

United States Securities Law and International Securities Transactions

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I. The U.S. Regulatory System.

A. Introduction.

The modern U.S. securities laws were first enacted in 1933 during the early years of the administration of President Franklin Delano Roosevelt, as a reaction to the stock market crash of 1929 and the ensuing Great Depression that gripped the United States. Imbued with New Deal zeal to remake the crippled economic order, the securities laws were intended to provide a framework to facilitate capital formation by issuers (entities that issue securities to investors) while emphasizing the need to provide full and fair disclosure to potential investors and existing shareholders.

The basic tenet of the law 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 behavior so that information made available by issuers accurately reflects the business operations, risks and benefits of a new investment or existing operation. This is designed to promote fully informed and appropriate investment decisions to be made - whether the decision is to buy a security, to continue to hold a security or to sell a security. The legislation also provides severe penalties to deter misrepresentation, deceit and other fraudulent behavior and to penalize persons or entities that act outside the law and regulations.

In the United States, securities transactions are subject to regulation at both the federal and the state level. On the federal level, the authority for federal preemption of securities law matters stems from the interstate commerce clause of the U.S. Constitution (U.S. Const., Art. I, Sec. 8). 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 (See, e.g., National Securities Markets Improvement

Act of 1996, Pub.L. No. 104-290 (1996)). State securities laws are the primary focus for transactions wholly within a state or which do not affect interstate commerce. Known as "blue sky" laws, the state law 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 with effects within those state borders.

This chapter will primarily focus on the U.S. federal law with regard to international securities transactions. It is intended to provide an overview of federal securities law as applied to international transactions.

B. Federal Law.

During the period from 1933 to 1940, the U.S. Congress enacted a number of statutes that form the basis for the regulatory framework in the United States. These statutes, and the rules and regulations promulgated under the authority granted to the U.S. Securities and Exchange Commission as part of the applicable law, form the cornerstone of the federal securities regulatory system. These acts (In addition, two other significant laws were enacted during this era which still have applicability to certain U.S. securities law issues, the Public Utility Holding Company Act of 1935, 15 U.S.C. . 79 et. seq., and the Trust Indenture Act of 1939, 15 U.S.C. . 77aaa et. seq.; however, these acts are outside the scope of this chapter) are as follows:

The Securities Act of 1933 (15 U.S.C. . 77a et. seq.), commonly known as 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 (15 U.S.C. . 78a et. seq.), commonly known as the "1934 Act," established the U.S. Securities and Exchange Commission and regulates the trading of securities;

The Investment Company Act of 1940 (15 U.S.C. . 80a et. seq.) regulates the activities of investment companies; and

The Investment Advisers Act of 1940 (15 U.S.C. . 81a et. seq.) regulates the activities of investment advisors.

C. Securities and Exchange Commission.

The U.S. Securities and Exchange Commission, the "Commission," was formed under the 1934 Act (See, 15 U.S.C. . 78d) and is charged with the administration of the U.S. securities laws. The Commission has broad rule-making authority to accomplish its goals to provide protection for investors and to ensure that securities markets are fair and honest. Rules and regulations promulgated by the Commission affect all aspects of the U.S. capital markets, including the issuance and aftermarket trading of securities, and the registration of broker and dealers. (See, e.g., 17 C.F.R. . 230 et. seq. for rules and regulations promulgated under the 1933 Act and 17 C.F.R. . 240 et. seq. for rules and regulations promulgated under the 1934 Act). Part of the authority of the Commission is carried out through management of "self-regulatory organizations," which today include the major U.S. securities exchanges, the National Association of Securities Dealers, Inc. and the over-the-counter market, stock clearing agencies and municipal securities rulemaking activities. Whether the issue is the sale of securities, the trading of securities, the organization 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 Commission that proscribes behavior, monitors activities and penalizes wrongdoers.

The Commission also serves as adviser to the U.S. federal courts in corporate reorganization proceedings under Chapter 11 of the Bankruptcy Reform Act of 1978 (11 U.S.C. ..364, 1125 and 1145).

The Commission consists of five commissioners appointed by the President and confirmed by the Senate. The Commissioners serve staggered five year terms (15 U.S.C. . 78d). The headquarters of the Commission is located at the nation's capitol in Washington, D.C., although the Commission has numerous field offices around the country. The staff of the Commission is organized 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 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 organizations; the Division of Investment Management, which is responsible for administering investment companies, investment advisers and public utilities; and the Division of Enforcement, which is responsible for enforcing the federal securities laws and regulations.

In addition, the Office of the Chief Accountant has the responsibility for advising the Commission on accounting and auditing matters and 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.

The Office of International Affairs of the Commission has primary responsibility for the international enforcement of U.S. securities laws and regulatory cooperation 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 judgments abroad. In addition to its enforcement activities, staff members engage in ongoing discussions with their non-U.S. counterparts, including the International Organization of Securities Commissions 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.

The Commission has the pre-eminent role in the regulation of U.S. 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, provide statutory sanctions and enforce the securities laws and rules by administrative action, conduct civil

litigation and to refer criminal conduct for potential prosecution. Significantly, however, the Commission does not approve or disapprove any security or guarantee the value or merit of any security.

The Commission will not bar from sale any security, even if the security has questionable value, although it may halt trading in securities which are the subject of illegal market manipulation activities. Its 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.

In 1996, the Commission reported a record \$1.2 trillion worth of securities were filed with the Commission for registration during the year, a 45% increase from 1995 (For the purposes of this chapter, all dollar amounts are in United States dollars). During this period, offerings by first time registrants (Initial public offerings, or "IPOs") totaled \$185.5 billion, more than twice the level of 1995. The gains were particularly impressive with respect to non-U.S. companies' participation in the U.S. public markets. During 1996, 136 foreign companies from 30 countries entered the U.S. public markets for the first time. At year-end, 843 foreign companies from 47 countries filed reports with the Commission. Non-U.S. companies registered public offerings worth a total of \$78 billion in 1996. (All statistics are taken from the SEC 1996 Annual Report) The listing of non-U.S. companies in markets in the United States and the use of U.S. capital markets by non-U.S. entities is growing exponentially.

D. State Law.

Although federal law applies to securities transactions across state lines, 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 its boundaries. These statutes also cover "intra-state" 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 within, or if a corporation, incorporated by and doing business within such state or territory (15 U.S.C. § 77c(a)(11)). Typically, these laws also have enforcement mechanisms which provide for penalties and sanctions for omissions or misrepresentations or other fraudulent behavior.

E. Extraterritorial Reach of the U.S. Securities Laws.

Increasingly, world financial markets have become more integrated and internationalized. Foreign listings on U.S. 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 U.S. securities laws. This trend has focused attention on the extraterritorial reach of the U.S. securities laws. In 1981, it was observed that "[w]ith increasing frequency foreigners are becoming concerned with the extraterritorial reach of the United States securities laws." (Robert C. Hacker & Ronald D. Rotunda, *The Extraterritorial Regulation of Foreign Business Under*

the U.S. Securities Laws, 59 N.C.L. Rev. 643 (1981)) This observation rings true even more today as financial markets have developed and integrated. A practitioner analyzing the extraterritorial reach of the U.S. securities law must first identify the specific U.S. securities laws at issue and then analyze the specific facts and circumstances involved to determine whether U.S. securities law concepts apply.

In the case of the registration of securities under the 1933 Act, the law is quite clear as to extraterritoriality. As the 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 U.S. or [non-U.S.] companies, including mutual funds." (Mike Krechew, SEC No-Action Letter, November 5, 1997, which held that non-U.S. mutual funds which offer securities in the United States must register with the Commission under both the 1933 Act and the Investment Company Act of 1940, unless exemptions from registration apply). In 1990, the Commission adopted Regulation S in order to clarify the extraterritorial application of the registration provisions of U.S. securities laws. (Securities Act Release No. 6863 (April 24, 1990)) 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 U.S. 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 U.S. securities laws (17 C.F.R. . 230.901). Regulation S is not an exemption from registration under U.S. securities laws; rather it provides that offers and sales occurring outside of the U.S. are not subject to the registration requirements of U.S. securities laws. (A full description of Regulation S and its applicability is discussed later in this chapter)

When it comes to the application of the anti-fraud provisions of the 1934 Act, however, the law is not as clear. 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." (Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31 (D.C. Cir. 1987)). Nonetheless, the U.S. federal courts have established a two level test under which it will extend the anti-fraud rules of the 1934 Act extraterritorially. (As will be discussed below, jurisdiction over the 1934 Act lies exclusively with the federal courts and not the courts of the individual States)

Generally, a U.S. federal court will have jurisdiction over the subject matter of a claim despite the fact that the conduct in question occurred outside the United States if such conduct produces substantial effects on U.S. markets or U.S. investors. This known as the "effects test". This test was first enumerated by the Second Circuit Court of Appeals in Schoenbaum v. Firstbrook. (405 F.2d 200 (2d Cir. 1968)) In that case, it was held that the principal anti-fraud section of the 1934 Act, namely Section 10(b) (15 U.S.C. . 78j) and Rule 10b-5 promulgated thereunder (17 C.F.R. . 240.10b-5), 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. The Court came to this conclusion despite the fact that all of the parties involved were non-U.S. entities because the Canadian issuer was listed on the American Stock Exchange and had, among others, U.S. shareholders. "[T]he anti-fraud provision of . 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 . 10(b)] is injurious to United States investors." (Schoenbaum, 405 F.2d at 206).

If, on the other hand, there is no effect on U.S. investors or the U.S. securities markets, the courts may still find that subject matter jurisdiction exists when conduct in the U.S. directly caused the losses suffered by investors outside of the U.S. It is important to note that although the trend is to find subject matter jurisdiction in an increasing number of situations, the U.S. federal courts have split in regard to the level of conduct that will cause them to have jurisdiction. The Courts of Appeal for the Second Circuit and the District of Columbia Circuit have held that jurisdiction will 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 Section 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. (See, *IIT v. Cornfeld*, 619 F.2d 909, 920-21 (2d Cir. 1980), and *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987)). 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." (*Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979). See, also, *SEC v. Kasser*, 548 F.2d 109 (3d Cir. 1977), *Grunenthal GmbH v. Holtz*, 712 F.2d 421 (9th Cir. 1983)). 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-U.S. entity or person.

II. United States Markets and Market Listing Requirements.

In the United States, there are two basic types of stock markets upon which a company, an "issuer," can elect to have its securities traded. A centralized or fixed stock exchange trades securities in one central location through specialists that auction or execute buy and sell orders at the best available price. The New York Stock Exchange, "NYSE," and the American Stock Exchange, "AMEX," are examples of a centralized, specialist based, physical stock exchange. An over-the-counter market trades securities through 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 over-the-counter market. The Commission provides oversight to these self-regulatory organizations, whether a national securities exchange or market.

Each exchange or market provides extensive guidelines and rules which govern the conduct

of its members and participants. Non-U.S. entities seeking to list on a U.S. stock exchange or market must not only conform to the requirements of the Commission, but to those of the stock exchange or market itself. These requirements are both quantitative and qualitative, and they mandate behavior as well as business and financial disclosure standards.

There are two national, centralized stock exchanges the New York Stock Exchange and the American Stock Exchange and a number of smaller regional exchanges which often either specialize in certain defined types of activities, such as the Chicago Board Options Exchange which specializes in the trading of options, or which focus on a certain geographic area, such as the Pacific Stock Exchange. (Other regional exchanges include the Boston Stock Exchange, the Cincinnati Stock Exchange, the Inter-Mountain Stock Exchange, the Midwest Stock Exchange, and the Philadelphia Stock Exchange) There also is a thriving over-the-counter market regulated by the National Association of Securities Dealers, Inc., "NASD," a national securities association. The NASD operates The Nasdaq Stock Markets, comprised of the Nasdaq National Market System for larger, more seasoned issuers; the Nasdaq SmallCap market for smaller, less seasoned issuers; and the OTC Electronic Bulletin Board, a bulletin board service where broker-dealers can report trades for small, less widely traded securities. Some of the world's largest and most famous technology companies trade on the Nasdaq National Market System. Another group, the National Quotation Bureau, "NQB," provides lists of securities, commonly known as the "pink sheets," reporting trades for thinly traded securities on a daily list printed on pink paper.

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 Commission is closely monitoring developments on the internet and has interceded aggressively to halt behavior deemed detrimental to investors. The Commission has since issued a "no-action letter" which permitted a company to make a market in its own shares using the internet under certain circumstances. (Real Goods Trading Corp., 28 Sec. Reg. & L. Rep. (BNA) 850; SEC No Action Letter available June 25, 1996).

Non-U.S. entities are welcome to list their securities on all the available exchanges and markets. In fact, exchanges and markets aggressively seek qualified listing applicants that meet their requirements. Non-U.S. entities who 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. Often an exchange will meet with the entity in advance to discuss the listing and the prospects for successful listing. The goal for the non-U.S. entity is to have its securities trade on an exchange where its securities will be actively traded, where shareholders are provided liquidity in good markets and bad, and where the quantitative and qualitative disclosure requirements are not unduly burdensome.

Foreign entities have the option of directly listing their shares on an exchange or to create a new security, known as an American Depositary Receipt, or "ADR." An ADR is a negotiable instrument issued by a third party depository, usually a U.S. bank or its foreign affiliate, and represents a specified number of shares or units of the underlying issuer which are held by the depository on behalf of the ADR holders.

Trades in the United States on U.S. exchanges and markets are effected in the ADR and not in the underlying securities. Often an ADR is used so that securities traded in the United States are denominated in U.S. dollars and can meet the minimum price requirements of the

listing exchange or market. (A full description of the use of the ADR and its applicability is discussed later in this chapter)

The following is a listing of the major stock exchanges and markets, and their listing requirements.

A. New York Stock Exchange. The most prestigious national securities exchange in the United States is the New York Stock Exchange. The NYSE provides a liquid, tightly regulated market for the most seasoned of issuers. Over 3,000 of the world's leading companies list on the NYSE. Of these, over 343 non-U.S. entities are listed from 45 different countries. (NYSE web site, <http://www.nyse.com>, visited April 23, 1998). One reason for the prestige of this exchange is its exacting listing requirements.

By executing a NYSE listing agreement, a company agrees not only to strictly abide by the U.S. securities law, but to conform to a demanding series of requirements and obligations to continue to enjoy listing privileges on the NYSE. These requirements go beyond quantitative criteria for initial or continuing listing -- such as value of the company, the public float and 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 NYSE reviews the degree of national interest in the company, its relative position and stability in the industry, and whether it is engaged in an expanding industry with prospect of at least maintaining its relative position.

Listing on the NYSE provides the non-U.S. company with the ability 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.

Non-U.S. issuers may list on the NYSE concurrently with their initial entry into the U.S. capital markets, whether through an offering of securities or not, or by transferring the listing from another U.S. exchange or stock market.

Non-U.S. companies have the option of seeking to qualify for listing with the NYSE either by the NYSE's standard domestic listing criteria or by special listing standards exclusively reserved for non-U.S. companies. The criteria for non-U.S. 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. The criteria for domestic companies focuses more on the U.S. market as the principal market and the minimum distribution of the non-U.S. issuer's stock within that market. Whatever criteria is used, an applicant company must meet or exceed all of the criteria within the standards under which it seeks to qualify for listing.

The listing requirements and procedures for non-U.S. entities are as follows:

Non-U.S. Company Listing Standards:

Round-lot holders 5,000 worldwide (holders of 100 or more shares) Public shares 2,500,000 worldwide (shares not held by insiders or control persons)

Market value of public shares US \$100,000,000 worldwide

Net tangible assets US \$100,000,000 worldwide

Pre-tax income - aggregate for last three years US \$100,000,000 worldwide

Minimum pre-tax income for any one of three years US \$25,000,000 worldwide

If the foreign entity meets all the financial criteria but due to the use of bearer shares outside of the United States has difficulty in demonstrating that they have the required number of shareholders on a worldwide basis, the NYSE provides that a NYSE member may "sponsor" the applicant and verify the liquidity and depth of the market for a company's shares.

Domestic Listing Standards:

Alternative One

Round-lot holders (a round lot is 100 shares) 2,000 U.S. or total shareholders 2,200 U.S. and Minimum average monthly trading volume for the most recent six months 100,000 shares

-or-

Alternative Two

Total shareholders 500 and Minimum average monthly trading volume for the most recent twelve months 1,000,000 shares

FOR EITHER ALTERNATIVE ONE OR TWO:

Minimum public shares 1,100,000 U.S.

Market value of public shares US \$40,000,000

Net tangible assets US \$40,000,000.

-and-, one of the following:

Most recent year pre-tax income US \$2,500,000 Each of two preceding years pre-tax income US \$2,000,000

-or-

Aggregate pre-tax income for the last three years US \$6,500,000 Minimum in most recent year pre-tax income US \$4,500,000 (All three years must be profitable)

-or-

For companies with not less than \$500 million in market capitalization and \$200 million in

revenues in the most recent fiscal year, an aggregate for the three years adjusted net income US \$25,000,000 (each year must report a positive amount)

A third alternative exists which is intended to provide the opportunity for companies that are valued more on the basis of "cash flow" than reported income. In performing its due diligence listing application analysis, the NYSE will consider each company on a case by case basis and will examine not only at the specifics of the company's business but will also look to its industry, peer group and other relevant factors.

Corporate Governance Requirements. Beyond numerical criteria, other factors are considered when determining eligibility for listing. The New York Stock Exchange requires that listed U.S. companies meet certain criteria with respect to outside directors, audit committee composition, voting rights and related party transactions. The following is a summary of these policies:

Outside Directors. NYSE companies must have a minimum of two outside directors. For those companies which do not have outside directors at the time their eligibility for listing is approved, the NYSE 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 not an individual member of an organization acting as an advisor, consultant, legal counsel, etc., who is receiving compensation on a continuing basis from the company in addition to director's fees. The NYSE encourages discussion with an Exchange representative to clarify any uncertainty with regard to qualification of outside directors.

Audit Committee. Each U.S. company seeking to list on the NYSE must have 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.

Voting Rights. The NYSE 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." In its review of a company's eligibility for listing, the NYSE will evaluate any unusual voting provisions associated with a company's securities.

Related Party Transactions. The NYSE 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. However, the NYSE expects corporations to discharge their responsibility in this area in an appropriate fashion. For this reason, companies applying to list on the NYSE will be required to confirm that they will appropriately review and oversee related party transactions on an ongoing basis. Though no particular method of oversight is dictated, the Audit Committee or another comparable body would be considered an appropriate forum.

In general, the NYSE will accept corporate governance practices of non-U.S. companies that do not comply with NYSE policies to the extent that such practices are not prohibited by the home country law of the non-U.S. issuer. (NYSE Listing Standards and Procedures for Non- U.S. Corporations, page 10 (1998)).

B. American Stock Exchange. In April 1998, the National Association of Securities Dealers, Inc. and the American Stock Exchange jointly announced a definitive agreement to merge the AMEX into the NASD organization. (AMEX Press Release, dated April 9, 1998) Under the agreement, the AMEX will continue to operate as a separate specialist based auction market, like the NYSE. Typically, the AMEX has been the market for smaller companies than those listed on the NYSE but in recent years its market and the number of its listed companies has eroded due to the success of the NYSE in the fixed, physical location specialist based auction market favored by "blue chip" companies, and the success of the Nasdaq in the computer-based trading market favored by "technology" companies. The AMEX has evolved to become a leader in offering markets for option trading and other derivative products. Over 900 issuers trade on the AMEX, as well as options on 29 broad-based and sector indexes, options on 896 stocks, and 103 long-term equity anticipation securities or "LEAPS." (AMEX Press Release, April 9, 1998) The proposed merger is intended to provide the AMEX with capital to expand and enhance its infrastructure, particularly to update its technology. For the NASD, the merger provides its listed companies with a specialist based auction market alternative to the NYSE.

In order to list on the AMEX, a non-U.S. company needs to satisfy one of two alternative financial guidelines and one of four distribution guidelines. The listing requirements for non- U.S. companies are as follows:

Financial Guidelines - Alternative 1

Pre-tax income US \$750,000 latest fiscal year or 2 of most recent 3 years

Market value of public float US \$3,000,000

Minimum Price US \$3.00 per share

Stockholders' equity US \$4,000,000

Financial Guidelines - Alternative 2

Pre-tax income N/A

Market value of public float US \$15,000,000

Minimum Price US \$3.00 per share

Stockholders' equity US \$4,000,000

Distribution Guidelines - Alternative 1

Public float 500,000 shares (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 ten percent of the total shares outstanding.)

Public stockholders in United States 800

Average daily volume N/A

Distribution Guidelines - Alternative 2

Public float 1,000,000 shares

Public stockholders in United States 400

Average daily volume N/A

Distribution Guidelines - Alternative 3 Public float 500,000 shares

Public stockholders in United States 400

Average daily volume 2,000 shares

Distribution Guidelines - Alternative 4 Public float 1,000,000 shares

Public stockholders - worldwide 800

Average daily volume 2,000 shares

C. National Association of Security Dealers, Inc. The NASD is the largest securities industry self-regulatory organization in the United States, and operates subject to oversight from the Commission. The NASD has two primary functions - to register, regulate and oversee all of the broker-dealers in the United States, and to regulate and operate the over-the-counter market. In 1996, the NASD was formally restructured to create two separate, distinct, wholly owned subsidiaries of the NASD: NASD Regulation, Inc., which is charged with the regulation, registration and oversight of broker-dealers, and the The Nasdaq Stock Market, Inc., which is charged with the regulation of the over-the-counter stock markets.

The Nasdaq Stock Market is the largest electronic, screen-based market in the world. It is not a physical market, but rather trades occur over computer systems from remote locations. It handles transactions involving over one billion shares a day. More than 5,100 companies are listed on Nasdaq, more than any other market. The Nasdaq has two tiers: The Nasdaq National Market System for larger companies, and The Nasdaq Smallcap Market for smaller emerging growth companies.

The NASD has also recently 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-U.S. securities (except Canadian), ADRs, and equity securities listed on U.S. securities exchanges. This office also assists non-U.S. companies in accessing the U.S. capital markets and in gaining a listing on Nasdaq.

1. National Market System. In order to qualify for listing on the National Market System, a security of a non-U.S. issuer or an ADR or similar security issued in respect of a security of a non-U.S. issuer, must either be already registered and traded on another exchange or market pursuant to the 1934 Act (Pursuant to 12(g) of the 1934 Act, 15 U.S.C. . 78l) 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 shall be considered for inclusion on the day that its registration statement is declared effective by the Commission. If on a best

efforts commitment basis, the securities of the issuer shall be considered for inclusion upon the closing of the offering. If a new issue, qualification shall automatically terminate 120 days after the last day of the issuer's fiscal year during which the registration statement became effective. The three alternative listing requirements for the Nasdaq National Market System (NASD Manual, Marketplace Rules, Rules 4300 to 4400 et. seq.), which are applicable both to non-U.S. and domestic companies, are as follows:

Alternative 1:

Net Tangible Assets US \$6,000,000 (Net tangible assets means total assets, excluding goodwill, minus total liabilities)

Pretax Income - latest fiscal year or 2 of last 3 fiscal years US \$1 million

Public Float 1.1 million shares (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 ten percent of the total shares outstanding)

Market Value of Public Float US \$8 million

Minimum Bid Price US \$5

Shareholders (round lot holders) 400

Market Makers 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)

Alternative 2:

Net Tangible Assets: US \$18,000,000

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

Market Makers 3

Alternative 3:

Market Capitalization 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

Market Makers 4 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. The NASD provides that no provision of its listing requirements "shall be construed to require any foreign 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 of these provisions as may be necessary or appropriate to carry out this intent." (NASD Manual, Marketplace Rules, Rule 4320) This rule particularly applies to the corporate governance provisions where corporate behavior is mandated.

The principal corporate governance requirements for listing on the National Market System (NASD Manual, Marketplace Rules, Rule 4320), are as follows:

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. 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.

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 Commission (Form 10-Q for domestic issuers), except that foreign private issuers (The term "foreign private issuer" is defined to include "any corporation organized under the laws of a foreign country, unless: (i) more than 50 percent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificates or depository receipts by residents of the United States; and (ii) any of the following: (a) the majority of the executive officers or directors are United States citizens or residents, (b) more than 50 percent of the assets of the issuer are located in the United States, or (c) the business of the issuer is administered principally in the United States." 17 U.S.C. . 240.13a-13) do not have to file quarterly reports with the Commission and therefore do not have to file interim reports.

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

Audit Committee. Each issuer is required to establish and maintain an Audit Committee, a majority of the members of which shall be independent directors.

Shareholder Meetings. Each issuer is required to hold an annual meeting of shareholders and shall provide advance notice of such meeting to Nasdaq.

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

Conflicts of Interest. Each issuer is required to conduct an appropriate review of all related party transactions on an ongoing basis and to utilize 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.

Shareholder Approval. Each issuer shall require shareholder approval of a plan or arrangement under subparagraph (A) below or, prior to the issuance of designated securities, under subparagraph (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 (for example, ESOP - employee stock ownership plans). 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. The establishment of a plan or arrangement under which the amount of securities which may be issued does not exceed the least of: (a) 1% of the number of shares of common stock; (b) 1% 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: (i) any individual director, officer or substantial shareholder of the issuer has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction, or series of related transactions, and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more; or (ii) 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: (a) the common stock has, or will have upon issuance, voting power equal to or in excess of 20% of the voting power outstanding before the issuance of stock or securities convertible into or exercisable for common stock, or (b) the number of shares of common stock to be issued is or will be equal to or in excess of 20% 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: (i) 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% or more of common stock or 20% or more of the voting power outstanding before the issuance; or (ii) the sale or issuance by the company of common stock, or securities convertible into or exercisable for common stock, equal to 20% or more of the common stock or 20% 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 upon application to Nasdaq when: (x) the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise; and (y) reliance by the company on this exception is expressly approved by the Audit Committee or a comparable body of the Board of Directors. A company relying on this exception must mail to all shareholders not later than ten 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.

Voting Rights. A company may not take: (a) 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; (b) 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; (c) 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 (d) 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.

Listing Agreement. Each issuer shall execute a Listing Agreement in the form designated by Nasdaq.

Peer Review of Accountant. Each issuer must be audited by an independent public accountant that: (i) 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 (ii) is enrolled in a peer review program and within 18 months receives a peer review that meets acceptable guidelines. These guidelines are that: (i) 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 AICPA's SEC Practice Section Reference Manual; (ii) the peer review program should be subject to oversight by an independent body comparable to the organizational structure of the Public Oversight Board as codified in the AICPA's SEC Practice Section Reference Manual; and (iii) 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.

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.

For each of the above corporate governance requirements, the non-U.S. issuer may send an "request for exemption" to the Nasdaq Listing & Qualification Department, requesting an exemption from a specific requirement if such requirement is not required in the home country of the issuer. (NASD Manual, Marketplace Rules, Rule 4460A) For example, the Netherlands does not require solicitation of proxies. The non-U.S. company is exempt from the federal proxy solicitation requirements of Section 14 of the 1934 Act by virtue of Rule 3a12-3(b) (17 C.F.R. . 240.3a12-3).

2. SmallCap Market Listing. In order to qualify for listing on the SmallCap Market, a security of a foreign issuer, an ADR or similar security issued in respect of a security of a foreign issuer, must either be already registered and traded on another exchange or market

pursuant to the 1934 Act (Pursuant to 12(g) of the 1934 Act, 15 U.S.C. . 78l(g)) 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 shall be considered for inclusion on the day that its registration statement is declared effective by the Commission. If on a best efforts commitment basis, the securities of the issuer shall be considered for inclusion upon the closing of the offering. If a new issue, qualification shall automatically terminate 120 days after the last day of the issuer's fiscal year during which the registration statement became effective.

The listing requirements for listing on the SmallCap Market (NASD Manual, Marketplace Rules, Rule 4310; see also, NASD web site, <http://www.nasdaq.com>, visited April 23, 1998) are as follows:

Net Tangible Assets US \$4 million

-or-

Market Capitalization US \$50 million

-or-

Net Income - latest fiscal year or 2 of last 3 fiscal years US \$750,000

AND all of the following:

Public Float 1 million shares (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 ten percent of the total shares outstanding)

Market Value of Public Float US \$5 million

Minimum Bid Price US \$4

Shareholders (round lot holders) 300

Market Makers 3

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

3. OTC Bulletin Board. The NASD also operates and oversees the OTC Electronic Bulletin Board, which is an electronic, screen-based market for securities that are not listed on Nasdaq or any U.S. 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. 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 foreign stocks and ADRs, quotations can be updated twice a day.

D. National Quotation Bureau "Pink Sheets". 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 the National Quotation Service, "NQS," to brokers and dealers, commonly known as the "pink sheets." A non-U.S. issuer may list on the pink sheets as a result of not qualifying for an exchange or market, or through a lack of resources or insolvency, or as a result of being delisted from an exchange or market. The pink sheets do not have formal listing requirements, and do not provide real-time quotation or transaction information. The NQB produces, on a daily basis, on pink paper, bid and ask prices for various securities for which there is not an active market. Information provided by the pink sheets is not available to the general public and is only distributed to broker-dealers.

E. PORTAL Market. Simultaneously with the adoption of Rule 144A (17 C.F.R. . 230.144A), which provides for the sale of restricted securities of large companies to a qualified institutional buyer, the Commission approved the NASD's Private Offering, Resale and Trading Through Automated Linkages, or "PORTAL," System. (Exchange Act Release No. 27956, April 27, 1990). 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, or "QIBs," through the International Securities Clearing Corporation, Depository Trust Company and Centrale de Livraison de Valeurs Mobilières, S.A. Luxembourg. PORTAL also provides facilities for primary placements of Rule 144A securities.

III. Public Offerings by Foreign Issuers.

A. Introduction. The U.S. has historically been a strong advocate of commerce and the free international movement of goods, services and capital. Nowhere is the advocacy more apparent than in the accessibility of the U.S. capital markets to non-U.S. companies. Non-U.S. companies offering their securities to U.S. persons are generally subject to U.S. securities laws in the same manner as their counterpart U.S. domestic issuers (15 U.S.C. . 77b), except that in certain circumstances the domestic disclosure requirements have been altered to fit a typical foreign company profile. (For example, the non-U.S. company is exempt by virtue of Rule 3a12- 3(b) from the proxy solicitation requirements of Section 14 of the 1934 Act, 17 C.F.R. . 240.3a12-3) Thus, a non-U.S. issuer proposing to make a public offering of securities in the United States must register the offering under the 1933 Act (15 U.S.C. . 77f) and market trading must be conducted under the 1934 Act (15 U.S.C. . 778b) but the disclosure requirements have been altered to fit an international context.

The securities regulatory system in the United States does not register companies; rather the regulatory system focuses on the type of transaction, whether a private or public transaction, and the actual securities sold or traded. A "public offering" in the United States is a distribution transaction where an issuer sells its securities to the public by registering the shares and the distribution by filing a registration statement with the Commission in accordance with the rules and regulations of the Commission, gaining effectiveness for the registration statement, and closing the purchase and sale. Usually this transaction is conducted through one or more lead underwriters (An "underwriter" is defined as a person who has purchased from an 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, see, 15 U.S.C. . 77b(11)) that organize a syndicate of underwriters to sell the securities to the public. 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 (15 U.S.C. . 78l). The 1934 Act requires the periodic disclosure of business and financial information to the broker-dealer community and the investing public. (15 U.S.C. . 78m) Concurrently with registration, an issuer may apply to be listed on one or more stock exchanges or markets.

With the expansion of stock markets activity around the world, the volatility of emerging stock markets, and the extended bull market in the United States, more and more foreign issuers are looking outside of their home markets to the United States when seeking to raise capital. Over the last several years, the volume of non-U.S. company financing in the United States has increased dramatically. In 1996 alone, over 130 first-time non-U.S. issuers from over 30 countries registered their securities with the Commission, and the total dollar amount of securities registered for sale by all non-U.S. issuers exceeded \$78 billion, both record amounts. As of December 31, 1996, there were 843 non-U.S. companies representing 47 countries filing periodic reports with the Commission. (SEC 1996 Annual Report; SEC web site, <http://www.sec.gov>, visited April 23, 1998). Both the NYSE and the Nasdaq are actively courting new non-U.S. listings.

Commission policy is that foreign issuers must comply with the registration provisions of the federal securities laws, including the presentation of financial statements in accordance with U.S. generally accepted accounting principles, known as "U.S. GAAP." However, U.S. securities laws provide that a foreign issuer which qualifies as a "foreign private issuer" is subject to somewhat narrower disclosure obligations than U.S. issuers and is exempt from the application of certain U.S. securities law provisions. Foreign private issuers with little or no experience in U.S. capital markets should be aware of the requirements of the public and private markets in the United States, and the advantages and disadvantages related to becoming a publicly traded company in the United States.

B. Definition of a Foreign Private Issuer. The Commission has provided an integrated disclosure system for "foreign private issuers" that is different from the requirements for domestic issuers. A "foreign private issuer" (17 C.F.R. . 230.405 or 17 C.F.R. 240.3b- 4(c)) includes "any corporation organized under the laws of a foreign country, unless: (a) more than 50 percent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificates or depositary receipts 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 percent 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." If an issuer is a foreign private issuer, the U.S. securities law prescribes a different set of requirements. Generally these are as follows:

Interim reporting on the basis of 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. (See Regulation S- X discussion below)

Foreign private issuers are exempt from the proxy solicitation requirements of Section 14 of the 1934 Act (15 U.S.C. .78n) and the short swing trading restrictions of Section 16 of the 1934 Act (15 U.S.C. .78p) applicable to domestic issuers. (17 C.F.R. .240.3a12- 3(b))

Foreign private issuers are not required to disclose executive compensation on an individual basis, but may instead disclose on an aggregate if so permitted in a foreign issuer's home country. (Items 11-12 of Form 20-F; 17 C.F.R. . 249.220f)

Foreign private issuers may update their offering document on a semi-annual, rather than a quarterly, basis. (17 C.F.R. .240.13a-16, filing of the Form 6-K).

(See, generally, 15 U.S.C. . 78l(g); 17 C.F.R. .240.13a; and Form F-1, as discussed within, compared to the Form S-1 for U.S. companies)

C. The Advantages and Disadvantages of Going Public in the United States. One of the main advantages of going public in the United States is access to capital at a fair valuation or multiple of earnings based on the type of company, its historical earnings and growth, and its future business plan. An initial 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. In addition, a public offering is one method to provide for the listing of the securities of a non-U.S. company on a stock exchange or market. The creation of a public market will 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. This is especially true for non-U.S. persons who may value the ability to have liquidity outside of their home market in U.S. dollars.

A public offering 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. 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.

Company founders, directors and officers may be able sell their shares, which were acquired in private transactions, as "selling stockholders" at either the initial public offering stage or in subsequent offerings. Publicly traded stock, as opposed to a private company equity interest, provides a shareholder with liquidity upon death.

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 without concern for additional registration or an exemption thereof, subject to Commission rules on sales of restricted securities. (See, generally, 17 C.F.R. .240.144) In addition, an issuer should 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.

A 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 favorable 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.

However, the privilege of access to U.S. public markets and use of U.S. markets and exchanges brings with it the obligation to comply with the complex U.S. securities laws. The U.S. securities laws are enforced zealously, and foreign issuers coming into U.S.

markets should appreciate the fact that the Commission takes the enforcement of such laws very seriously. In fact, it is the activism of the Commission in promoting fair and full disclosure of information and enforcing penalties and sanctions against fraudulent conduct that creates investor confidence in U.S. markets.

Full public disclosure is one of the main disadvantages of going public. The issuer immediately becomes subject to the annual and periodic reporting requirements and other requirements of the 1934 Act. In addition, 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." (John K. Hoyns, *Deciding Whether to Go Public, PLI - How to Prepare an Initial Public Offering* 9, 13 (1995)) The initial prospectus and subsequent Commission filings will reveal a significant amount of material business and financial information about the company, which would not be available about a private company. This information provides competitors with a view of the company that they would not otherwise have. Among the disclosures are descriptions of the business, 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. Inaccurate disclosure may be the source of litigation. The disclosure, accounting, and reporting requirements imposed by the Commission are far more stringent than those of other nations. (Harold Schimkat, *The SEC's Proposed Regulations of Foreign Securities Issued In the United States*, 60 *Fordham L. Rev.* S203 (1992)).

Offering costs required for a public offering of securities -- underwriters, legal, accounting, printing, transfer agents, stock exchange listing, and state "blue sky" fees -- are very high 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. 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.

Once an issuer has offered its shares to the public, the relationship between the company's managers, directors and controlling shareholders to its shareholders has been altered. 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. As a result of the pressures imposed by market forces, management of a publicly traded company tends to focus on short-term maximization of profits rather than developing long-term goals.

Being publicly traded company also subjects the company to increased litigation risk. The Commission has significant enforcement powers to deter fraudulent behavior and to enforce compliance with U.S. law. U.S. law provides for private rights of action to enforce the regulatory system. As a result, the potential for litigation plays a major role in the actions of a publicly traded company.

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 purchased in the secondary market in response to nonpublic material information. In addition, there are periods specified by law when shares may not be traded at the time of earnings announcements, and periods when shares purchased in the public

market may not be resold. Also, selling by high-ranking insiders 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. (See, generally, 17 C.F.R. .240.144)

D. Non-U.S. Issuers - Public Offerings in the U.S. Non-U.S. private issuers effecting an initial public offering in the United States must register the offering pursuant to the registration requirement of Section 5 of the 1933 Act. (15 U.S.C. . 77e) Section 5 of the 1933 Act makes it illegal to offer or sell securities in the United States without a registration statement declared effective by the Commission or pursuant to an exemption from registration. (15 U.S.C. . 77e(a)) 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 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 Commission - no matter the merits of the company, its management and its prospects. Rather the standard when registering securities is whether there has been adequate and accurate disclosure of material information. To this end, the Commission mandates registration forms for different types of companies, and sets disclosure requirements and standards. The registration statement includes a prospectus, which is the actual document provided directly to investors. All registration statements and prospectuses filed with the Commission are public documents and are available for inspection and copying at the offices of the Commission or through EDGAR, the on-line database of reporting companies and their filings. (See, generally, the Commission's web site at <http://www.sec.gov/edgar>)

There are four registration forms -- F-1, F-2, F-3, and F-4 -- which can be used to register securities of a foreign private issuer for a public offering in the United States. They essentially parallel the registration forms used for U.S. companies: Forms S-1 through S-4. In addition, Form F-6 is available to register American Depositary Receipts of non-U.S. issuers. (See discussion of ADR below)

Form F-1 is the basic registration form for public offerings by a foreign private issuer. Form F-2, F-3 and F-4 are mainly used by non-U.S. 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. (2 Fed.Sec.L.Rep. (CCH) ..6952, 6062) The majority of first-time registrants who are foreign private issuers utilize the registration statement of Form F-1, since the issuers do not qualify for the other forms due to a lack of history of 1934 Act reporting obligations. The disclosure requirements under Form F-1 are in many respects identical to the disclosure obligations of a U.S. issuer on Form S-1.

Information required under Form F-1 includes:

a description of the securities to be offered;

pending legal proceedings;

risk factors;

use of proceeds;

determination of offering price;

dilution, selling security holders;

plan of distribution;

general information with respect to the registrant;

the identity of directors and officers, and their remuneration as a group (Compare to the Form S-1 used for domestic issuers, which requires remuneration to be listed per director and officer in addition to in the aggregate, 17 C.F.R. . 229.701); and

audited financial statements prepared under, or reconciled with, U.S. GAAP. (Form F-1, 17 C.F.R. .239.31)

Unlike its Form S-1 counterpart, the foreign private issuer's Form F-1 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. (Compare 17 C.F.R. . 239.31 to 17 C.F.R. . 229.701) In addition, certain disclosure requirements in the 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-U.S. 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 U.S. security holders under the laws of the country in which the issuer is organized and any applicable tax treaty; and

exchange rates between U.S. dollars and the home country currency. (Form F-1, 17 C.F.R. .239.31)

The 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: (a) 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 (b) is subject to 1934 Act reporting obligations and has filed at least one annual report; or (c) has timely filed required 1934 Act reports during the last 12 months; and (i) has at least \$75,000,000 in voting stock held by non-affiliates; or (ii) is registering non-convertible investment grade debt or preferred securities; or (iii) has been subject to 1934 Act reporting obligations for at least 12 months and is registering securities to be offered upon exercise of outstanding transferable warrants or rights granted pro rata by the issuer, pursuant to a

dividend or interest reinvestment plan, or upon conversion of outstanding securities; and has had no material default on loans or long-term leases or failure to pay a sinking fund installment 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. (Form F-2; 17 C.F.R. . 239.32)

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.

Form F-3, used primarily for non-convertible debt offerings, may be used if the registrant's latest annual report filed with the Commission contains financial statements with full reconciliation to U.S. GAAP and is available with a reconciliation if the securities are non-convertible investment grade securities or are to be offered: (i) in secondary offerings; (ii) upon exercise of certain outstanding transferable warrants; (iii) upon exercise of rights granted pro rata by the issuer to existing holders of such class; (iv) pursuant to a dividend or interest reinvestment plan; or (v) upon conversion of outstanding convertible securities. (Form F-3; 17 C.F.R. . 239.33)

To be eligible to use Form F-3, the issuer (i) must have securities registered under 1934 Act Section 12(b) or 12(g) or be required to file reports under 1934 Act Section 15(d) and have filed at least one annual report; (ii) must have been subject to 1934 Act reporting obligations and filed all required materials on a timely basis for the last 12 months; (iii) must have had no material default on loans or long-term leases or failure to pay a sinking fund installment 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 (iv) must have common stock held by non-affiliates with a market value of at least \$75,000,000, unless it is registering non-convertible investment grade securities to be offered for cash. (Form F-3; 17 C.F.R. . 239.33)

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

the terms of the offering, including the use of proceeds;

the issuer, through incorporation by reference to its latest and future 1934 Act annual reports and, if appropriate, reports on Form 6-K;

material changes in its affairs since the latest annual report; and

financial statements of any business acquired or to be acquired.

Employing the same approach as a U.S. issuer's Form S-3, the Form F-3 incorporates by reference the registrant's latest Form 20-F (discussed below) and otherwise generally requires only transaction-related data. (Form F-3; 17 C.F.R. . 239.33)

The Form F-4 is available for business combination transactions involving foreign private issuers. (Form F-4; 17 C.F.R. . 239.34) Forms F-7, F-8, F-9, F-10, and F-80 contain the curtailed disclosure requirements available to qualifying non-U.S. companies under the multi-jurisdictional disclosure system. (A full discussion of MJS and Canadian companies is discussed later in this chapter).

E. American Depository Receipts. Foreign private issuers raising capital in the U.S. markets frequently elect to effect the offering utilizing American Depository Receipts, "ADRs." (Defined at 17 C.F.R. . 230.405) An ADR is a negotiable instrument issued by a third party depository, usually a U.S. bank or its non-U.S. affiliate, and represents a specified number of securities of the underlying issuer, which are held by the depository on behalf of the ADR holders. Trades are typically effected in the ADRs themselves and not in the underlying securities. ADRs have been developed to alleviate certain legal restrictions and practical problems related to the trading in the underlying issuer of non-U.S. securities. First, the ADR is transferable on the books of the depository bank without the need to effect 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-U.S. exchange controls. In addition, the registration of ADR holdings eliminates problems associated with non-U.S. equity securities, such as legal requirements that effectively restrict the ability of holders to vote shares. (Howard S. Zeprun, U.S. Public Offerings and Periodic Reporting by Foreign Issuers, 1018 PLI Corporate Finance 695, 704 (1997)) The depository bank acts as the issuer's agent, notifying ADR holders of dividend distributions, paying dividends to the ADR holders [after converting the dividends to U.S. currency], and providing to the ADR holders other information provided by the issuer to its shareholders, and voting on behalf of the ADR holders. ADRs may be traded on a U.S. stock exchange or Nasdaq if registered pursuant to Section 12 of the 1934 Act. ADRs may also trade on the OTC Bulletin Board and NQB pink sheets.

ation statement when it is filed for the accuracy and adequacy of all material facts -- information that would affect investment decisions and compliance with the Commission's rules and forms. Unlike U.S. issuers, the 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-U.S. issuers in draft form on a confidential non-public basis, if requested by the non-U.S. issuer. The Division will provide solutions and comments to the documents, prior to actual filing. The Commission has stated that it will, on a day-to-day basis, find solutions to problems non-U.S. issuers have with registering under the federal securities laws, including rule-making initiatives and meeting with non-U.S. issuers. (Richard Kosnick, *The Role of the SEC In Evaluating Foreign Issuers Coming to U.S. Markets*, 17 *Fordham Int'l L. J.* S97, S108-110 (1994)).

The registration statement has to be reviewed, cleared and declared effective by the Commission before sales can be confirmed. It is unlawful to sell securities until the registration statement has been declared effective. (15 U.S.C. . 77e(1)) To facilitate cross-border offerings and listings, and recognizing the particular difficulties of coordinating time schedules for cross-border offerings, the Commission staff review process has been tailored to accommodate the special scheduling demands for such offerings. Often first comments are received within six weeks of submission. The Commission will respond formally to the registration statement with a "comment letter" specifying any deficiencies that need to be addressed. The company, in turn, files a letter with the Commission responding to requests for information and describing proposed amendments to the prospectus.

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 can not be used to effect sales) has been filed with the 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. 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 investors.

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 in the United States and perhaps overseas. 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. (NASD Publications, *Going Public*, located at the NASD web site, <http://www.nasd.com>, visited April 29, 1998)

Contemporaneously with filing with the Commission, the registration statement is filed with the NASD, which reviews the underwriting compensation and offering terms. The NASD regulates the actions of broker-dealers, including underwriters, and must approve the compensation arrangements prior to the registration statement being declared effective. While the Commission's review focuses on proper disclosure, the NASD's review focuses on the fairness of underwriting compensation, terms, and arrangements. The NASD's review is conducted by its Corporate Financing Department according to the NASD's Corporate Financing Rules and Code of Procedure. (NASD Publications, *Going Public*, located at the NASD web site, <http://www.nasd.com>, visited April 29, 1998)

After first comments are received from the Commission, the issuer will respond to the Commission and, if required, amend the registration statement by providing amendments to the Commission. Once the Staff of the Commission believes that the registration conforms to the requirements of the form applicable, the Commission will declare the statement effective. The final version of the prospectus can now be printed, delivered to prospective investors, and the registered securities may be sold.

IV. Private Placements by Non-U.S. Issuers.

A. Exemptions from Registration. Section 5(a) of the 1933 Act states 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 U.S. or a non-U.S. person or entity. (15 U.S.C. . 77e(a)). However, there are a series of statutory provisions, rules and interpretations, that exempt certain transactions from Section 5(a), a number of which are available to non-U.S. issuers offering and selling securities within the United States. (See, 15 U.S.C. . 77d) 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 deemed restricted securities which may be resold only if registered or if another exemption is available.

B. Exemptions Not Available to Non-U.S. Issuers. Certain exemptions available for domestic entities are not available for non-U.S. issuers offering and selling securities within the U.S. 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 organized under the laws of a state or territory of the United States and doing business in that same state or territory. (15 U.S.C. . 77c(a)(11)) Similarly, Regulation A, promulgated under Section 3(b)

of the 1933 Act, (17 C.F.R. . 230.251 to 230.263, promulgated under 15 U.S.C. . 77c(b)) which provides for a conditional exemption from registration for public offerings not exceeding \$5 million, will not be available to most non-U.S. issuers, because its use is limited to issuers organized under the laws of the U.S. or Canada. (17 C.F.R. . 230.251(a)(1)).

C. Exemptions Applicable to Non-U.S. Issuers. The 1933 Act provides statutory authority for exemptions from the registration requirements under Section 5. Section 3(b) provides authority to the Commission to exempt transactions that are under \$5,000,000 in value. (15 U.S.C. . 77c(b)). Section 4(2) exempts transactions by an issuer not involving a public offering. (15 U.S.C. . 77d(2)) Section 4(6) exempts transactions with accredited investors (15 U.S.C. . 77d(6)). This patchwork of exemptions in the statute, and the rules and regulations promulgated by the Commission thereunder, form the basis for the exemption of certain limited offerings from the registration provisions of the 1933 Act.

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 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 U.S. securities law purposes. (See, generally, 17 C.F.R. . 230.502(a))

In 1982, the Commission adopted Regulation D to clarify the exemptions available for the sale of securities by issuers on a private basis. (17 C.F.R. . 230.500 et. seq.) Among other things, these rules clarify the disclosure obligations for certain types of limited offerings, and set forth clear criteria for integration of previous offerings. There are three exemptions under Regulation D, all of which may be used by non-U.S. issuers, as follows:

1. Rule 504 Exemption. Rule 504 provides for an exemption from registration pursuant to Section 3(b) of the 1933 Act. (17 C.F.R. . 230.504(a)). This exemption from registration will apply to an offer of securities not exceeding \$1 million during any 12-month period. The exemption is available to any issuer, including a non-U.S. 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. (17 C.F.R. . 230.504(a)(1) & (a)(2)). 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 purposes exists or where a business plan exists to engage in a merger or acquisition with an unidentified company or companies. (17 C.F.R. . 230.504(a)(3)). Under Rule 504, an offer may not be made by any general solicitation or advertisement. (17 C.F.R. . 230.502(c)).

Rule 504 does not include a specific disclosure requirement. However, the issuer should be aware that, whether or not disclosure requirements exist, the issuer is still be subject to the anti-fraud provisions of the 1933 Act, which may cause the issuer to provide disclosure in the event that a sale of the securities is questioned. (17 C.F.R. . 230.503(a))

2. Rule 505 and 506 Exemption. Rules 505 and 506 are similar to Rule 504 but permit larger amounts to be offered, subject to stricter requirements. Rule 505 provides exemptions

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 \$5 million during a twelve month period. (17 C.F.R. . 230.505(b) (2)(i)). In contrast, Rule 506 sets no limitation on the amount that may be offered. (17 C.F.R. . 230.506)

Another restriction is that the number of purchasers in a Rule 505 or 506 offering is limited to 35 non-accredited investors. (17 C.F.R. . 230.505(b)(2)(ii) and 17 C.F.R. . 230.506(b)(2) (i)). 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 organized for the purpose of purchasing the securities in questions. (17 C.F.R. . 230.501(e)(2)). Also, a person and his or her relative, spouse or spouse's relative will be deemed to be one investor if they have the same principal residence. (17 C.F.R. . 230.501(e)(1)). In addition, this numerical limit does not include persons qualifying as "accredited investors." (17 C.F.R. . 230.501(e)(1)(iv)). 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 his or her spouse, of \$1 million or an individual income of \$200,000, or \$300,000 joint income with his or her spouse, during the two most recent years, if he or she expects to reach the same income level in the current year. (17 C.F.R. . 230.501(a)) 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. (17 C.F.R. . 230.506(b)(2)(ii)) Rule 505 contains no such requirement.

Rule 505 and 506 offerings may be made by any issuer including non-U.S. issuers, except, in the case of a Rule 505 offering, investment companies and companies meeting certain disqualification provisions for previous improper conduct. (17 C.F.R. . 230.505(b) (2)(iii)). Neither type of offering, however, may be made by any general solicitation or advertisement. (17 C.F.R. . 230.502(c)).

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. (17 C.F.R. . 230.502(b)(1)). 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. (17 C.F.R. . 230. 502(b)(1)). The disclosure document 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 fulfilled by delivering certain of its 1934 Act filings to the offerees.

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. (17 C.F.R. . 230.502(b)(2)(i)(A)). As discussed above, most non-U.S. issuers are not eligible to use Regulation A, since it is available only to U.S. and Canadian issuers. Thus, the non-financial information required will be that required in Part I of the registration statement form available to the non-U.S. issuer, such as Form F-1. (17 C.F.R. . 230.502(b)(2) (i)(C)). 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. (17 C.F.R. . 230.502(b)(2)(i)(B) & (C))

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 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. (17 C.F.R. . 230.502(b)(2)(v))

Although U.S. securities law provides that certain transactions are exempt from registration, and in certain circumstances it does not mandate specific disclosure requirements, these transactions are still subject to the anti-fraud provisions of the U.S. securities laws which provide for civil liability for misleading statements made, or material information omitted, in the offer and sale of securities. (17 C.F.R. . 240.10b-5)

3. Section 4(6). Another exemption from the registration requirements of Section 5(a) is set forth in Section 4(6) of the 1933 Act (15 U.S.C. . 77d(6)). This exemption from registration is similar to that set forth in Rule 505, in that it is available for offers not exceeding \$5 million and requires the filing of a Form D with the Commission. Section 4(6) contains no numerical limit on offerees, but offers may be made to accredited investors only.

D. 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, a Form D, with the Commission, although, for purposes of Regulation D, such filing is not a condition to the availability of an exemption. (17 C.F.R. . 230.503(a) & 17 C.F.R. . 230.507). Pursuant to Rule 503, five copies of the Form D, one of which must be manually executed, must be filed with the SEC within 15 days of the first sale of the securities in question. (17 C.F.R. . 230.503(a) & (b)). However, once this Form D is filed, there will be no further periodic filings required.

E. Restrictions on Transfer. Securities sold under Rules 504, 505 or 506 or under Section 4 (6) are deemed to be restricted securities. (17 C.F.R. . 230.502(d)) As such, the securities may resold only if they are registered or an exemption applies.

As restricted securities, such shares will be subject to the limitations of Rule 144, as promulgated under the 1933 Act, relating to shares acquired in a transaction other than a public offering. (17 C.F.R. . 230.144) 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. First, there must be available adequate current public information with respect to the issuer of the securities. (17 C.F.R. . 230.144(c)). Second, the purchaser may resell only an amount equal to a small percentage of the total outstanding securities of the same class - in general one percent - during a three-month period. (17 C.F.R. . 230.144(e)). Third, such sales must be made in a brokers' transaction or through a market maker. (17 C.F.R. . 230.144(f)). Finally, 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 \$10,000, the purchaser must file three copies of a notice on Form 144 with the Commission and, if the securities are admitted to trading on any national securities exchange, one copy must be filed with the exchange or marketplace. (17 C.F.R. . 230.144(h)). However, if the purchaser desiring to resell the securities is not an affiliate of the issuer an officer, director, or ten percent shareholder -- and has held the securities for more than two years, these restrictions will not apply. (17 C.F.R. . 230.144(k)).

F. Rule 144A Restricted Securities. Rule 144A provides a non-exclusive safe harbor 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 or "QIBs." Rule 144A defines QIBs as institutions that in the aggregate own and invest on a discretionary basis at least \$100 million in securities. (Securities Act Release No. 6862 (April 23, 1990)). Rule 144A imposes a "reasonable belief" standard on sellers with respect to the status of buyers as QIBs. (17 C.F.R. . 230.144A). Rule 144A also imposes an information requirement where the issuer of the securities to be resold in reliance on Rule 144A is neither an 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. The financial statements should be audited to the extent reasonably available. However, non-U.S. companies which furnish the 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.

Securities acquired in reliance upon Rule 144A are deemed restricted securities and may be resold only in compliance with the requirements of Rule 144. If a market for Rule 144A securities develops, often the number of U.S. security holders will increase, subjecting many non-U.S. issuers to the registration and periodic reporting requirements of the 1934 Act. A Rule 144A offering of ADRs or ordinary shares does not preclude an issuer from subsequently registering the securities with the Commission SEC and applying for an exchange or Nasdaq listing. For example, the following non-U.S. issuers, after conducting Rule 144A transactions, entered the U.S. public market for the first time: Telefonos de Mexico, Petro-Canada, Vitro, Micro Focus Group, and Enterprise Oil. (Frode Jensen, III, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From A Legal Perspective*, 17 *Fordham Int'l L.J.* S25, S37 (1994))

As noted above, Rule 144A has been successful in attracting non-U.S. issuers to the U.S. private market. Moreover the rule has also been successful in increasing the awareness of non- U.S. issuers of the possibility of listing on U.S. markets. Unlike a private placement, which is illiquid and requires an opinion of counsel for transfers, Rule 144A does not require any additional information to be provided to QIB other than information in the marketplace. In most instances, no further paperwork is necessary.

V. Non-U.S. Investment Outside of the U.S. -- Regulation S.

A. Introduction. In 1990, the Commission adopted Regulation S in order to clarify the extraterritorial application of the registration provisions of U.S. securities laws. (Securities Act Release No. 6863 (April 24, 1990)). Regulation S employs a territorial approach, in that any offer or sale of a security that is deemed to occur within the U.S. is subject to the registration provisions of U.S. securities laws, while any offer or sale of a security that is not deemed to occur within the U.S. is not subject to the registration provisions of U.S. securities laws (17 C.F.R.. 230.901). Regulation S is not an exemption from registration under U.S. securities laws; rather it provides that offers and sales occurring outside of the U.S. are not subject to the registration requirements of U.S. securities laws. Regulation S speaks only to the registration provisions of U.S. securities law and does not limit or otherwise restrict application of the anti- fraud provisions of U.S. securities laws (17 C.F.R..

230.900, Preliminary Note 1).

In addition to setting forth the foregoing general principle regarding territorial application of the registration provisions of U.S. securities laws, Regulation S provides three categories of non-exclusive (See, 17 C.F.R. . 230.900, Preliminary Note 5) "safe harbors" (17 C.F.R. . 230.903(b)(1) through (b)(3)) 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 harbors are deemed to occur outside the U.S. and, therefore, are not subject to the registration requirements of U.S. securities laws.

The safe harbors may be utilized 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 utilized for resale transactions by such persons (17 C.F.R. . 230.903(a)). Regulation S also provides a non-exclusive safe harbor 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. (17 C.F.R. . 230.904)

Equity securities of a U.S. "domestic issuer" issued in a transaction which relies on Regulation S to avoid registration under U.S. securities laws are deemed "restricted securities" under U.S. securities laws and may only be resold in a transaction which complies with the registration requirements of U.S. securities laws or an exemption therefrom, or in a transaction occurring outside the U.S. in accordance with Regulation S (17 C.F.R. . 230.905).

Regulation S is not available for any transactions that, although in technical compliance with the provisions of Regulation S, is part of a plan or scheme to evade the registration provisions of U.S. securities laws (17 C.F.R. . 230.900, Preliminary Note 2). In this regard, subsequent to the adoption of Regulation S in 1990, the Commission issued an interpretive release which identified practices occurring in the context of Regulation S which it deemed abuses (Securities Act Release No. 7190 (June 27, 1995)). Ultimately, in February, 1998, the concerns of the Commission expressed in that interpretive release resulted in amendments to Regulation S designed to halt such abuses (Securities Act Release No. 7505 (February 17, 1998)).

B. General Principle. Regulation S provides that no offer or sale of a security which occurs outside of the United States shall be subject to the registration requirements of United States securities laws (17 C.F.R. .230.901). 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 (15 U.S.C. . 77e), such provisions literally apply to any offer or sale of a security involving any communication between the United States and any other country (15 U.S.C. . 77b(7)).

Regulation S provides safe harbors for specified issuance and resale transactions which, if complied with in all respects, will result in such transactions being deemed to occur outside the United States. These safe harbors are non-exclusive. As a result transactions which are not in compliance with a safe harbor may still be deemed to occur outside the United States for purposes of U.S. securities law and Rule 901. In view of 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 harbor provided by Regulation S is not utilized, Rule 901 may be

of utility in instances where non-U.S. issuers may inadvertently or unknowingly trigger the broad jurisdictional reach of United States securities laws in a transaction which nonetheless arguably has not occurred in the United States. Otherwise, compliance with a Regulation S safe harbor is effectively the only way to ensure availability of the jurisdictional exclusion from application of the registration requirements of U.S. securities laws.

C. "Safe Harbors" for Transactions by Issuers, Distributors, or their Affiliates. Regulation S provides three categories of safe harbors for use in transactions by an issuer, a distributor, or any of their respective affiliates or persons acting on their behalf. These safe harbors may be used for transactions in which securities are initially issued and for resales by such persons. All three safe harbors require compliance with two general conditions -- namely, an offshore transaction with no directed selling efforts -- as well as the more specific conditions for each category.

1. General Conditions. Regulation S requires that the offer or sale be made in an offshore transaction. For purposes of the three safe harbor categories of Regulation S, an offer or sale of securities is made in an offshore transaction if: (i) the offer is not made to a person in the United States; and (ii) either (A) 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 (B) the transaction is executed on an established non-U.S. securities exchange located outside the United States (17 C.F.R. . 230.902(h)(1)). 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 (17 C.F.R. . 230.902(h)(2)). However, offers and sales to certain international organizations, such as the International Monetary Fund and the United Nations, and their affiliates are excluded from the definition of U.S. persons and shall be deemed to be made in an offshore transaction (see, 17 C.F.R. . 230.902(h)(3) and 17 C.F.R. . 230.902(k)(2)(vi)). 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-U.S. person by a dealer or other professional fiduciary organized, incorporated or resident in the United States are also deemed to be made in an offshore transaction (see, 17 C.F.R. . 230.902(h)(3) and 17 C.F.R. . 230.902(k)(2)(i)).

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 (17 C.F.R. . 230.903(a)(2)). 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 (17 C.F.R. . 230.902(c)(1)). Directed selling efforts include advertisements placed in a publication with a general circulation in the United States (see, 17 C.F.R. . 230.902(c)(2)), but do not include (see, 17 C.F.R. . 230.902(c)(3)): (i) 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; (ii) contact with persons excluded from the definition of U.S. person (For purposes of Regulation S, a U.S. person is defined as: (i) any natural person resident in the United States; (ii) any partnership or corporation organized or incorporated under the laws of the United States; (iii) any estate of which any executor or administrator is a U.S. person; (iv) any trust of which any trustee is a U.S. person; (v) any agency or branch of a non-U.S. entity located in the United States; (vi) any non- discretionary or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit of a U.S. person; (vii) any discretionary or similar account (other than an estate or trust) held by a dealer or other

fiduciary organized, incorporated or resident (if an individual) in the United States; and (viii) any partnership or corporation organized or incorporated under laws of any jurisdiction other than the United States and formed by a U.S. person to invest in securities not registered under United States securities law, unless organized and owned by accredited investors who are not natural persons, estates or trusts, 17 C.F.R. . 230.902(o)(1)), (iii) a tombstone advertisement in a publication with a general circulation in the United States, provided such publication has less than 20% of its circulation in the United States, such advertisement contains a statement regarding the restricted nature of such securities pursuant to U.S. securities laws, and such advertisement contains only certain limited information about the offering (see, 17 C.F.R. . 230.902(c)(3)(iii)(C)); (iv) bona fide visits by prospective investors to the issuer's United States facilities; (v) distribution in the United States of a non-U.S. 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 "U.S. persons" or persons in the United States (see, 17 C.F.R. . 230.902(c)(3)(v)(B)); (vi) publication by the issuer of a notice containing only certain limited information (see, 17 C.F.R. . 230.902(c)(3)(vi)); and (vii) 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 are also satisfied (see, 17 C.F.R. . 230.902(c)(3)(vii)).

2. Specific Conditions - Category 1.

The Category 1 safe harbor (17 C.F.R. . 230.903(b)(1)) 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, (i) securities issued by an issuer that is not a domestic issuer (For purposes of Regulation S, a United States "domestic issuer" is defined as any issuer other than a non-United States government or non-U.S. issuer, except a non-U.S. issuer meeting the following conditions: (i) more than 50% of its outstanding voting securities held of record directly or indirectly by United States residents; and (ii) the majority of its directors or executive officers are United States citizens or residents, more than 50% of its assets are located in the United States, or its business is administered principally in the United States (17 C.F.R. . 230.902(e)) which reasonably believes at commencement of the offering that there is no "substantial United States market interest" (For purposes of Regulation S "substantial United States market interest" exists with respect to a class of equity securities if: (i) 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 (ii) 20% 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% of all trading in such securities took place in, on or through securities markets of a single country other than the United States, see, 17 C.F.R. . 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, see, 17 C.F.R. . 230.902(j)(3) if: (i) its debt securities are held of record by 300 or more "U.S. persons"; (ii) US \$1 billion or more of its debt securities are held of record by "U.S. persons"; and (iii) 20 percent or more of its debt securities are held of record by "U.S. persons," see, 17 C.F.R. . 230.902(j)(2).) in the class or type of securities

offered or sold [or issuable upon exercise or conversion of the class or type of securities offered or sold]; (ii) 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; (iii) 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 nor 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; (iv) securities which are backed by the full faith and credit of a government other than the United States; and (v) 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 upon 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.

3. Specific Conditions - Category 2. The Category 2 safe harbor (17 C.F.R. . 230.903 (b)(2)) is available for transactions in securities not eligible for the Category 1 safe harbor and that are equity securities of a reporting issuer (For purposes of Regulation S, a "reporting issuer" is defined as an issuer, other than an investment company, that: (i) 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 (ii) has filed all reports and other material required to be filed with the United States 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 upon Regulation S (17 C.F.R. . 230.902(i)) that is not a United States domestic issuer, debt securities of a reporting issuer, or debt securities of a non-reporting issuer 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 Rules 903 (a)(1) and (a) (2): (i) "offering restrictions" (For purposes of Regulation S, offering restrictions are implemented if: (i) each distributor agrees in writing that all offers and sales during the applicable distribution compliance period shall 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; (ii) 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 U.S. 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 U.S. securities laws and such statements appear on the cover or inside cover of the prospectus or offering circular, in the underwriting section of the prospectus or offering circular, and in any advertisements. 17 C.F.R. . 230.902(g)) are implemented; (ii) the offer or sale, if made during a 40-day distribution compliance period (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: (i) all offers and sales by a distributor of an unsold allotment are deemed made during the distribution compliance period; (ii) in a continuous offering, the distribution compliance period commences upon completion of the distribution, as determined and certified by the managing underwriter; (iii) in a continuous offering of identifiable tranches of non-convertible debt securities, the distribution compliance period for securities in a tranche commences upon completion of the distribution of such tranche, as determined and certified by the managing underwriter; and (iv) in a continuous offering of securities to be acquired upon the exercise of warrants, the distribution compliance period commences upon completion of the distribution of the warrants, as determined and certified by the managing underwriter if the following requirements are satisfied, 17 C.F.R. . 230.903(b)(5)), (A) each warrant bears a legend regarding the restricted nature of the warrant and securities issuable upon exercise pursuant to U. S. securities laws and disclosing that the warrant may not be exercised by or on behalf of a U.S. person except in compliance with the registration requirements of U.S. securities laws or pursuant to an exemption therefrom, (B) each person exercising a warrant provides written certification that it is not a U.S. person and that the warrant is not being exercised on behalf of a U.S. person or provides a written opinion of legal counsel that the warrant and securities issuable upon exercise are in compliance with the registration requirements of U.S. 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 upon exercise may not be delivered within the United States, other than in an a transaction which qualifies as an offshore transaction, unless in compliance with the registration requirements of U.S. securities laws or pursuant to an exemption therefrom (17 C.F.R. . 230.902(f)) is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and (iii) 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 (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 C.F.R. . 230.902(d)).

4. Specific Conditions - Category 3. The Category 3 safe harbor (17 C.F.R. . 230.903 (b) (3)) is available for transactions in securities not eligible for the Category 1 or 2 safe harbors, provided that the offer and sale is 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: (i) offering restrictions are implemented; (ii) in the case of debt securities, (A) the offer or sale, if made during a 40-day distribution compliance period is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor) and (B) the securities are represented during the 40-day distribution compliance period by a temporary global security and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who acquired such securities in a transaction not requiring registration under U.S. securities laws; (iii) in the case of equity securities, (A) the offer or sale, if made during a one-year distribution compliance period is not made to a U.S. person or for the account or benefit of a United States person (other than a distributor), (B) the offer or sale, if made during a one-year distribution compliance period is made in compliance with the following conditions, (1) the purchaser (other than a distributor) certifies that it is not a U.S.

person and is not acquiring the securities for the account or benefit of a U.S. person or that it is a U.S. person who acquired the securities in a transaction not requiring registration under U.S. securities laws, (2) the purchaser agrees to resell the securities only in accordance with Regulation S, the registration requirements of U.S. securities laws or an exemption therefrom and not to engage in hedging transactions except in compliance with U.S. securities laws, (3) securities of a domestic issuer are legended to the effect that transfer is prohibited except in accordance with Regulation S, the registration requirements of U.S. securities laws or an exemption therefrom and that hedging transactions may not be conducted except in compliance with U.S. securities laws, and (4) 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 U.S. securities laws or an exemption therefrom or, if the securities are in bearer form or non-U.S. 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 (iv) each distributor selling securities, in the case of debt securities, during a 40-day distribution compliance period, or in the case 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.

D. Safe Harbor for Resale Transactions by Persons Other Than Issuers, Distributors, or their Affiliates. Regulation S also provides a safe harbor 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 (17 C.F.R. . 230.904). 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: (i) 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 U.S. 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 (ii) 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. (17 C.F.R. . 230.904)

E. Restrictions on Resale. Equity securities of a domestic 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 U.S. securities laws by virtue of the general principle of Rule 901 or the safe harbors of Rule 903 are deemed restricted securities (17 C.F.R. . 230.905) as defined in Rule 144. (17 C.F.R. . 230.144) Such restricted securities may only be resold in accordance with Regulation S, the registration requirements of United States securities laws or an exemption therefrom (17 C.F.R. . 230.905). 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 U.S. securities laws. 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 (17 C.F.R. . 230.144(k)).

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 harbor of Rule 904 and, therefore, any applicable legend on such securities may not be removed upon such a resale.

VI. Trading of Non-U.S. Securities - Compliance with the 1934 Act.

A. Introduction. In order for a non-U.S. issuer to list its securities on a U.S. 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. (15 U.S.C. . 78l(b), 78l(g)) Listing is accomplished either contemporaneously with the initial public offering of the non-U.S. issuer's securities in the United States, or directly without a corresponding financing. 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 Commission pursuant to Section 12(b) of the 1934 Act (15 U.S.C. . 78l(b)) and to execute a trade in a security on the over-the-counter market unless the security is registered with the Commission pursuant to Section 12(g) of the 1934 Act. (15 U.S.C. . 78l(g)) (An "exempted security" under the 1934 Act is generally limited to governmental and other municipal securities; see definition of an exempted security at 15 U.S.C. . 78c(a)(12))

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 sidestep such regulation. As a result, Congress amended Section 12(g) (1) to provide that:

Every issuer which 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 one hundred twenty days after the last day of its first fiscal year . . . on which the issuer has total assets exceeding \$1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more . . .

register such security by filing with the Commission a registration statement . . . with respect to such security containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the 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. (15 U.S.C. . 78l(g)(1))

The Commission by rule has exempted from registration under Section 12(g) companies that would otherwise be subject to registration if total assets do not exceed \$10 million. (17

C.F.R. . 240.12g-1, as amended in Exchange Act Release No. 37,157 (May 9, 1996); [1996 - 1997 Transfer Binder] Fed. Sec. L.Rep. (CCH) . 85,801, at 88,001). The asset test and the number of shareholder test is applied collectively; that is, the company must have both total assets of \$10 million or greater, and 500 or more shareholders together before it is required to register under the 1934 Act.

B. 1934 Act Registration. To register the securities of a non-U.S. company on an exchange or market, the Company must either use a simplified registration procedure available on Form 8-A for registrants who have concurrently conducted a public offering of the class of securities, or file Form 20-F, which is a more comprehensive disclosure document, for issuers that 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 12(g) of the 1934 Act.

The Form 8-A may be used for a class of securities to be effective upon filing with the Form 8-A, for non-U.S. 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. (Form 8-A, General Instruction A.(c)) The 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 the Form 8-A is: (i) a description of the securities to be registered, pursuant to Item 202 of Regulation S-K (17 C.F.R. . 229.202); (ii) a list of the exhibits to be incorporated by reference or filed as part of the registration statement; and (iii) the signature of the registrant. Documents filed as part of the concurrent public offering or in prior 1934 Act filings are incorporated by reference.

C. Form 20-F. 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 securities under the 1934 Act. To assist foreign private issuers with the complexities of 1934 Act registration and periodic reports, the Commission has created a "foreign integrated disclosure system" which is the result of the Commission attempting to balance the goal of investor protection with the goal of facilitating the free flow of capital among nations. It has been suggested that a means for achieving this goal is to reduce the reporting burdens of foreign private issuers. (Thomas Lee Hazen, Securities Regulation, at 763 (1995)) The foreign integrated disclosure system is limited to issuers who file the Form 20-F on an annual basis, and are non-Canadian foreign private issuers registering their securities under Section 12 of the 1934 Act. (17 C.F.R. . 249.220f) There is a different standard for Canadian issuers as the Commission has previously distinguished the North American foreign private issuer - those from Canada and Mexico - from other foreign private issuers. (Securities Act Release No. 6437 (Nov. 19, 1982))

A foreign private issuer is required to register its equity securities under Section 12(g) the 1934 Act if: (i) the securities are listed or to be listed on a U.S. stock exchange or market; or (ii) the issuer has more than \$10 million of total assets and more than 500 stockholders of whom more than 300 are U.S. residents. (17 C.F.R. . 240. 12g-1, as amended in Release No. 34-37157, May 1, 1996). In addition, a non-U.S. issuer that wishes to become listed on a U.S. exchange is required to register under Section 12(b) of the 1934 Act (15 U.S.C. . 78l (b)) and the non-U.S. issuer that wishes to become listed on the Nasdaq is required to register under Section 12(g) of the 1934 Act. (15 U.S.C. . 78l(g))

The 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 United States. (Exchange Act Release No. 16,371 (Nov. 29, 1979)). The foreign integrated disclosure system is based upon those disclosures required by Form 20-F. (17 C.F.R. . 249. 220f) Rather than the two separate documents of the Form 10-K and Annual Report to Shareholders used for U.S. 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 15(d), or in connection to registration related to public offerings pursuant to Sections 12(b) or 12(g) of the 1934 Act.

Form 20-F requires the registrant to provide similar information as required by a Form F-1 under the 1933 Act. (Form F-1 has been previously discussed in this chapter) 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 U.S. GAAP or reconciled with U.S. GAAP. (17 C.F.R. . 249.220f)

The Commission stated, in adopting the form, 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." (Exchange Act Release No. 16,371 (Nov. 29, 1979); 44 Fed.Reg. 70,132 (1979)). 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 Commission indicated that substantial reductions in the proposed disclosure requirements had been made. (Exchange Act Release No. 16,371 (Nov. 29, 1979); 44 Fed.Reg. 70,132 (1979))

Two major differences between the disclosure system for non-U.S. and domestic issuers are the disclosures of conflicts of interest and use of proceeds. Items 11 to 13 of the Form 20-F permit non-U.S. issuers to disclose options to purchase securities in the aggregate, as opposed to requiring disclosure for each individual and specify that data concerning material transactions with control persons need be disclosed only if 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.

D. Annual Reports. One of the objectives of the 1934 Act is to assure the public availability of adequate information about companies with publicly traded stock. A non-U.S. issuer becomes a reporting company when it becomes subject to regular reporting requirements under the foreign integrated disclosure system. As discussed above, non-U.S. companies become reporting companies as result of (i) registration of a class of securities under the 1934 Act (15 U.S.C. . 78m) or registration of an offering of securities pursuant to the 1933 Act (15 U.S.C. . 78o). A Form 20-F is also the form used by foreign private issuers to file their Annual Report pursuant to Section 13 or 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 the Form 10-K for domestic issuers which must be filed within 90 days of the end of the fiscal year. (Form 20-F, General Instruction A(c)). E. Interim Reports. Foreign private issuers are not required to file quarterly reports on Form 10-Q or current reports on Form 8-K, as is required of a U.S. issuer. Instead, the foreign private issuer is required to file with the 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. (17 C.F.R. . 240.13a-1 to 13a- 17) The Form 6-K, the interim reporting form used by non-U.S. issuers, requires non-U.S. issuers to provide the information with English translations or English versions. (17 C.F.R. . 240.13a-3, as modified by Exchange Act Release No. 16,371 (Nov. 29, 1979)). Financial statements contained in interim reports on Form 6-K are not required to be prepared under U.S. GAAP or reconciled to U.S. GAAP.

Finally, NYSE, AMEX, and Nasdaq require their listed non-U.S. companies to provide interim reports on at least a semi-annual basis. As a practical matter, many non-U.S. 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 feel that these steps aid in the acceptance of the company in the marketplace and assist the company in managing shareholder relationships.

F. Proxy Requirements. Securities registered by a foreign private issuer (A foreign private issuer means any foreign issuer other than a foreign government, except when (i) more than 50 percent of the outstanding voting securities of such issuer are held of record either directly or indirectly or through voting trust certificates or depositary by residents of the

United States, or (ii) any of the following: (a) the majority of the executive officers or directors are U.S. citizens or residents, (b) more than 50 percent of the assets of the issuer are located in the United States, or (c) the business of the issuer is administered principally in the United States, 17 C.F.R. . 240.3b-4(c)) eligible to use Form 20-F, is exempt from proxy requirements of the 1934 Act (17 C.F.R. . 240.3112-3(b)). For non-U.S. issuers who are not a foreign private issuer, 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 Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." (15 U.S.C. . 78n) 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. (15 U.S.C. . 78n; 17 C.F.R. .240.14a-3.4). Where securities are held in the names of brokers, banks, or nominees, the 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.

In connection with any solicitation of a proxy (or other form of consent or authorization by shareholders) directed to more than ten persons, a proxy statement and proxy form complying with the proxy rules must be filed with the Commission, and used, if the solicitation pertains to a security registered under the 1934 Act. (17 C.F.R. .240.14a-6). 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. (17 C.F.R. .240.14a-3). 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. 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. (17 C.F.R. .240.14a-4(b)(2)). There are extensive disclosure requirements related to executive compensation and compensation tables required under Item 402 of Regulation S-K are required to be included as well. 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; option repricing disclosure; and proxy rule amendments changing the disclosure requirements that apply if shareholder action is being taken with respect to employee benefit plans.

The preliminary proxy statement and proxy have to be filed with the Commission at least ten calendar days before the definitive proxy statement and proxy is 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. (17 C.F.R. .240.14a-6 (a)). 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.

G. Short Swing Trading. Securities registered by a foreign private issuer (A foreign private issuer means any foreign issuer other than a foreign government, except when (i) more than 50 percent of the outstanding voting securities of such issuer are held of record either

directly or indirectly or through voting trust certificates or depositary by residents of the United States, or (ii) any of the following: (a) the majority of the executive officers or directors are U.S. citizens or residents, (b) more than 50 percent of the assets of the issuer are located in the United States, or (c) the business of the issuer is administered principally in the United States, 17 C.F.R. . 240.3b-4(c)) eligible to use Form 20-F, is exempt from the short swing profit requirements of the 1934 Act (17 C.F.R. . 240.3a12-3(b)). As a result, non-U.S. 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 have to file either Form 3, Form 4 or Form 5 required thereunder to disclose beneficial ownership of more than 10 percent of any class of securities (see, 15 U.S.C. . 78p and 17 C.F.R. . 240.16a-1 et. seq.).

H. Takeover Provisions; Disclosure of Beneficial Ownership of U.S. Issuer. A non-U.S. person holding securities of a non-U.S. or U.S. issuer is required to file notice of the acquisition, directly or indirectly, of the beneficial ownership of more than 5 percent of any equity security of a class registered pursuant to Section 12 of the 1934 Act, within 10 days after such acquisition (see, 17 C.F.R. . 240.13d-1 et. seq.). These provisions were enacted to prevent creeping takeovers by undisclosed principals of U.S. companies with a class of securities listed pursuant to Section 12 and are part of what is commonly referred to as the Williams Act, which regulates conduct of management, bidders and broker-dealers in a hostile takeover. 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 (i) voting power, which includes the power to vote, or to direct the voting of, such security; or (ii) investment power, which includes the power to dispose, or to direct the disposition of, such security (17 C.F.R. . 240.13d-3). 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 sixty days through any option, warrant or right, 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 (17 C.F.R. . 240.13d-3). All securities held by persons acting as a group are aggregated for purposes of determining whether the 5 percent 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 (15 U.S.C. . 78m).

I. Multi-Jurisdictional Disclosure System for Canadian Issuers. Based upon the close relationship between the United States and Canada, in July 1991 the Commission adopted the Multi-Jurisdictional Disclosure System, the "MJS," 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 Canadian provincial securities regulators. (Securities Act Release No. 6902 (June 21, 1991); 56 Fed. Reg. 30,036 (1991)). The MJS concept of mutual recognition 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. Under a parallel system adopted by Canada's securities regulators, U.S. issuers may publicly offer and sell securities in Canada using documentation that complies with the requirements governing public offers and sales of securities in the United States. (Canadian Securities Administrators, National Policy Statement No. 45). Canadian issuers using the MJS to make offers of securities in connection with certain exchange offers and amalgamations are not required to reconcile their financial statements to U.S. GAAP. Reconciliation to U.S. GAAP is required in the case of other offerings of securities under the MJS.

The MJS is significant because it represents the first time that the Commission has been willing to accept documentation prepared in accordance with securities law requirements of a non-U.S. jurisdiction for use in registered public offerings made in the United States. Under the MJS, 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 MJS disclosure for Canadian issuers under the 1933 Act are the Forms F-7, F-8, F-9, F-10, and F-80. (17 C.F.R. .. 239.37 to 239.380)

VII. Approaches to Jurisdictional Conflicts.

A. Subject Matter Jurisdiction. Just as the U.S. securities law is comprised of a potpourri of Acts of Congress and regulations promulgated thereunder by the Commission, so are the rules concerning the litigation of disputes arising thereunder. However, prior to determining in which court a dispute under the U.S. securities laws should be brought, it must be determined if the securities laws will be applicable. This determination will be based upon 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 includes the use of any means or instrumentality of transportation or communication in interstate commerce or of the mails. (15 U.S.C. .. 77e, 77l, 77q; 15 U.S.C. .. 78i(a), 78j, 78o(c)(1), 78o(c)(2)). In addition, in the case of Sections 9(a) and 10 of the 1934 Act, the use of the facility of any national securities exchange or market will be a necessary jurisdictional means. Due to the broad nature of the necessary jurisdictional means, it should not be difficult to show, although it should be noted that such use must be alleged and established in every case.

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. Whether such a dispute will be brought at the federal level or in the courts of the individual states will be determined by the nature of the claims to be litigated. In certain instances, jurisdiction will lie exclusively with the federal courts. For example, jurisdiction over any appeal from a Commission administrative decision will lie exclusively with the federal courts, (15 U.S.C. . 77i and 15 U.S.C. . 78y), as will that over criminal proceedings and SEC enforcement actions. (15 U.S.C. . 77v and 15 U.S.C. . 78aa).

Likewise, the federal courts will have exclusive jurisdiction over all suits in law or equity to enforce liabilities arising under the 1934 Act and the applicable Commission rules. (15 U.S.C. . 78aa). Thus any claim under the 1934 Act brought in a state court will be barred. (See e.g., *Evans v. Dale*, 896 F.2d 975 (5th Cir. 1990), *Kleckley v. Hebert*, 464 So.2d 39 (La.App. 1985)) Even if the complaint does not specifically cite the 1934 Act, but rather alleges facts that resemble a 1934 Act claim, the action may not be brought in a state court. (See e.g., *Hudson v. Burns*, 293 A.2d 610 (Conn. 1971), *Community Nat'l Bank & Trust Co. v. Vigman*, 330 So.2d 211 (Fla.App. 1976), cert. denied, 341 So.2d 294 (1976)).

In contrast, jurisdiction over civil actions arising under the 1933 Act will lie concurrently in the federal and the state courts. (15 U.S.C. . 77v(a)). 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. (15 U.S.C. . 77v(a)). One commentator has stated that the justification for this rule is the "facilitation of private enforcement by giving the plaintiff an absolute choice of forum; especially since, in many cases, state court litigation may prove less complex and less expensive than suits in federal court. (Hacker, .

14.1 at 49 (citations omitted)).

B. Procedural Requirements 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. The rules as to proper venue (i.e., 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. Sections 22 (a) of the 1933 Act and 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.

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. (15 U.S.C. . 77v(a) and 15 U.S.C. . 78aa).

Service of Process. Process may be served on a defendant by serving him in any district in which he is an inhabitant or in which he may be found. (15 U.S.C. . 77v and 15 U.S.C. . 78aa). In this way, personal jurisdiction over the defendant will be obtained.

Statutes of Limitations. 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. Finally, the Supreme Court, in *Lampf, Levva Lipkind, Prupis & Petigrow v. Gilbertson*, (111 S.Ct. 2773, 2780 (1991)), 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, analogizing to the other similar statutes of limitations contained in the securities laws. It should be noted, however, that, after the Court's decision in *Lampf*, Congress promulgated Section 27A of the 1934 Act in order to quash any retroactive application of this statute of limitations to cases initiated on or before June 19, 1991, the day before the Court's decision. (15 U.S.C. . 78aa-1)

Damages. 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. 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. (15 U.S.C. . 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 - (1) if the plaintiff has not disposed of the security, the amount paid for the security in question plus interest less any income received thereon, upon the tendering of the security, or (2) if the security has already been sold, the difference between the purchase price and the amount received upon disposition. (15 U.S.C. . 77l(a)).

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. (*Sackett v. Beaman*, 399 F.2d 884 (2d Cir. 1968)). 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. (*Clark v. John Lamula Investors, Inc.*, 583 F.2d 594 (2d Cir. 1978)). 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 (*Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965), cert. denied 382 U.S. 879 (1965)). Finally, it should be noted that a plaintiff cannot recover punitive damages under the U.S. securities laws. (*Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969))

VIII. Conclusion. The U.S. securities laws are a complex set of statutes, rules, regulations, judicial interpretations and practice that have evolved since modern securities law concepts were first enacted in the 1930's. 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. Over time, the U.S. securities laws have been adapted for the non-U.S. issuer, as world financial markets have become more integrated and internationalized. Leading the way has been the Commission, who, through various initiatives, has sought to include non-U.S. issuers within the regulatory framework and has worked to instill in other non-U.S. markets the concepts of the U.S. regulatory scheme. The benefits of the U.S. markets to non-U.S. companies, in terms of fair valuations, liquid markets, political stability, and evenly administered regulatory schemes, are substantial. The enforcement activities of the Commission, and self regulatory organizations, ensure compliance with the law and deter fraudulent conduct. The United States is a leading jurisdiction in attracting non-U.S. companies to its capital markets. All indications are that this trend will continue.

In most cases an ADR is a superior mechanism for trading the securities of non-U.S. issuers for the following reasons:

- (i) the ADR form of registration is more familiar to the U.S. investment community;
- (ii) the ADR is easier to use than non-U.S. stock certificates issued for the non-U.S. issuer, which may be denominated in a foreign currency or in bearer form with divided coupons;
- (iii) the ADR arrangement enhances transferability of stock certificates by avoiding foreign law, which may require an execution of a deed and an acknowledgment before a notary public in order to transfer securities, and/or might impose stamp or other transfer taxes on share transfers; and
- (iv) the ADR can be issued in any ratio, such as one ADR equals three underlying shares, which could be used to increase the price level of the shares to customary levels of equivalent U.S. securities or to satisfy minimum price requirements of a U.S. exchange or market.

ADRs generally take two forms, "sponsored" and "unsponsored." An "unsponsored" ADR is typically created by a depositary bank acting on its own initiative in response to investor interest in a non-U.S. security. The bank establishes the arrangement, generally with the knowledge, but not the active cooperation, of the non-U.S. issuer. Dividend distribution fees and other administrative costs are borne by the ADR 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-6 (17 C.F.R. . 239.36), and then may accept deposits of the issuer's securities and commence issuance of receipts against those deposits.

A "sponsored" ADR is created with the consent and assistance of the issuer of the underlying securities. The issuer typically enters into a deposit agreement with the depository bank, setting forth the rights and obligations of the issuer, the depository bank and the holders of ADRs, and signs the F-6 registration statement (17 C.F.R. . 239.36). In a sponsored arrangement, the issuer typically bears the fees of the depository.

There are three levels of sponsored ADRs, each requiring different registration and reporting procedures pursuant to the 1933 Act and the 1934 Act. Level I ADRs trade on the OTC Bulletin Board and NQB pink sheets, and do not require the foreign issuer to comply with U.S. GAAP or full Commission disclosure requirements, based upon the exemption created by Rule 12g3-2(c), promulgated under the 1934 Act (17 C.F.R. . 240.12g3-2(c)). Since Level I ADRs are not registered under Section 12 of the 1934 Act, the issuer is prohibited from raising capital. The issuer of the ADR must file the Form F-6, and the ADR's underlying security must be registered or exempt from registration under the 1934 Act.

Level II ADRs 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 U.S. investors in a public offering. Level II registration requires the filing of Form F-6 as well as Form 20-F with the Commission. The Level III ADR requires detailed disclosure about both the issuer and the securities being offered to the public, and allows the issuer to raise capital by a public offering to U.S. investors and a listing of the ADRs on a national exchange or market.

The Form F-6 may be used to register the shares evidenced by ADRs issued against the deposit of the securities of a non-U.S. issuer, and may be used only if the issuer is filing periodic reports with the Commission under the 1934 Act or the deposited securities are exempt from such reporting by Rule 12g3-2(b) (17 C.F.R. . 240.12g3-2(b)), if the deposited securities are registered under the 1933 Act or exempt from such registration, and if the ADR holder is entitled to withdraw the deposited securities at any time subject only to temporary delays for specified, limited reasons.

A main advantage of an ADR is the relative simplicity of the Form F-6 and that, pursuant to Rule 15d-3 (17 C.F.R. . 240.15d-3), annual and other reports are not required as a result of registering ADRs on Form F-6, and ADRs are exempt from registration under Section 12(g) of the 1934 Act pursuant to Rule 12g3-2(c). (17 C.F.R. . 240.12g3-2(c)) However, to become listed on a U.S. exchange or quoted on Nasdaq, ADRs must be registered pursuant to Section 12 of the 1934 Act (15 U.S.C.. 78I), and a registration statement and annual reports must be filed on Form 20-F. Thus, a number of companies decide not to have their ADRs listed on an exchange or market, and instead are Level I ADRs, trading on the NQB "pink sheets" or the OTC Bulletin Board, services that do not provide real-time quotation or transaction information. However, in July 1997, the Commission adopted Rule 12a-8 to exempt ADRs 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. (17 C.F.R. . 240.12a-8; Securities Act Release No. 7431 (July 18, 1997)) Nevertheless, the Section 12 registration requirement of the 1934 Act still applies to the class of securities underlying the ADRs. (17 C.F.R. . 240.12a-8; Securities Act Release No. 7431 (July 18, 1997)).

F. Financial Statements. The 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 U.S. capital

markets and exchanges and markets.

The foreign private issuer must include in the registration statement those financial statements covering similar periods as would be required of a U.S. issuer effecting a registration on Form S-1. These include: audited income statements and statements of changes in financial position or cash flow for the last three fiscal years;

audited balance sheets as of the end of the two most recent fiscal years;

unaudited financial statements for any interim period since the most recent fiscal year end;
and

selected financial data and dividend information for each of the issuer's last five fiscal years.

As discussed below, among the issues involving the financial statements of foreign private issuers are the reconciliation with U.S. GAAP, the currency standard, the age of the statements, and international efforts towards uniformity.

U.S. issuers must provide financial statements prepared in accordance with U.S. GAAP. The Commission, through a comprehensive set of rules, known as Regulation S-X, specifies accounting standards and requirements. (17 C.F.R. .210 et seq.) However, foreign private issuers may provide financial statements prepared according to a comprehensive body of accounting principles other than those generally accepted in the United States if a "reconciliation" to U.S. GAAP is included, as the requirements for listing or offering of securities vary from country to country. However, the non-U.S. issuer financial statements must have an informational content substantially similar to that required of domestic companies, as required by U.S. GAAP and Regulation S-X. (5 Fed.Sec.L.Rep. (CCH) . 29,724 (Nov. 18, 1992)) The reconciliation process includes: disclosure of the basis of preparation of the financial statements, a discussion of the material differences in accounting principles between U.S. GAAP and the principles used, and providing a table which reconciles the primary financial statements to U.S. GAAP. (5 Fed.Sec.L.Rep. (CCH) . 29,724 (Nov. 18, 1992))

Reconciliation is also applicable to the Form 20-F used in connection with a registration and periodic reporting of a non-U.S. issuer under the 1934 Act. There are two types of reconciliation for the Form 20-F. Item 17 of Form 20-F requires reconciliation only of the difference in the measurement items, namely the income statement and balance sheet amounts, and is required when Form 20-F is used as an annual report pursuant to Section 13 or 15(d). Item 18 of Form 20-F requires full reconciliation, including all supplemental data such as full industry segment and geographic data, and is required in connection to registration related to public offerings pursuant to Sections 12(b) or 12(g). There is an exception, however, where the registration relates only to non-convertible investment grade securities (via the Form F-3, see above) or to securities to be offered upon exercise of outstanding transferable warrants or rights granted pro rata by the issuer, pursuant to a dividend or interest reinvestment plan, or upon conversion of outstanding securities.

A foreign government, defined in Rule 3b-4 of the 1934 Act as "the government of any foreign country or of any political subdivision of a foreign country," is permitted to register offerings of securities on Schedule B of the 1933 Act and is not required to reconcile financial statements to GAAP. (17 C.F.R. . 240.3b-4(a))

Rule 3-20 of Regulation S-X states that financial statements may be prepared in any currency that the issuer deems appropriate, provided that the same currency be used for all periods presented. (17 C.F.R. . 210.3-20) However, if the chosen reporting currency is not the U.S. dollar, a translation may be presented as of the most recent fiscal year and any subsequent interim period using the exchange rate as of the most recent balance sheet included in the filing. Notwithstanding the currency chosen as the reporting currency, the issuer is required to measure its transactions using the currency of its "primary economic environment." Assets and liabilities are translated into the reporting currency at the exchange rate as of the balance sheet date while revenues, expenses, gains, and losses are translated at the exchange rate as of the date of the transaction.

In 1994, the Commission adopted amendments to Rule 3-20 of Regulation S-X to allow non-U.S. private issuers to select any reporting currency that the issuer deems "appropriate" for use in the presentation of financial statements in filings with the Commission. (59 FR 65631 (Dec. 20, 1994)) The amendment requires an issuer that changes its currency to recalculate its financial statements as if the new reporting currency had always been used.

In 1993, the Commission amended Rule 3-19 of Regulation S-X, the rule relating to the age of the financial statements included in registration statements by non-U.S. companies. (17 C.F.R. . 210.3-19) Although the Commission does not impose periodic reporting requirements for non-U.S. companies more frequently than semi-annually, which is the standard non-U.S. practice, the practical effect of the Commission's age-of-financial statement requirements had been to require a non-U.S. company to provide interim financial information if it wishes to conduct continuous offerings without interruption and to avoid delays in commencing a registered offering. The changes adopted require non-U.S. companies to provide (i) audited fiscal year financial statements within six months following the end of the fiscal year; and (ii) unaudited interim financial statements as of a date within ten months of registration statement effectiveness, if the audited financial statements are more than ten months old. (Securities Act Release No. 7026 (Nov. 3, 1993)).

The amendment to Rule 3-19 of Regulation S-X was intended to minimize the financing "black out" period for non-U.S. companies. Under this system, a non-U.S. issuer can have uninterrupted access to the U.S. public market by providing within four months following the end of its fiscal year either its audited financial statements for that year or unaudited interim financial statements as of the end of the third quarter of that year.

Issuers wishing to access capital markets in more than one country may have to comply with requirements that differ in many respects, including accounting principles to be used in the preparation of financial statements. These differing requirements are believed to increase compliance costs for registrants and create inefficiencies in attempts to access multiple capital markets. As a result, securities regulators around the world have been working on several projects to reduce differences in reporting and disclosure requirements. (Staff of the Commission, "Pursuant to Section 509(5) of the National Securities Markets Improvement Act of 1996, Report on Promoting Global Preeminence of American Securities Markets," released October 1997, page 1)

The International Organization of Securities Commissions, of which the Commission is a member, has been working with the International Accounting Standards Committee since 1987, in an effort to develop a set of accounting standards for cross-border offerings and listings. The international disclosure standards are intended to facilitate cross border capital raising and listing by letting companies comply with one set of non-financial disclosure

requirements for offerings in several jurisdictions. (Id., page 1)

G. State "Blue Sky" Requirements. Non-U.S. 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 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. Following the amendment of certain aspects of the U.S. federal securities law under the National Securities Markets Improvement Act of 1996 (Pub.L. No. 104-290 (1996)), a security which trades on a national exchange is usually exempted from the laws of the individual States. One of the key benefits of listing on a U.S. exchange or stock market is that virtually all states grant an automatic exemption from their blue sky laws to such companies. (See, e.g., *The American Stock Exchange Guide to Foreign Issuers*, "Advantages of Listing on the AMEX"). This is commonly referred to as the "blue chip blue sky exemption."

H. The Registration Process. Once a company determines to register its shares with the Commission, to list the company's securities on the U.S. 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.

For initial public offerings, the non-U.S. company needs to select an investment banker experienced in this area. The company will formalize its relationship with the underwriter through a "letter of intent," outlining fees, ranges for stock price and number of shares, and certain other conditions.

The legal counsel for an initial public offering should be familiar with the underwriting process and should be accustomed to dealing with the Commission, the NASD, and the state securities commissions regarding prospectus approval. The accountants should be certified public accountants whose work conforms with U.S. GAAP.

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.

Typically, the registration statement goes through many drafts and is extensively reviewed for its accuracy prior to filing with the Commission. During this process, counsel typically reviews information regarding the company and its business, its material contracts, its supply and customer relationships, 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. Underwriters occupy a unique position in U.S. securities law and must perform "due diligence" on the company to meet its obligations under the U.S. securities law. 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 Commission and the appropriate fee paid.

The Commission's role in the regulation of prospectuses is primarily in the area of disclosure. Within the Commission, the Division of Corporation Finance will review 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 Commission's rules and forms. Unlike U.S. issuers, the 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-U.S. issuers in draft form on a confidential non-public basis, if requested by the non-U.S. issuer. The Division will provide solutions and comments to the documents, prior to actual filing. The Commission has stated that it will, on a day-to-day basis, find solutions to problems non-U.S. issuers have with registering under the federal securities laws, including rule-making initiatives and meeting with non-U.S. issuers. (Richard Kosnick, *The Role of the SEC In Evaluating Foreign Issuers Coming to U.S. Markets*, 17 *Fordham Int'l L. J.* S97, S108-110 (1994)).

The registration statement has to be reviewed, cleared and declared effective by the Commission before sales can be confirmed. It is unlawful to sell securities until the registration statement has been declared effective. (15 U.S.C. . 77e(1)) To facilitate cross-border offerings and listings, and recognizing the particular difficulties of coordinating time schedules for cross-border offerings, the Commission staff review process has been tailored to accommodate the special scheduling demands for such offerings. Often first comments are received within six weeks of submission. The Commission will respond formally to the registration statement with a "comment letter" specifying any deficiencies that need to be addressed. The company, in turn, files a letter with the Commission responding to requests for information and describing proposed amendments to the prospectus.

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 can not be used to effect sales) has been filed with the 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. 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 investors.

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 in the United States and perhaps overseas. 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. (NASD Publications, *Going Public*, located at the NASD web site, <http://www.nasd.com>, visted April 29, 1998)

Contemporaneously with filing with the Commission, the registration statement is filed with the NASD, which reviews the underwriting compensation and offering terms. The NASD regulates the actions of broker-dealers, including underwriters, and must approve the compensation arrangements prior to the registration statement being declared effective. While the Commission's review focuses on proper disclosure, the NASD's review focuses on the fairness of underwriting compensation, terms, and arrangements. The NASD's review is conducted by its Corporate Financing Department according to the NASD's Corporate Financing Rules and Code of Procedure. (NASD Publications, *Going Public*, located at the NASD web site, <http://www.nasd.com>, visted April 29, 1998)

After first comments are received from the Commission, the issuer will respond to the Commission and, if required, amend the registration statement by providing amendments to the Commission. Once the Staff of the Commission believes that the registration conforms to the requirements of the form applicable, the Commission will declare the statement effective. The final version of the prospectus can now be printed, delivered to prospective investors, and the registered securities may be sold.

IV. Private Placements by Non-U.S. Issuers.

A. Exemptions from Registration. Section 5(a) of the 1933 Act states 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 U.S. or a non-U.S. person or entity. (15 U.S.C. . 77e(a)). However, there are a series of statutory provisions, rules and interpretations, that exempt certain transactions from Section 5(a), a number of which are available to non-U.S. issuers offering and selling securities within the United States. (See, 15 U.S.C. . 77d) 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 deemed restricted securities which may be resold only if registered or if another exemption is available.

B. Exemptions Not Available to Non-U.S. Issuers. Certain exemptions available for domestic entities are not available for non-U.S. issuers offering and selling securities within the U.S. 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 organized under the laws of a state or territory of the United States and doing business in that same state or territory. (15 U.S.C. . 77c(a)(11)) Similarly, Regulation A, promulgated under Section 3(b) of the 1933 Act, (17 C.F.R. . 230.251 to 230.263, promulgated under 15 U.S.C. . 77c(b)) which provides for a conditional exemption from registration for public offerings not exceeding \$5 million, will not be available to most non-U.S. issuers, because its use is limited to issuers organized under the laws of the U.S. or Canada. (17 C.F.R. . 230.251(a) (1)).

C. Exemptions Applicable to Non-U.S. Issuers. The 1933 Act provides statutory authority for exemptions from the registration requirements under Section 5. Section 3(b) provides authority to the Commission to exempt transactions that are under \$5,000,000 in value. (15 U.S.C. . 77c(b)). Section 4(2) exempts transactions by an issuer not involving a public offering. (15 U.S.C. . 77d(2)) Section 4(6) exempts transactions with accredited investors (15 U.S.C. . 77d(6)). This patchwork of exemptions in the statute, and the rules and regulations promulgated by the Commission thereunder, form the basis for the exemption of certain limited offerings from the registration provisions of the 1933 Act.

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 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 U.S. securities law purposes. (See,

generally, 17 C.F.R. . 230.502(a))

In 1982, the Commission adopted Regulation D to clarify the exemptions available for the sale of securities by issuers on a private basis. (17 C.F.R. . 230.500 et. seq.) Among other things, these rules clarify the disclosure obligations for certain types of limited offerings, and set forth clear criteria for integration of previous offerings. There are three exemptions under Regulation D, all of which may be used by non-U.S. issuers, as follows:

1. Rule 504 Exemption. Rule 504 provides for an exemption from registration pursuant to Section 3(b) of the 1933 Act. (17 C.F.R. . 230.504(a)). This exemption from registration will apply to an offer of securities not exceeding \$1 million during any 12-month period. The exemption is available to any issuer, including a non-U.S. 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. (17 C.F.R. . 230.504(a)(1) & (a)(2)). 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 purposes exists or where a business plan exists to engage in a merger or acquisition with an unidentified company or companies. (17 C.F.R. . 230.504(a)(3)). Under Rule 504, an offer may not be made by any general solicitation or advertisement. (17 C.F.R. . 230.502(c)).

Rule 504 does not include a specific disclosure requirement. However, the issuer should be aware that, whether or not disclosure requirements exist, the issuer is still be subject to the anti-fraud provisions of the 1933 Act, which may cause the issuer to provide disclosure in the event that a sale of the securities is questioned. (17 C.F.R. . 230.503(a))

2. Rule 505 and 506 Exemption. Rules 505 and 506 are similar to Rule 504 but permit larger amounts to be offered, subject to stricter requirements. Rule 505 provides exemptions 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 \$5 million during a twelve month period. (17 C.F.R. . 230.505(b) (2)(i)). In contrast, Rule 506 sets no limitation on the amount that may be offered. (17 C.F.R. . 230.506)

Another restriction is that the number of purchasers in a Rule 505 or 506 offering is limited to 35 non-accredited investors. (17 C.F.R. . 230.505(b)(2)(ii) and 17 C.F.R. . 230.506(b)(2) (i)). 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 organized for the purpose of purchasing the securities in questions. (17 C.F.R. . 230.501(e)(2)). Also, a person and his or her relative, spouse or spouse's relative will be deemed to be one investor if they have the same principal residence. (17 C.F.R. . 230.501(e)(1)). In addition, this numerical limit does not include persons qualifying as "accredited investors." (17 C.F.R. . 230.501(e)(1)(iv)). 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 his or her spouse, of \$1 million or an individual income of \$200,000, or \$300,000 joint income with his or her spouse, during the two most recent years, if he or she expects to reach the same income level in the current year. (17 C.F.R. . 230.501(a)) 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. (17 C.F.R. . 230.506(b)(2)(ii)) Rule 505 contains no such requirement.

Rule 505 and 506 offerings may be made by any issuer including non-U.S. issuers, except,

in the case of a Rule 505 offering, investment companies and companies meeting certain disqualification provisions for previous improper conduct. (17 C.F.R. . 230.505(b) (2)(iii)). Neither type of offering, however, may be made by any general solicitation or advertisement. (17 C.F.R. . 230.502(c)).

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. (17 C.F.R. . 230.502(b)(1)). 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. (17 C.F.R. . 230.502(b)(1)). The disclosure document 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 fulfilled by delivering certain of its 1934 Act filings to the offerees.

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. (17 C.F.R. . 230.502(b)(2)(i)(A)). As discussed above, most non-U.S. issuers are not eligible to use Regulation A, since it is available only to U.S. and Canadian issuers. Thus, the non-financial information required will be that required in Part I of the registration statement form available to the non-U.S. issuer, such as Form F-1. (17 C.F.R. . 230.502(b)(2) (i)(C)). 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. (17 C.F.R. . 230.502(b)(2)(i)(B) & (C))

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 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. (17 C.F.R. . 230.502(b)(2)(v))

Although U.S. securities law provides that certain transactions are exempt from registration, and in certain circumstances it does not mandate specific disclosure requirements, these transactions are still subject to the anti-fraud provisions of the U.S. securities laws which provide for civil liability for misleading statements made, or material information omitted, in the offer and sale of securities. (17 C.F.R. . 240.10b-5)

3. Section 4(6). Another exemption from the registration requirements of Section 5(a) is set forth in Section 4(6) of the 1933 Act (15 U.S.C. . 77d(6)). This exemption from registration is similar to that set forth in Rule 505, in that it is available for offers not exceeding \$5 million and requires the filing of a Form D with the Commission. Section 4(6) contains no numerical limit on offerees, but offers may be made to accredited investors only.

D. 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, a Form D, with the Commission, although, for purposes of Regulation D, such filing is not a condition to the availability of an exemption. (17 C.F.R. . 230.503(a) & 17 C.F.R. . 230.507). Pursuant to

Rule 503, five copies of the Form D, one of which must be manually executed, must be filed with the SEC within 15 days of the first sale of the securities in question. (17 C.F.R. . . 230.503(a) & (b)). However, once this Form D is filed, there will be no further periodic filings required.

E. Restrictions on Transfer. Securities sold under Rules 504, 505 or 506 or under Section 4 (6) are deemed to be restricted securities. (17 C.F.R. . 230.502(d)) As such, the securities may resold only if they are registered or an exemption applies.

As restricted securities, such shares will be subject to the limitations of Rule 144, as promulgated under the 1933 Act, relating to shares acquired in a transaction other than a public offering. (17 C.F.R. . 230.144) 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. First, there must be available adequate current public information with respect to the issuer of the securities. (17 C.F.R. . 230.144(c)). Second, the purchaser may resell only an amount equal to a small percentage of the total outstanding securities of the same class - in general one percent - during a three-month period. (17 C.F.R. . 230.144(e)). Third, such sales must be made in a brokers' transaction or through a market maker. (17 C.F.R. . 230.144(f)). Finally, 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 \$10,000, the purchaser must file three copies of a notice on Form 144 with the Commission and, if the securities are admitted to trading on any national securities exchange, one copy must be filed with the exchange or marketplace. (17 C.F.R. . 230.144(h)). However, if the purchaser desiring to resell the securities is not an affiliate of the issuer an officer, director, or ten percent shareholder -- and has held the securities for more than two years, these restrictions will not apply. (17 C.F.R. . 230.144(k)).

F. Rule 144A Restricted Securities. Rule 144A provides a non-exclusive safe harbor 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 or "QIBs." Rule 144A defines QIBs as institutions that in the aggregate own and invest on a discretionary basis at least \$100 million in securities. (Securities Act Release No. 6862 (April 23, 1990)). Rule 144A imposes a "reasonable belief" standard on sellers with respect to the status of buyers as QIBs. (17 C.F.R. . 230.144A). 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. The financial statements should be audited to the extent reasonably available. However, non-U.S. companies which furnish the 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.

Securities acquired in reliance upon Rule 144A are deemed restricted securities and may be resold only in compliance with the requirements of Rule 144. If a market for Rule 144A securities develops, often the number of U.S. security holders will increase, subjecting many non-U.S. issuers to the registration and periodic reporting requirements of the 1934 Act. A Rule 144A offering of ADRs or ordinary shares does not preclude an issuer from subsequently registering the securities with the Commission SEC and applying for an

exchange or Nasdaq listing. For example, the following non-U.S. issuers, after conducting Rule 144A transactions, entered the U.S. public market for the first time: Telefonos de Mexico, Petro-Canada, Vitro, Micro Focus Group, and Enterprise Oil. (Frode Jensen, III, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From A Legal Perspective*, 17 *Fordham Int'l L.J.* S25, S37 (1994))

As noted above, Rule 144A has been successful in attracting non-U.S. issuers to the U.S. private market. Moreover the rule has also been successful in increasing the awareness of non- U.S. issuers of the possibility of listing on U.S. markets. Unlike a private placement, which is illiquid and requires an opinion of counsel for transfers, Rule 144A does not require any additional information to be provided to QIB other than information in the marketplace. In most instances, no further paperwork is necessary.

V. Non-U.S. Investment Outside of the U.S. -- Regulation S.

A. Introduction. In 1990, the Commission adopted Regulation S in order to clarify the extraterritorial application of the registration provisions of U.S. securities laws. (Securities Act Release No. 6863 (April 24, 1990)). Regulation S employs a territorial approach, in that any offer or sale of a security that is deemed to occur within the U.S. is subject to the registration provisions of U.S. securities laws, while any offer or sale of a security that is not deemed to occur within the U.S. is not subject to the registration provisions of U.S. securities laws (17 C.F.R.. 230.901). Regulation S is not an exemption from registration under U.S. securities laws; rather it provides that offers and sales occurring outside of the U.S. are not subject to the registration requirements of U.S. securities laws. Regulation S speaks only to the registration provisions of U.S. securities law and does not limit or otherwise restrict application of the anti- fraud provisions of U.S. securities laws (17 C.F.R.. 230.900, Preliminary Note 1).

In addition to setting forth the foregoing general principle regarding territorial application of the registration provisions of U.S. securities laws, Regulation S provides three categories of non-exclusive (See, 17 C.F.R. . 230.900, Preliminary Note 5) "safe harbors" (17 C.F.R. . 230.903(b)(1) through (b)(3)) 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 harbors are deemed to occur outside the U.S. and, therefore, are not subject to the registration requirements of U.S. securities laws.

The safe harbors may be utilized 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 utilized for resale transactions by such persons (17 C.F.R. . 230.903(a)). Regulation S also provides a non-exclusive safe harbor 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. (17 C.F.R. . 230.904)

Equity securities of a U.S. "domestic issuer" issued in a transaction which relies on Regulation S to avoid registration under U.S. securities laws are deemed "restricted securities" under U.S. securities laws and may only be resold in a transaction which complies with the registration requirements of U.S. securities laws or an exemption therefrom, or in a transaction occurring outside the U.S. in accordance with Regulation S (17 C.F.R. . 230.905).

Regulation S is not available for any transactions that, although in technical compliance with the provisions of Regulation S, is part of a plan or scheme to evade the registration provisions of U.S. securities laws (17 C.F.R. . 230.900, Preliminary Note 2). In this regard, subsequent to the adoption of Regulation S in 1990, the Commission issued an interpretive release which identified practices occurring in the context of Regulation S which it deemed abuses (Securities Act Release No. 7190 (June 27, 1995)). Ultimately, in February, 1998, the concerns of the Commission expressed in that interpretive release resulted in amendments to Regulation S designed to halt such abuses (Securities Act Release No. 7505 (February 17, 1998)).

B. General Principle. Regulation S provides that no offer or sale of a security which occurs outside of the United States shall be subject to the registration requirements of United States securities laws (17 C.F.R. .230.901). 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 (15 U.S.C. . 77e), such provisions literally apply to any offer or sale of a security involving any communication between the United States and any other country (15 U.S.C. . 77b(7)).

Regulation S provides safe harbors for specified issuance and resale transactions which, if complied with in all respects, will result in such transactions being deemed to occur outside the United States. These safe harbors are non-exclusive. As a result transactions which are not in compliance with a safe harbor may still be deemed to occur outside the United States for purposes of U.S. securities law and Rule 901. In view of 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 harbor provided by Regulation S is not utilized, Rule 901 may be of utility in instances where non-U.S. issuers may inadvertently or unknowingly trigger the broad jurisdictional reach of United States securities laws in a transaction which nonetheless arguably has not occurred in the United States. Otherwise, compliance with a Regulation S safe harbor is effectively the only way to ensure availability of the jurisdictional exclusion from application of the registration requirements of U.S. securities laws.

C. "Safe Harbors" for Transactions by Issuers, Distributors, or their Affiliates. Regulation S provides three categories of safe harbors for use in transactions by an issuer, a distributor, or any of their respective affiliates or persons acting on their behalf. These safe harbors may be used for transactions in which securities are initially issued and for resales by such persons. All three safe harbors require compliance with two general conditions -- namely, an offshore transaction with no directed selling efforts -- as well as the more specific conditions for each category.

1. General Conditions. Regulation S requires that the offer or sale be made in an offshore transaction. For purposes of the three safe harbor categories of Regulation S, an offer or sale of securities is made in an offshore transaction if: (i) the offer is not made to a person in the United States; and (ii) either (A) 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 (B) the transaction is executed on an established non-U.S. securities exchange located outside the United States (17 C.F.R. . 230.902(h)(1)). 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 (17 C.F.R. . 230.902(h)(2)). However, offers and sales to certain international organizations, such as the International Monetary Fund and the United

Nations, and their affiliates are excluded from the definition of U.S. persons and shall be deemed to be made in an offshore transaction (see, 17 C.F.R. . 230.902(h)(3) and 17 C.F.R. . 230.902(k)(2)(vi)). 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-U.S. person by a dealer or other professional fiduciary organized, incorporated or resident in the United States are also deemed to be made in an offshore transaction (see, 17 C.F.R. . 230.902(h)(3) and 17 C.F.R. . 230.902(k)(2)(i)).

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 (17 C.F.R. . 230.903(a)(2)). 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 (17 C.F.R. . 230.902(c)(1)). Directed selling efforts include advertisements placed in a publication with a general circulation in the United States (see, 17 C.F.R. . 230.902(c)(2)), but do not include (see, 17 C.F.R. . 230.902(c)(3)): (i) 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; (ii) contact with persons excluded from the definition of U.S. person (For purposes of Regulation S, a U.S. person is defined as: (i) any natural person resident in the United States; (ii) any partnership or corporation organized or incorporated under the laws of the United States; (iii) any estate of which any executor or administrator is a U.S. person; (iv) any trust of which any trustee is a U.S. person; (v) any agency or branch of a non-U.S. entity located in the United States; (vi) any non- discretionary or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit of a U.S. person; (vii) any discretionary or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated or resident (if an individual) in the United States; and (viii) any partnership or corporation organized or incorporated under laws of any jurisdiction other than the United States and formed by a U.S. person to invest in securities not registered under United States securities law, unless organized and owned by accredited investors who are not natural persons, estates or trusts, 17 C.F.R. . 230.902(o)(1)), (iii) a tombstone advertisement in a publication with a general circulation in the United States, provided such publication has less than 20% of its circulation in the United States, such advertisement contains a statement regarding the restricted nature of such securities pursuant to U.S. securities laws, and such advertisement contains only certain limited information about the offering (see, 17 C.F.R. . 230.902(c)(3)(iii)(C)); (iv) bona fide visits by prospective investors to the issuer's United States facilities; (v) distribution in the United States of a non-U.S. 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 "U.S. persons" or persons in the United States (see, 17 C.F.R. . 230.902(c)(3)(v)(B)); (vi) publication by the issuer of a notice containing only certain limited information (see, 17 C.F.R. . 230.902(c)(3)(vi)); and (vii) 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 are also satisfied (see, 17 C.F.R. . 230.902(c)(3)(vii)).

2. Specific Conditions - Category 1.

The Category 1 safe harbor (17 C.F.R. . 230.903(b)(1)) 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, (i) securities issued by an issuer that is not a domestic issuer (For purposes of Regulation S, a United States "domestic issuer" is defined as any issuer other than a non-United States government or non-U.S. issuer, except a non-U.S. issuer meeting the following conditions: (i) more than 50% of its outstanding voting securities held of record directly or indirectly by United States residents; and (ii) the majority of its directors or executive officers are United States citizens or residents, more than 50% of its assets are located in the United States, or its business is administered principally in the United States (17 C.F.R. . 230.902(e)) which reasonably believes at commencement of the offering that there is no "substantial United States market interest" (For purposes of Regulation S "substantial United States market interest" exists with respect to a class of equity securities if: (i) 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 (ii) 20% 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% of all trading in such securities took place in, on or through securities markets of a single country other than the United States, see, 17 C.F.R. . 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, see, 17 C.F.R. . 230.902(j)(3) if: (i) its debt securities are held of record by 300 or more "U.S. persons"; (ii) US \$1 billion or more of its debt securities are held of record by "U.S. persons"; and (iii) 20 percent or more of its debt securities are held of record by "U.S. persons," see, 17 C.F.R. . 230.902(j)(2).) in the class or type of securities offered or sold [or issuable upon exercise or conversion of the class or type of securities offered or sold]; (ii) 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; (iii) 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 nor 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; (iv) securities which are backed by the full faith and credit of a government other than the United States; and (v) 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 upon 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.

3. Specific Conditions - Category 2. The Category 2 safe harbor (17 C.F.R. . 230.903 (b)(2)) is available for transactions in securities not eligible for the Category 1 safe harbor and that

are equity securities of a reporting issuer (For purposes of Regulation S, a "reporting issuer" is defined as an issuer, other than an investment company, that: (i) 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 (ii) has filed all reports and other material required to be filed with the United States 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 upon Regulation S (17 C.F.R. . 230.902(i)) that is not a United States domestic issuer, debt securities of a reporting issuer, or debt securities of a non-reporting issuer 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 Rules 903 (a)(1) and (a) (2): (i) "offering restrictions" (For purposes of Regulation S, offering restrictions are implemented if: (i) each distributor agrees in writing that all offers and sales during the applicable distribution compliance period shall 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; (ii) 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 U.S. 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 U.S. securities laws and such statements appear on the cover or inside cover of the prospectus or offering circular, in the underwriting section of the prospectus or offering circular, and in any advertisements. 17 C.F.R. . 230.902(g)) are implemented; (ii) the offer or sale, if made during a 40-day distribution compliance period (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: (i) all offers and sales by a distributor of an unsold allotment are deemed made during the distribution compliance period; (ii) in a continuous offering, the distribution compliance period commences upon completion of the distribution, as determined and certified by the managing underwriter; (iii) in a continuous offering of identifiable tranches of non-convertible debt securities, the distribution compliance period for securities in a tranche commences upon completion of the distribution of such tranche, as determined and certified by the managing underwriter; and (iv) in a continuous offering of securities to be acquired upon the exercise of warrants, the distribution compliance period commences upon completion of the distribution of the warrants, as determined and certified by the managing underwriter if the following requirements are satisfied, 17 C.F.R. . 230.903(b)(5)), (A) each warrant bears a legend regarding the restricted nature of the warrant and securities issuable upon exercise pursuant to U. S. securities laws and disclosing that the warrant may not be exercised by or on behalf of a U.S. person except in compliance with the registration requirements of U.S. securities laws or pursuant to an exemption therefrom, (B) each person exercising a warrant provides written certification that it is not a U.S. person and that the warrant is not being exercised on behalf of a U.S. person or provides a written opinion of legal counsel that the warrant and securities issuable upon exercise are in compliance with the registration requirements of U.S. 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 upon exercise may not be delivered within the United States, other than in an a transaction which qualifies as an offshore transaction, unless in compliance with the registration requirements of U.S. securities laws or pursuant

to an exemption therefrom (17 C.F.R. . 230.902(f)) is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and (iii) 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 (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 C.F.R. . 230.902(d)).

4. Specific Conditions - Category 3. The Category 3 safe harbor (17 C.F.R. . 230.903 (b) (3)) is available for transactions in securities not eligible for the Category 1 or 2 safe harbors, provided that the offer and sale is 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: (i) offering restrictions are implemented; (ii) in the case of debt securities, (A) the offer or sale, if made during a 40-day distribution compliance period is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor) and (B) the securities are represented during the 40-day distribution compliance period by a temporary global security and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who acquired such securities in a transaction not requiring registration under U.S. securities laws; (iii) in the case of equity securities, (A) the offer or sale, if made during a one-year distribution compliance period is not made to a U.S. person or for the account or benefit of a United States person (other than a distributor), (B) the offer or sale, if made during a one-year distribution compliance period is made in compliance with the following conditions, (1) the purchaser (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of a U.S. person or that it is a U.S. person who acquired the securities in a transaction not requiring registration under U.S. securities laws, (2) the purchaser agrees to resell the securities only in accordance with Regulation S, the registration requirements of U.S. securities laws or an exemption therefrom and not to engage in hedging transactions except in compliance with U.S. securities laws, (3) securities of a domestic issuer are legended to the effect that transfer is prohibited except in accordance with Regulation S, the registration requirements of U.S. securities laws or an exemption therefrom and that hedging transactions may not be conducted except in compliance with U.S. securities laws, and (4) 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 U.S. securities laws or an exemption therefrom or, if the securities are in bearer form or non-U.S. 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 (iv) each distributor selling securities, in the case of debt securities, during a 40-day distribution compliance period, or in the case 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.

D. Safe Harbor for Resale Transactions by Persons Other Than Issuers, Distributors, or their Affiliates. Regulation S also provides a safe harbor 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 (17 C.F.R. . 230.904). 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: (i) 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 U.S. 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 (ii) 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. (17 C.F.R. . 230.904)

E. Restrictions on Resale. Equity securities of a domestic 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 U.S. securities laws by virtue of the general principle of Rule 901 or the safe harbors of Rule 903 are deemed restricted securities (17 C.F.R. . 230.905) as defined in Rule 144. (17 C.F.R. . 230.144) Such restricted securities may only be resold in accordance with Regulation S, the registration requirements of United States securities laws or an exemption therefrom (17 C.F.R. . 230.905). 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 U.S. securities laws. 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 (17 C.F.R. . 230.144(k)).

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 harbor of Rule 904 and, therefore, any applicable legend on such securities may not be removed upon such a resale.

VI. Trading of Non-U.S. Securities - Compliance with the 1934 Act.

A. Introduction. In order for a non-U.S. issuer to list its securities on a U.S. 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. (15 U.S.C. .. 78l(b), 78l(g)) Listing is accomplished either contemporaneously with the initial public offering of the non-U.S. issuer's securities in the United States, or directly without a corresponding financing. 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 Commission pursuant to Section 12(b) of the 1934 Act (15 U.S.C. . 78l (b)) and to execute a trade in a security on the over-the-counter market unless the security is registered with the Commission pursuant to Section 12(g) of the 1934 Act. (15 U.S.C. . 78l (g)) (An "exempted security" under the 1934 Act is generally limited to governmental and other municipal securities; see definition of an exempted security at 15 U.S.C. . 78c(a)(12))

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 sidestep such regulation. As a result, Congress amended Section 12(g)(1) to provide that:

Every issuer which 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 one hundred twenty days after the last day of its first fiscal year . . . on which the issuer has total assets exceeding \$1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more . . .

register such security by filing with the Commission a registration statement . . . with respect to such security containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the 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. (15 U.S.C. . 78l(g)(1))

The Commission by rule has exempted from registration under Section 12(g) companies that would otherwise be subject to registration if total assets do not exceed \$10 million. (17 C.F.R. . 240.12g-1, as amended in Exchange Act Release No. 37,157 (May 9, 1996); [1996 - 1997 Transfer Binder] Fed. Sec. L.Rep. (CCH) . 85,801, at 88,001). The asset test and the number of shareholder test is applied collectively; that is, the company must have both total assets of \$10 million or greater, and 500 or more shareholders together before it is required to register under the 1934 Act.

B. 1934 Act Registration. To register the securities of a non-U.S. company on an exchange or market, the Company must either use a simplified registration procedure available on Form 8-A for registrants who have concurrently conducted a public offering of the class of securities, or file Form 20-F, which is a more comprehensive disclosure document, for issuers that 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 12(g) of the 1934 Act.

The Form 8-A may be used for a class of securities to be effective upon filing with the Form 8-A, for non-U.S. 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. (Form 8-A, General Instruction A.(c)) The 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 the Form 8-A is: (i) a description of the securities to be registered, pursuant to Item 202 of Regulation S-K (17 C.F.R. . 229.202); (ii) a list of the exhibits to be incorporated by reference or filed as part of the registration statement; and (iii) the signature of the registrant. Documents filed as part of the concurrent public offering or in prior 1934 Act filings are incorporated by reference.

C. Form 20-F. 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 securities under the 1934 Act. To assist foreign private issuers with the complexities of 1934 Act registration and periodic reports, the Commission has created a "foreign integrated disclosure system" which is the result of the Commission attempting to balance the goal of investor protection with the goal of facilitating the free flow of capital among nations. It has been suggested that a means for achieving this goal is to reduce the reporting burdens of foreign private issuers. (Thomas Lee Hazen, *Securities Regulation*, at 763 (1995)) The foreign integrated disclosure system is limited to issuers who file the Form 20-F on an annual basis, and are non-Canadian foreign private issuers registering their securities under Section 12 of the 1934 Act. (17 C.F.R. . 249.220f) There is a different standard for Canadian issuers as the Commission has previously distinguished the North American foreign private issuer - those from Canada and Mexico - from other foreign private issuers. (Securities Act Release No. 6437 (Nov. 19, 1982))

A foreign private issuer is required to register its equity securities under Section 12(g) the 1934 Act if: (i) the securities are listed or to be listed on a U.S. stock exchange or market; or (ii) the issuer has more than \$10 million of total assets and more than 500 stockholders of whom more than 300 are U.S. residents. (17 C.F.R. . 240. 12g-1, as amended in Release No. 34-37157, May 1, 1996). In addition, a non-U.S. issuer that wishes to become listed on a U.S. exchange is required to register under Section 12(b) of the 1934 Act (15 U.S.C. . 78l (b)) and the non-U.S. issuer that wishes to become listed on the Nasdaq is required to register under Section 12(g) of the 1934 Act. (15 U.S.C. . 78l(g))

The 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 United States. (Exchange Act Release No. 16,371 (Nov. 29, 1979)). The foreign integrated disclosure system is based upon those disclosures required by Form 20-F. (17 C.F.R. . 249. 220f) Rather than the two separate documents of the Form 10-K and Annual Report to Shareholders used for U.S. 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 15(d), or in connection to registration related to public offerings pursuant to Sections 12(b) or 12(g) of the 1934 Act.

Form 20-F requires the registrant to provide similar information as required by a Form F-1 under the 1933 Act. (Form F-1 has been previously discussed in this chapter) 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 U.S. GAAP or reconciled with U.S. GAAP. (17 C.F.R. . 249.220f)

The Commission stated, in adopting the form, 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." (Exchange Act Release No. 16,371 (Nov. 29, 1979); 44 Fed.Reg. 70,132 (1979)). 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 Commission indicated that substantial reductions in the proposed disclosure requirements had been made. (Exchange Act Release No. 16,371 (Nov. 29, 1979); 44 Fed.Reg. 70,132 (1979))

Two major differences between the disclosure system for non-U.S. and domestic issuers are the disclosures of conflicts of interest and use of proceeds. Items 11 to 13 of the Form 20-F permit non-U.S. issuers to disclose options to purchase securities in the aggregate, as opposed to requiring disclosure for each individual and specify that data concerning material transactions with control persons need be disclosed only if 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.

D. Annual Reports. One of the objectives of the 1934 Act is to assure the public availability of adequate information about companies with publicly traded stock. A non-U.S. issuer becomes a reporting company when it becomes subject to regular reporting requirements under the foreign integrated disclosure system. As discussed above, non-U.S. companies become reporting companies as result of (i) registration of a class of securities under the 1934 Act (15 U.S.C. . 78m) or registration of an offering of securities pursuant to the 1933

Act (15 U.S.C. . 78o). A Form 20-F is also the form used by foreign private issuers to file their Annual Report pursuant to Section 13 or 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 the Form 10-K for domestic issuers which must be filed within 90 days of the end of the fiscal year. (Form 20-F, General Instruction A(c)). E. Interim Reports. Foreign private issuers are not required to file quarterly reports on Form 10-Q or current reports on Form 8-K, as is required of a U.S. issuer. Instead, the foreign private issuer is required to file with the 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. (17 C.F.R. . 240.13a-1 to 13a- 17) The Form 6-K, the interim reporting form used by non-U.S. issuers, requires non-U.S. issuers to provide the information with English translations or English versions. (17 C.F.R. . 240.13a-3, as modified by Exchange Act Release No. 16,371 (Nov. 29, 1979)). Financial statements contained in interim reports on Form 6-K are not required to be prepared under U.S. GAAP or reconciled to U.S. GAAP.

Finally, NYSE, AMEX, and Nasdaq require their listed non-U.S. companies to provide interim reports on at least a semi-annual basis. As a practical matter, many non-U.S. 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 feel that these steps aid in the acceptance of the company in the marketplace and assist the company in managing shareholder relationships.

F. Proxy Requirements. Securities registered by a foreign private issuer (A foreign private issuer means any foreign issuer other than a foreign government, except when (i) more than 50 percent of the outstanding voting securities of such issuer are held of record either directly or indirectly or through voting trust certificates or depositary by residents of the United States, or (ii) any of the following: (a) the majority of the executive officers or directors are U.S. citizens or residents, (b) more than 50 percent of the assets of the issuer are located in the United States, or (c) the business of the issuer is administered principally in the United States, 17 C.F.R. . 240.3b-4(c)) eligible to use Form 20-F, is exempt from proxy requirements of the 1934 Act (17 C.F.R. . 240.3112-3(b)). For non-U.S. issuers who are not a foreign private issuer, 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 Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." (15 U.S.C. . 78n) 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. (15 U.S.C. . 78n; 17 C.F.R. .240.14a-3.4). Where securities are held in the names of brokers, banks, or nominees, the 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.

In connection with any solicitation of a proxy (or other form of consent or authorization by shareholders) directed to more than ten persons, a proxy statement and proxy form complying with the proxy rules must be filed with the Commission, and used, if the solicitation pertains to a security registered under the 1934 Act. (17 C.F.R. .240.14a-6). 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. (17 C.F.R. .240.14a-3). 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. 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. (17 C.F.R. .240.14a-4(b)(2)). There are extensive disclosure requirements related to executive compensation and compensation tables required under Item 402 of Regulation S-K are required to be included as well. 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; option repricing disclosure; and proxy rule amendments changing the disclosure requirements that apply if shareholder action is being taken with respect to employee benefit plans.

The preliminary proxy statement and proxy have to be filed with the Commission at least ten calendar days before the definitive proxy statement and proxy is 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. (17 C.F.R. .240.14a-6 (a)). 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.

G. Short Swing Trading. Securities registered by a foreign private issuer (A foreign private issuer means any foreign issuer other than a foreign government, except when (i) more than 50 percent of the outstanding voting securities of such issuer are held of record either directly or indirectly or through voting trust certificates or depositary by residents of the United States, or (ii) any of the following: (a) the majority of the executive officers or directors are U.S. citizens or residents, (b) more than 50 percent of the assets of the issuer are located in the United States, or (c) the business of the issuer is administered principally in the United States, 17 C.F.R. . 240.3b-4(c)) eligible to use Form 20-F, is exempt from the short swing profit requirements of the 1934 Act (17 C.F.R. . 240.3a12-3(b)). As a result, non-U.S. 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 have to file either Form 3, Form 4 or Form 5 required thereunder to disclose beneficial ownership of more than 10 percent of any class of securities (see, 15 U.S.C. . 78p and 17 C.F.R. . 240.16a-1 et. seq.).

H. Takeover Provisions; Disclosure of Beneficial Ownership of U.S. Issuer. A non-U.S. person holding securities of a non-U.S. or U.S. issuer is required to file notice of the acquisition, directly or indirectly, of the beneficial ownership of more than 5 percent of any equity security of a class registered pursuant to Section 12 of the 1934 Act, within 10 days after such acquisition (see, 17 C.F.R. . 240.13d-1 et. seq.). These provisions were enacted to prevent creeping takeovers by undisclosed principals of U.S. companies with a class of securities listed pursuant to Section 12 and are part of what is commonly referred to as the Williams Act, which regulates conduct of management, bidders and broker-dealers in a hostile takeover. 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 (i) voting power, which includes the power to vote, or to direct the

voting of, such security; or (ii) investment power, which includes the power to dispose, or to direct the disposition of, such security (17 C.F.R. . 240.13d-3). 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 sixty days through any option, warrant or right, 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 (17 C.F.R. . 240.13d-3). All securities held by persons acting as a group are aggregated for purposes of determining whether the 5 percent 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 (15 U.S.C. . 78m). I. Multi-Jurisdictional Disclosure System for Canadian Issuers. Based upon the close relationship between the United States and Canada, in July 1991 the Commission adopted the Multi-Jurisdictional Disclosure System, the "MJS," 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 Canadian provincial securities regulators. (Securities Act Release No. 6902 (June 21, 1991); 56 Fed. Reg. 30,036 (1991)). The MJS concept of mutual recognition 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. Under a parallel system adopted by Canada's securities regulators, U.S. issuers may publicly offer and sell securities in Canada using documentation that complies with the requirements governing public offers and sales of securities in the United States. (Canadian Securities Administrators, National Policy Statement No. 45). Canadian issuers using the MJS to make offers of securities in connection with certain exchange offers and amalgamations are not required to reconcile their financial statements to U.S. GAAP. Reconciliation to U.S. GAAP is required in the case of other offerings of securities under the MJS.

The MJS is significant because it represents the first time that the Commission has been willing to accept documentation prepared in accordance with securities law requirements of a non-U.S. jurisdiction for use in registered public offerings made in the United States. Under the MJS, 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 MJS disclosure for Canadian issuers under the 1933 Act are the Forms F-7, F-8, F-9, F- 10, and F-80. (17 C.F.R. . 239.37 to 239.380)

VII. Approaches to Jurisdictional Conflicts.

A. Subject Matter Jurisdiction. Just as the U.S. securities law is comprised of a potpourri of Acts of Congress and regulations promulgated thereunder by the Commission, so are the rules concerning the litigation of disputes arising thereunder. However, prior to determining in which court a dispute under the U.S. securities laws should be brought, it must be determined if the securities laws will be applicable. This determination will be based upon 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 includes the use of any means or instrumentality of transportation or communication in interstate commerce or of the mails. (15 U.S.C. . 77e, 77l, 77q; 15 U.S.C. . 78i(a), 78j, 78o(c)(1), 78o(c)(2)). In addition, in the case of Sections 9(a) and 10 of the 1934 Act, the use of the facility of any national securities exchange or market will be a necessary jurisdictional means. Due to the broad nature of the necessary jurisdictional means, it should not be difficult to show, although it should be

noted that such use must be alleged and established in every case.

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. Whether such a dispute will be brought at the federal level or in the courts of the individual states will be determined by the nature of the claims to be litigated. In certain instances, jurisdiction will lie exclusively with the federal courts. For example, jurisdiction over any appeal from a Commission administrative decision will lie exclusively with the federal courts, (15 U.S.C. . 77i and 15 U.S.C. . 78y), as will that over criminal proceedings and SEC enforcement actions. (15 U.S.C. . 77v and 15 U.S.C. . 78aa).

Likewise, the federal courts will have exclusive jurisdiction over all suits in law or equity to enforce liabilities arising under the 1934 Act and the applicable Commission rules. (15 U.S.C. . 78aa). Thus any claim under the 1934 Act brought in a state court will be barred. (See e.g., *Evans v. Dale*, 896 F.2d 975 (5th Cir. 1990), *Kleckley v. Hebert*, 464 So.2d 39 (La.App. 1985)) Even if the complaint does not specifically cite the 1934 Act, but rather alleges facts that resemble a 1934 Act claim, the action may not be brought in a state court. (See e.g., *Hudson v. Burns*, 293 A.2d 610 (Conn. 1971), *Community Nat'l Bank & Trust Co. v. Vigan*, 330 So.2d 211 (Fla.App. 1976), cert. denied, 341 So.2d 294 (1976)).

In contrast, jurisdiction over civil actions arising under the 1933 Act will lie concurrently in the federal and the state courts. (15 U.S.C. . 77v(a)). 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. (15 U.S.C. . 77v(a)). One commentator has stated that the justification for this rule is the "facilitation of private enforcement by giving the plaintiff an absolute choice of forum; especially since, in many cases, state court litigation may prove less complex and less expensive than suits in federal court. (Hacker, . 14.1 at 49 (citations omitted)).

B. Procedural Requirements 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. The rules as to proper venue (i.e., 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. Sections 22 (a) of the 1933 Act and 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. 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. (15 U.S.C. . 77v(a) and 15 U.S.C. . 78aa).

Service of Process. Process may be served on a defendant by serving him in any district in which he is an inhabitant or in which he may be found. (15 U.S.C. . 77v and 15 U.S.C. . 78aa). In this way, personal jurisdiction over the defendant will be obtained.

Statutes of Limitations. 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. Finally, the Supreme Court, in *Lampf, Levva Lipkind, Prupis & Petigrow v. Gilbertson*, (111 S.Ct. 2773, 2780 (1991)), 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, analogizing to the other similar statutes of limitations contained in the securities laws. It should be noted, however, that, after the Court's decision in *Lampf*, Congress promulgated Section 27A of the 1934 Act in order to quash any retroactive application of this statute of limitations to cases initiated on or before June 19, 1991, the day before the Court's decision. (15 U.S.C. . 78aa-1)

Damages. 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. 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. (15 U.S.C. . 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 - (1) if the plaintiff has not disposed of the security, the amount paid for the security in question plus interest less any income received thereon, upon the tendering of the security, or (2) if the security has already been sold, the difference between the purchase price and the amount received upon disposition. (15 U.S.C. . 77l(a)).

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. (*Sackett v. Beaman*, 399 F.2d 884 (2d Cir. 1968)). 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. (*Clark v. John Lamula Investors, Inc.*, 583 F.2d 594 (2d Cir. 1978)). 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 (*Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965), cert. denied 382 U.S. 879 (1965)). Finally, it should be noted that a plaintiff cannot recover punitive damages under the U.S. securities laws. (*Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969))

VIII. Conclusion. The U.S. securities laws are a complex set of statutes, rules, regulations, judicial interpretations and practice that have evolved since modern securities law concepts were first enacted in the 1930's. 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. Over time, the U.S. securities laws have been adapted for the non-U.S. issuer, as world financial markets have become more integrated and internationalized. Leading the way has been the Commission, who, through various initiatives, has sought to include non-U.S. issuers within the regulatory framework and has worked to instill in other non-U.S. markets the concepts of the U.S. regulatory scheme. The benefits of the U.S. markets to non-U.S. companies, in terms of fair valuations, liquid markets, political stability, and evenly administered regulatory schemes, are substantial. The enforcement activities of the Commission, and self regulatory organizations, ensure compliance with the law and deter fraudulent conduct. The United States is a leading jurisdiction in attracting non-U.S. companies to its capital markets. All indications are that this trend will continue.