a) the purchaser (other than a distributor) certifies that it is not a United States person and is not acquiring the securities for the account or benefit of a United States person or that it is a United States person who acquired the securities in a transaction not requiring registration under United States securities laws, (b) the purchaser agrees to resell the securities only in accordance with Regulation S, the registration requirements of United States securities laws, or an exemption therefrom and not to engage in hedging transactions except in compliance with United States securities laws, (c) securities of a domestic issuer are legended to the effect that transfer is prohibited except in accordance with Regulation S, the registration requirements of United States securities laws, or an exemption therefrom and that hedging transactions may not be conducted except in compliance with United States securities laws, and (d) the issuer is required, by contract or a provision in its governing documents, to refuse to register transfers of the securities not made in accordance with Regulation S, the registration requirements of United States securities laws, or an exemption therefrom or, if the securities are in bearer form or non-United States law prevents the issuer from refusing to register securities transfers, other reasonable procedures are implemented to prevent any transfer of the securities not made in accordance with Regulation S; and
 - Each distributor selling securities, in the case of debt securities, during a 40-day distribution compliance period or, in the case of equity securities, during a one-year distribution compliance period, to a distributor, dealer, or person receiving compensation in respect of the securities sold sends a notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales applicable to a distributor.

Safe Harbour for Resale Transactions by Persons Other than Issuers, Distributors, or Affiliates

US284 Regulation S also provides a safe harbour for resale transactions by persons other than an issuer, a distributor, any of their respective affiliates (except officers or directors who are affiliates solely by virtue of holding such position), or persons acting on their behalf.¹ Rule 904 requires that the offer or sale be made in an offshore transaction, that no directed selling efforts be made in the United States by the seller, its affiliates, or any persons acting on their behalf with respect to the offer or sale, and that the transaction comply with all of the following conditions:

- In the case of an offer or sale during the applicable distribution compliance period by a dealer or person receiving compensation in respect of the securities sold, neither the seller nor any person acting on the seller's behalf knows that the offeree or buyer is a United States person and, if the seller or any person acting on the seller's behalf knows that the purchaser is a dealer or person receiving compensation in respect of the securities sold, the seller or person acting on the seller's behalf sends a notice to the purchaser stating that offers and sales of the securities during the distribution compliance period may be made only in accordance with Regulation S, the registration requirements of United States securities laws, or an exemption therefrom; and
- In the case of an offer or sale by an officer or director of the issuer of the securities who is an affiliate solely by virtue of holding such position, no compensation is paid in respect of the securities sold other than a usual and customary brokerage commission.²

Restrictions on Resale

US285 Equity securities of a United States issuer acquired from the issuer, a distributor, or any of their respective affiliates in a transaction which is not subject to the registration requirements of United States securities laws by virtue

¹ 17 Code of Federal Regulations, s 230.904.

² 17 Code of Federal Regulations, s 230.904.

of the general principle of rule 901 or the safe harbours of rule 903 are deemed restricted securities,¹ as defined in rule 144.²

US286 Such restricted securities may only be resold in accordance with Regulation S, the registration requirements of United States securities laws, or an exemption therefrom.³ Rule 144 provides clear guidance regarding when and how restricted securities may be resold in the United States in a transaction exempt from the registration requirements of United States securities laws.

US287 Subject to the satisfaction of certain current public information, volume limitation, manner of sale, and notice conditions set forth in rule 144, restricted securities may generally be resold in the United States after a one-year holding period. Restricted securities held by non-affiliates of the issuer may generally be freely resold in the United States after a two-year holding period.⁴

US288 Any restricted securities, as defined in rule 144, that are equity securities of a domestic issuer will continue to be deemed restricted securities after any resale transaction pursuant to the general principle of rule 901 or the safe harbour of rule 904 and, therefore, any applicable legend on such securities may not be removed on such a resale.

Crossborder Transactions

In General

US289 One ramification of the extraterritorial application of the registration provisions of the United States securities laws is the negative impact on United States investors in foreign private issuers. Previously, due to the registration provisions, United States shareholders in foreign private issuers would often be excluded from tender and exchange offers, business combinations, and rights offerings so as to avoid the reach of the registration mandates of the United States securities laws.

1 17 Code of Federal Regulations, s 230.905.

2 17 Code of Federal Regulations, s 230.144.

3 17 Code of Federal Regulations, s 230.905.

4 17 Code of Federal Regulations, s 230.144(k).

US290 In an effort to remove this prejudice against United States shareholders, the Securities and Exchange Commission has recently adopted and/or modified rules 800, 801, and 802 to the Securities Act to address these concerns.¹

Exemptive Rule 801

US291 Under exemptive rule 801 of the Securities Act, equity securities issued in rights offerings by foreign private issuers will be exempt from the registration requirements of the Securities Act if United States securities holders own 10 per cent or less of the issuer's securities that are subject of the rights offering.

Exemptive Rule 802

US292 Under exemptive rule 802 of the Securities Act, equity securities issued in exchange offers for foreign private issuers' securities and securities issued in business combinations involving foreign private issuers rights offerings by foreign private issuers will be exempt from the registration requirements of the Securities Act and the qualification requirements of the Trust Indenture Act, if United States securities holders own 10 per cent or less of the subject class of securities.

Exemption from Rule 14e-5

US293 Tender offers for the securities of foreign private issuers will be exempt from new rule 14e-5 (formerly 10b-13) of the Exchange Act, which prohibits a bidder from purchasing securities other than that pursuant to the tender offer. This exemption will permit purchases outside the tender offer during the offer when United States security holders hold 10 per cent or less of the subject securities.

US294 For those instances where an exchange offer for securities of a foreign private issuer constitutes a tender offer under United States securities laws, thereby invoking certain registration requirements under the Williams Act, the Securities

¹ Securities Act Release Number 7759; Exchange Act Release Number 42054; Trust Indenture Act Release Number 2378; and International Series Release Number 1208 (22 October 1999).

and Exchange Commission has enacted the following companion rules to rule 14D that mimic the modified rules 801 and 802.¹

US295 Again, it must be noted that the foregoing exemptions do not obviate the application of the United States antifraud and antimanipulation rules or any applicable state securities laws.

Trading of Non-United States Securities

In General

US296 In order for a non-United States issuer to list its securities on a United States exchange or over-the-counter market, it must either register under section 12(b) of the 1934 Act to list on an exchange or under section 12(g) of the 1934 Act to list on the over-the-counter market.² Listing is accomplished either contemporaneously with the initial public offering of the non-United States issuer's securities in the United States, or directly without a corresponding financing.

¹ The Securities and Exchange Commission has created a Tier I Exemption and a Tier II Exemption. As to a Tier I Exemption, the recently adopted rules provide that tender offers for the securities of a foreign private issuer will be exempt from most provisions of the Exchange Act and rules governing tender offers when United States security holders hold 10 per cent or less of the subject securities, based on the 'look through' analysis described contained in rule 12(g)3-2(a). In addition to bidders, the subject company, or any officer, director, or other person who otherwise would have an obligation to file Schedule 14D-9 also may rely on the exemption. However, it must be noted that the Tier I Exemption is not available if the target company is an investment company registered or required to be registered under the Investment Company Act of 1940. Rule 14d-1(c)(4), 17 Code of Federal Regulations, s 240.14d(c)(4). As to a Tier II Exemption, when United States security holders hold 40 per cent or less of the class of securities of the foreign private issuer sought in the offer, limited tender offer exemptive relief will be available to bidders to eliminate frequent areas of conflict between United States and foreign regulatory requirements. This codification of current exemptive and interpretive positions is now referred to as a Tier II Exemption. However, it must be noted that the Tier II Exemption is not available if the target company is an investment company registered or required to be registered under the Investment Company Act of 1940 unless it is a closed end investment company. In addition, the target company must be a foreign private issuer. Rule 14d-1(d)(1)(i), 17 Code of Federal Regulations, s 240.14d(d)(1)(i). Securities Act Release Number 7759; Exchange Act Release Number 42054; Trust Indenture Act Release Number 2378; and International Series Release Number 1208 (22 October 1999).

² Securities and Exchange Act of 1934, 15 United States Code, section 781(b) and (g).

US297 It is unlawful for anyone to execute a trade in a security, other than an exempted security, on a national securities exchange unless the security is registered with the Securities and Exchange Commission pursuant to section 12(b) of the 1934 Act.¹

US298 Prior to 1964, registration under the 1934 Act was limited to securities of companies listed on a national securities exchange. Because registration under the 1934 Act activated the continuous reporting requirements, many companies purposefully avoided listing on a national exchange to side-step such regulation. As a result, Congress amended section 12(g)(1) to provide that:

Every issuer who is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce shall . . .

(b) within 120 days after the last day of its first fiscal year . . . on which the issuer must have assets exceeding US \$10 million and a class of equity security (other than an exempted security) held of record by 500 or more persons.

. . . register such security by filing with the Securities and Exchange Commission a registration statement . . . with respect to such security containing such information and documents as the Securities and Exchange Commission may specify comparable to that which is required in an application to register a security pursuant to sub-section (b) of this section. Each such registration statement will become effective sixty days after filing with the Securities and Exchange Commission or within such shorter period as the Securities and Exchange Commission may direct. Any issuer may register any class of equity security not required to be registered by filing a registration statement pursuant to the provisions of this paragraph.²

US299 The Securities and Exchange Commission has exempted from registration under section 12(g) companies that would otherwise be subject to registration if total assets do not exceed US \$10 million.³ The asset test and the

¹ Securities and Exchange Act of 1934, 15 United States Code, s 78l(a).

² Securities and Exchange Act of 1934, 15 United States Code, s 78l(g)(1).

³ 17 Code of Federal Regulations, s 240.12g-1, as amended in Exchange Act Release Number 37,157 (9 May 1996); [1996–1997 Transfer Binder] Federal Securities Law Rep, paragraphs 85,801 and 88,001.

number-of-shareholders test is applied collectively, ie, the issuer must have both total assets of US \$10 million or greater and 500 or more shareholders together before it is required to register under the 1934 Act.

Exchange Act Registration

US300 To register the securities of a non-United States company on an exchange or market, the company must either use a simplified registration procedure available on Form 8-A for registrants who have conducted a United States public offering of the class of securities, or file on Form 20-F, which is a more comprehensive disclosure document, for issuers that have not conducted a public offering and rather intend to directly list their securities. Either form of registration enables the company to list on either a stock exchange or market and satisfies the requirements of either section 12(b) or section 12(g) of the 1934 Act.

US301 Form 8-A may be used for a class of securities to be effective on filing with Form 8-A, for non-United States issuers that already have a class of securities registered under the 1934 Act, or to be effective simultaneously with the effectiveness of a concurrent registration statement which is filed pursuant to the 1933 Act.¹ Form 8-A is often used to register classes of securities on an exchange on which other securities of the registrant are registered, such as common shares, preferred shares, or debt instruments. The information required in Form 8-A is:

- A description of the securities to be registered, pursuant to item 202 of Regulation S-K;²
- A list of the exhibits to be incorporated by reference or filed as part of the registration statement; and
- The signature of the registrant. Documents filed as part of the concurrent public offering or in prior 1934 Act filings are incorporated by reference.

Form 20-F

US302 In addition to filing a registration statement under the 1933 Act for any public offering of securities, a foreign private issuer must file to register its

¹ Form 8-A, General Instruction A(c).

² 17 Code of Federal Regulations, s 229.202.

securities under the 1934 Act. To assist foreign private issuers with the complexities of 1934 Act registration and periodic reports, the Securities and Exchange Commission has created a 'foreign integrated disclosure system', which attempts to balance investor protection with facilitating the free flow of capital among nations.

US303 The foreign integrated disclosure system is limited to issuers who file Form 20-F on an annual basis and are non-Canadian foreign private issuers registering their securities under section 12 of the 1934 Act.¹ There is a different standard for Canadian issuers as the Securities and Exchange Commission has previously distinguished the North American foreign private issuer — those from Canada and Mexico — from other foreign private issuers.²

US304 A foreign private issuer is required to register its equity securities under section 12(g) of the 1934 Act if:

- The securities are listed, or are going to be listed, on a United States stock exchange or market; or
- The issuer has more than US \$10 million of total assets and more than 500 stockholders of whom more than 300 are United States residents.³

US305 In addition, a non-United States issuer that wishes to become listed on a United States exchange is required to register under section 12(b) of the 1934 Act⁴ and the non-United States issuer that wishes to become listed on the NASDAQ is required to register under section 12 (g) of the 1934 Act.⁵

US306 The Securities and Exchange Commission adopted the foreign integrated disclosure system for offerings of securities issued by foreign private issuers, based on the theory that a foreign private issuer already furnishing information on a continuous basis under the 1934 Act reporting requirements should be able to use that information when it makes a public offering in the

1 17 Code of Federal Regulations, s 249.220f.

2 Securities Act Release Number 6437 (19 November 1982).

3 17 Code of Federal Regulations, s 240.12g-1, as amended in Release Number 34-37157 (1 May 1996).

4 15 United States Code, s 78l(b).

5 Securities and Exchange Act of 1934, 15 United States Code, s 78l(g).

United States.¹ The foreign integrated disclosure system is based on those disclosures required by Form 20-F.²

US307 Rather than the two separate documents of Form 10-K and the Annual Report to Shareholders used for United States issuers, the single Form 20-F may be used as the primary 1934 Act registration and annual report form for foreign private issuers. On the cover page of Form 20-F, the issuer notes whether the Form 20-F is being used as an annual report pursuant to section 13 or section 15(d), or in connection with registration pursuant to section 12(b) or section 12(g) of the 1934 Act.

US308 Form 20-F requires the registrant to provide similar information as required by Form F-1. However, Form 20-F calls for specific disclosure concerning:

- A description of property;
- Pending legal proceedings;
- Control of the registrant;
- Nature of the trading market(s) for the securities;
- Exchange controls and other limitations that would affect payments of dividends or interest, or exercise of voting rights;
- Taxation;
- Selected financial data for the last five years;
- Management's discussion and analysis of financial condition and results of operations;
- Derivatives disclosure;
- Directors and officers, and their remuneration as a group;
- Options to purchase securities;
- Material transactions between the issuer and its management;
- If used as a registration form, the securities being registered;
- If used as an annual report form, defaults on senior securities and changes in securities and in security for registered securities;
- A description of business; and
- Audited financial statements under United States GAAP or reconciled with United States GAAP.³

¹ Exchange Act Release Number 16,371 (29 November 1979).

² 17 Code of Federal Regulations, s 249.220f.

³ 17 Code of Federal Regulations, s 249.220f.

US309 When it was initially adopted in 1979, the Securities and Exchange Commission stated that Form 20-F represented a ‘significant improvement in the amount of information required of foreign issuers in the United States, placing their required disclosures on a level closer to that required of domestic issuers’.¹ At the same time, in recognition of the ‘differences in various national laws and businesses and accounting customs [to be taken] into account when assessing disclosure requirements for foreign issuers’, the Securities and Exchange Commission indicated that substantial reductions in the proposed disclosure requirements had been made.²

US310 Two major differences between the disclosure system for non-United States and domestic issuers are the disclosures of conflicts of interest and use of proceeds. Currently, items 11–13 of Form 20-F permit non-United States issuers to disclose options to purchase securities in the aggregate, as opposed to requiring disclosure for each individual. Additionally, currently, under Form 20-F, controlling persons need only disclose data concerning material transactions with control persons if such transactions have been made public in reports to shareholders. These requirements significantly compromise the more demanding conflict of interest requirements found in the domestic issuer’s Regulation S-K.

US311 Effective as of 30 September 2000, the revised Form 20-F generally incorporates the International Organisation of Securities Commissions standards. These modifications have been undertaken with the expressed intention of creating and promulgating a harmonised international disclosure standard.

US312 However, the revised Form 20-F, specifically items 6 and 7, significantly change these differences. The new item 6 of Form 20-F eliminates the ability to disclose ownership interest of individual directors and management on an aggregate basis. However, if ‘an individual member of management beneficially owns less than one per cent of the outstanding securities that fact may be stated instead of providing the specific number of shares that individual beneficially owns . . . ’.³

1 Exchange Act Release Number 16,371 (29 November 1979); 44 Fed Reg 70,132 (1979).

2 Exchange Act Release Number 16,371 (29 November 1979); 44 Fed Reg 70,132 (1979).

3 Securities Act Release Number 7745, Exchange Act Release Number 41936, International Series Release Number 1205 (28 September 1999).

US313 One additional significant change is that, under item 7 of the revised Form 20-F, the disclosure threshold for beneficial ownership has been reduced from 10 per cent to five per cent.¹

Annual Reports

US314 The primary objective of the Exchange Act is to assure the public availability of adequate material information about companies with publicly traded stock. On becoming a reporting company, a non-United States issuer becomes subject to regular reporting requirements under the foreign integrated disclosure system. As discussed above, non-United States companies become reporting companies as a result of registration of a class of securities under the 1934 Act² or registration of an offering of securities pursuant to the 1933 Act.³

US315 Form 20-F also is the form used by foreign private issuers to file their Annual Report pursuant to section 13 or section 15(d) of the 1934 Act. The annual report on Form 20-F needs to be filed within six months after the end of the fiscal year covered by such report, compared to Form 10-K for domestic issuers, which must be filed within 90 days of the end of the fiscal year.⁴

Interim Reports

US316 Unlike a domestic issuer, foreign private issuers are not required to file quarterly reports on Form 10-Q or current reports on Form 8-K. Instead, the foreign private issuer is required to file with the Securities and Exchange Commission those interim reports that are required to be made public in the issuer's domicile, filed with a stock exchange on which the company's securities are traded, or otherwise distributed to stockholders.⁵

US317 Form 6-K, the interim reporting form used by non-United States issuers, requires non-United States issuers to provide the information with English

1 Securities Act Release Number 7745, Exchange Act Release Number 41936, International Series Release Number 1205 (28 September 1999).

2 Securities and Exchange Act of 1934, 15 United States Code, s 78m.

3 Securities and Exchange Act of 1934, 15 United States Code, s 78o.

4 Form 20-F, General Instruction A(c).

5 17 Code of Federal Regulations, ss 240.13a-1–240.13a-17.

translations or English versions.¹ Financial statements contained in interim reports on Form 6-K are not required to be prepared under United States GAAP or reconciled to United States GAAP.²

US318 Finally, the New York Stock Exchange, the American Stock Exchange, and NASDAQ require their listed non-United States companies to provide interim reports on at least a semi-annual basis. As a practical matter, many non-United States companies file quarterly reports on Form 10-Q so that current information is available to investors and to permit analysts to track the development of the company on a current basis. Many companies believe that these steps aid in the acceptance of the company in the marketplace and assist the company in managing shareholder relationships.

Proxy Requirements

US319 Securities registered by a foreign private issuer eligible to use Form 20-F are exempt from the proxy requirements of the 1934 Act.³

US320 For non-United States issuers who are not foreign private issuers, section 14 of the 1934 Act makes it unlawful for a company registered under section 12 of the 1934 Act to solicit proxies from its shareholders 'in contravention of such rules and regulations as the Securities and Exchange Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors'.⁴

US321 In general, prior to every meeting of its security holders, a company registered under the 1934 Act must furnish each shareholder with a proxy statement containing the information specified in Schedule 14A of the 1934 Act, together with a form of proxy on which the security holder can indicate his or her approval or disapproval of each proposal expected to be presented at the meeting.⁵

1 17 Code of Federal Regulations, s 240.13a-3, as modified by Exchange Act Release Number 16,371 (29 November 1979).

2 17 Code of Federal Regulations, s 240.15d-16 and s 240.13a-16.

3 17 Code of Federal Regulations, s 240.3a12-3(b).

4 Securities and Exchange Act of 1934, 15 United States Code, s 78n.

5 Securities and Exchange Act of 1934, 15 United States Code, s 78n; 17 Code of Federal Regulations, s 240.14a-3.4.

US322 When securities are held in the names of brokers, banks, or nominees, the registrant or issuer company must inquire as to the beneficial ownership of the securities, furnish sufficient copies of the proxy statement for distribution to all of the beneficial owners, and pay the reasonable expenses of such distribution.

US323 In connection with any solicitation of a proxy (or other form of consent or authorisation by shareholders) directed to more than 10 persons, a proxy statement and proxy form complying with the proxy rules must be filed with the Securities and Exchange Commission if the solicitation pertains to a security registered under the 1934 Act.¹ The annual election of directors for a company whose common stock is registered under the 1934 Act normally gives rise to an obligation to file and use a proxy statement in connection with the solicitation of proxies.² The proxy statement sets forth:

- The names of nominees for election to the board;
- The date when they first became directors;
- Their shareholdings; and
- The compensation of and transactions with officers and directors during the past year.

US324 The proxy relating to the election of directors must list the nominees for whom proxies are being solicited and afford shareholders an opportunity to withhold their vote as to all or specified nominees.³ Moreover, the directives of item 402 of Regulation S-K mandate extensive disclosure related to executive compensation and compensation tables. Additionally, there are disclosure requirements which require:

- A board compensation committee report on executive compensation;
- A performance graph, which must compare the issuer's total shareholder return with certain specified performance indicators;
- An option re-pricing disclosure; and
- Information relating to proxy rule amendments changing the disclosure requirements that apply if shareholder action is being taken with respect to employee benefit plans.

¹ 17 Code of Federal Regulations, s 240.14a-6.

² 17 Code of Federal Regulations, s 240.14a-3.

³ 17 Code of Federal Regulations, s 240.14a-4(b)(2).

US325 The preliminary proxy statement and proxy must be filed with the Securities and Exchange Commission at least 10 calendar days before the definitive proxy statement and proxy are to be distributed in connection with shareholder action. This requirement for preliminary filing does not apply if the proxy statement and proxy relate only to an annual or special meeting at which only the election of directors and related routine matters are to take place.¹ As noted above, when the proxies are being solicited for use at an annual meeting for election of directors, the proxy statement must be accompanied by an annual report to the shareholders.

Short-Swing Trading

US326 Securities registered by a foreign private issuer eligible to use Form 20-F are exempt from the short-swing profit provisions of the 1934 Act.²

US327 As a result, non-United States persons holding securities in a foreign private issuer are exempt from the provisions of section 16 which require disgorgement of the profits from the purchase and sale, or any sale and purchase, of any equity securities of such issuer within six months and do not need to file Form 3, Form 4, or Form 5 required thereunder to disclose persons with beneficial ownership of more than 10 per cent of any class of securities and the beneficial ownership of officers and directors.³

Take-Over Provisions; Disclosure of Beneficial Ownership of United States Issuer

US328 A non-United States person holding securities of a non-United States or United States issuer is required to file notice of the acquisition, directly or indirectly, of the beneficial ownership of more than five per cent of any equity security of a class registered pursuant to section 12 of the 1934 Act, within 10 days after such acquisition.⁴ These provisions were enacted to prevent creeping

1 17 Code of Federal Regulations, s 240.14a-6(a).

2 17 Code of Federal Regulations, s 240.3a12-3(b).

3 Securities and Exchange Act of 1934, 15 United States Code, s 78p; 17 Code of Federal Regulations, ss 240.16a-1 *et seq.*

4 17 Code of Federal Regulations, ss 240.13d-1 *et seq.*

take-overs by undisclosed principals of United States companies with a class of securities listed pursuant to section 12.

US329 The provisions are part of what is commonly referred to as the Williams Act, a series of statutes and rules that regulate the conduct of management, bidders, and broker-dealers in a hostile take-over. For purposes of this rule, a beneficial owner includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:

- Voting power, which includes the power to vote, or to direct the voting of, such security; or
- Investment power, which includes the power to dispose, or to direct the disposition of, such security.¹

US330 In addition, a person is deemed to be the beneficial owner of a security if that person has the right to acquire such security within 60 days through any option, warrant or right to conversion of a security, pursuant to power to revoke a trust, discretionary account, or similar arrangement, or any automatic termination of a trust, discretionary account, or similar arrangement.² All securities held by persons acting as a group are aggregated for purposes of determining whether the five per cent disclosure trigger has been reached. A group is defined as when two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer.³

Multi-Jurisdictional Disclosure System for Canadian Issuers

US331 Based on the close relationship between the United States and Canada, in 1991 the Securities and Exchange Commission adopted the Multi-Jurisdictional Disclosure System, which permits certain Canadian issuers to offer publicly and to sell their securities in the United States using documentation prepared in accordance with the requirements of Canadian law and reviewed by provincial securities regulators.

¹ 17 Code of Federal Regulations, s 240.13d-3.

² 17 Code of Federal Regulations, s 240.13d-3.

³ Securities and Exchange Act of 1934, 15 United States Code, s 78m.

US332 Likewise, Canadian securities administrators adopted a similar provision that extended the same system for United States issuers.¹ In short, these systems were intended to permit United States and Canadian issuers to comply with their local disclosure requirements and make securities offerings in the other country.²

US333 ‘Substantial’ Canadian companies with a three-year reporting history in Canada are permitted to use documents prepared according to Canadian securities laws to register securities with the United States Securities and Exchange Commission and meet the periodic reporting requirements. In addition, under the Multi-Jurisdictional Disclosure System, Canadian companies registered thereunder are exempt from the Securities and Exchange Commission’s proxy requirements. Substantial Canadian companies include companies that are incorporated in Canada and have either:

- A total market value for common stock of Cdn \$180 million and a public float of US \$75 million and are eligible to use the F-9 registration form for investment grade debt and preferred stock offerings; or
- A market value for common stock of Cdn \$360 million and a public float of US \$75 million and are eligible to use the F-10 registration form for equity offerings.³

US334 The Securities and Exchange Commission’s willingness to harmonise United States and Canadian requirements was largely based on the similarities between United States and Canadian securities regulations and accounting and auditing standards as well as the existence of a Memorandum of Understanding concerning mutual co-operation in matters relating to the administration and enforcement of United States and Canadian securities laws.⁴

1 The Multi-Jurisdictional Disclosure System concept of mutual recognition also allows certain cash tender and exchange offers in the United States for securities of Canadian issuers to proceed in accordance with Canadian, provincial, and territorial tender offer requirements.

2 Securities Act Release 7606A, Exchange Act Release 40632A, International Series Release Number 1167A (13 November 1999); Canadian Securities Administrators, National Policy Statement Number 45.

3 Securities Act Release Number 6841 (24 July 1989), 54 Fed Reg 32,226, at 32,241.

4 Securities Act Release Number 6841 (24 July 1989), 54 Fed Reg 32,226, at 32,231.

US335 The Multi-Jurisdictional Disclosure System is significant because it represents the first time that the Securities and Exchange Commission has been willing to accept documentation prepared in accordance with securities law requirements of a non-United States jurisdiction for use in registered public offerings made in the United States. This was a precursor to the harmonisation that is intended by the International Organisation of Securities Commissions standards.

US336 Under the Multi-Jurisdictional Disclosure System, eligible issuers can more easily conduct cross border offerings in Canada and the United States because they prepare only one set of registration documents and are allowed to use one offering document in selling securities in both Canada and the United States. Among the forms used for disclosure for Canadian issuers under the 1933 Act are Forms F-7, F-8, F-9, F-10, and F-80.¹

Jurisdictional Conflicts

Subject Matter Jurisdiction

US337 Just as the United States securities law is comprised of a combination of Congressional Acts and regulations promulgated thereunder by the Securities and Exchange Commission, so are the rules concerning the litigation of disputes under the securities laws. However, prior to determining in which court a dispute under the United States securities laws should be brought, it must be determined if the securities laws will be applicable.

US338 This determination will be based on whether the necessary 'jurisdictional means' have been used directly or indirectly in connection with the securities transaction in question. In general, for purposes of the securities laws, the necessary jurisdictional means include the use of any means or instrumentality of transportation or communication in interstate commerce or of the mails.²

¹ 17 Code of Federal Regulations, ss 239.37–239.380.

² Securities and Exchange Act of 1934, 15 United States Code, ss 77e, 77l, and 77q; 15 United States Code, ss 78i(a), 78j, 78o(c)(1), and 78o(c)(2).

US339 In addition, sections 9(a) and 10 of the 1934 Act designate the use of the facility of any national securities exchange or market as a bridge to Commission jurisdiction. Due to the broad nature of the necessary jurisdictional means, it is generally not difficult to establish this jurisdictional means, however, this pleading requirement must be alleged and established in every case.

US340 Once it is established that the necessary jurisdictional means have been used, one must then determine the appropriate forum in which to bring the dispute. The question of federal or state jurisdiction is determined by the nature of the claims to be litigated. In certain instances, jurisdiction will lie exclusively with the federal courts.

US341 For example, jurisdiction over any appeal from an administrative decision of the Securities and Exchange Commission will lie exclusively with the federal courts,¹ as will that over criminal proceedings and Securities and Exchange Commission enforcement actions.²

US342 Moreover, federal courts have exclusive jurisdiction over all suits in law or equity to enforce claims arising under the 1934 Act and the applicable Commission rules.³ Thus, any claim under the 1934 Act brought in a state court will be barred.⁴ The exclusivity of federal jurisdiction is applicable even if the complaint does not specifically allege violations of the 1934 Act; it merely must allege facts that resemble a 1934 Act claim.

US343 In contrast, jurisdiction over civil actions arising under the 1933 Act will lie concurrently in the federal and the state courts.⁵ This rule is taken a step further under the 1933 Act, in that, if an action under the 1933 Act is brought in a state court, the action may not be removed to the federal court level.⁶

US344 One commentator has stated that the justification for this rule is the facilitation of private enforcement by giving the plaintiff an absolute choice

1 Securities and Exchange Act of 1934, 15 United States Code, s 77I; 15 United States Code, s 78y.

2 Securities and Exchange Act of 1934, 15 United States Code, s 77v, and 15 United States Code, s 78aa.

3 Securities and Exchange Act of 1934, 15 United States Code, s 78aa.

4 *Riley v Simmons*, 45 F3d 764 (3d Cir, 1995); *Evans v Dale*, 896 F2d 975 (5th Cir, 1990); *Kleckley v Hebert*, 464 So 2d 39 (La App, 1985).

5 Securities Act of 1933, 15 United States Code, s 77v(a).

6 Securities Act of 1933, 15 United States Code, s 77v(a).

of forum; especially since, in many cases, state court litigation may prove less complex and less expensive than suits in federal court.¹

Procedural Requirements

In General

US345 Although a discussion of all of the procedural requirements involved in the litigation of a securities case is beyond the scope of this chapter, the following is a summary of the major procedures involved in securities litigation.

Venue

US346 The rules as to proper venue (ie, the court in which litigation may be brought, whether it be at the state or the federal level) are set forth in the securities laws. Section 22(a) of the 1933 Act and section 27 of the 1934 Act provide that an action may be brought in the district in which the defendant is found or is an inhabitant or transacts business.

US347 Furthermore, for purposes of an action brought under the 1933 Act, venue is proper in any district in which an offer or sale took place, if the defendant participated therein.²

Service of Process

US348 Generally, process may be served on, and personal jurisdiction over the defendant established, by serving the defendant in any district in which he or she is an inhabitant or in which he or she may be found.³

US349 However, as various jurisdictions may present certain nuances or other unique requirements, potential parties to any action should consult with local counsel regarding the specifics of that particular jurisdiction relating to personal jurisdiction.

1 Hacker and Rotunda, 'The Extraterritorial Regulation of Foreign Business under the United States Securities Laws', 59 *NCL Rev* 643 (1981), s 14.1, at p 49.

2 15 United States Code, s 77v(a); 15 United States Code, s 78aa.

3 15 United States Code, s 77v; 15 United States Code, s 78aa.

Statutes of Limitation

US350 The securities laws provide specifically for statutes of limitations when express remedies are set forth. However, as to actions brought under rule 10b-5, no specific statute of limitations exists, since the remedy it provides is only an implied remedy for damages in private actions brought by a purchaser or seller of a security. This lack of a statute of limitations led to a significant amount of litigation, with the Federal Circuits split as to what statute of limitations should be applied by analogy.

US351 Finally, the Supreme Court, in *Lampf, Leva Lipkind, Prupis and Petigrow v Gilbertson*,¹ through a myriad of five different opinions, held that the proper statute of limitations should be one year after discovery, limited by a three-year statute of repose, analogising to the other similar statutes of limitations contained in the securities laws. It should be noted, however, that, after the Supreme Court's decision in *Lampf*, Congress promulgated section 27A of the 1934 Act to quash any retroactive application of this statute of limitations to cases initiated on or before 19 June 1991, the day before the court's decision.²

Damages

US352 As with statutes of limitations, a dichotomy exists as to the provision for damages between the express remedies of the securities laws and the implied remedy in rule 10b-5 promulgated under section 10 of the 1934 Act. For example, if a suit is brought by a person under section 11 of the 1933 Act due to the acquisition of a security through a registration statement containing an untrue statement or omission of material fact, such person's damages are limited to the difference between the amount paid for such security (not exceeding the public offering price) and the price at which it was disposed prior to the initiation of the suit.³

¹ *Lampf, Leva Lipkind, Prupis and Petigrow v Gilbertson*, 111 SCt 2773, at p 2780 (1991), *reh'g denied*, 501 US 1277 (1991).

² 15 United States Code, s 78aa-1.

³ 15 United States Code, s 77k(e).

Similarly, section 12 of the 1933 Act provides a specific limit on damages in the case of violations of sections 3 or 5 of the 1933 Act, namely:

- If the plaintiff has not disposed of the security, the amount paid for the security in question plus interest less any income received thereon, on the tendering of the security; or
- If the security has already been sold, the difference between the purchase price and the amount received on disposition.¹

US353 In the case of a rule 10b-5 action, the limitation of damages is set forth under the case law. In general, the purchaser in such an action may either rescind the purchase or recover the difference between the purchase price of the security in question and the real value of the security, plus interest.² However, if the plaintiff has already disposed of the security, damages will be limited to the difference between the purchase price and the price at which the security was sold.³

US354 In the case of a defrauded seller, such seller will be able to recover the difference between the amount received on the sale and the purchase price received by the purchaser on resale.⁴ Finally, it should be noted that a plaintiff cannot recover punitive damages under the United States securities laws.⁵

Conclusion

US355 The United States securities laws are a complex set of statutes, rules, regulations, judicial interpretations, and practices that have evolved since modern securities law concepts were first enacted in the 1930s. Underlying the extensive regulation is the goal to protect the investor by mandating adequate and fair disclosure so that appropriate investment decisions can be made.

1 Securities Act of 1933, 15 United States Code, s 77l(a).

2 *Sackett v Beaman*, 399 F2d 884 (2nd Cir, 1968).

3 *Clark v John Lamula Investors, Inc*, 583 F2d 594 (2nd Cir, 1978).

4 *Janigan v Taylor*, 344 F2d 781, 786 (1st Cir, 1965), *cert denied*, 382 US 879 (1965).

5 *Globus v Law Research Serv, Inc*, 418 F2d 1276 (2nd Cir, 1969), *cert denied*, 397 US 913 (1970).

Conclusion

US356 Over time, the United States securities laws have been adapted for the non-United States issuer, as world financial markets have become more integrated and internationalised. Leading the way has been the Securities and Exchange Commission, which, through various initiatives, has sought to include non-United States issuers within the regulatory framework and has worked to instill in other non-United States markets the concepts of the United States regulatory scheme.

US357 The benefits of the United States markets to non-United States companies, in terms of relatively fair valuations, liquid markets, political stability, and evenly administered regulatory schemes, are substantial. The enforcement activities of the Securities and Exchange Commission, and self-regulatory organisations, ensure compliance with the law and deter fraudulent conduct. The United States is a leading jurisdiction in attracting non-domestic companies to its capital markets. All indications are that this trend will continue.

