# FREQUENTLY ASKED QUESTIONS ABOUT REGULATION S

## Understanding Regulation S

***What is Regulation S?***

Regulation S provides an exclusion from the Section 5 registration requirements of the Securities Act of 1933, as amended (the "Securities Act"), for offerings made outside the United States by both U.S. and foreign issuers. A securities offering, whether private or public, made by an issuer outside of the United States in reliance on Regulation S need not be registered under the Securities Act. The Regulation S safe harbors are non-exclusive, meaning that an issuer that attempts to comply with Regulation S also may claim the availability of another applicable exemption from registration. Regulation S is available for offerings of both equity and debt securities.

Regulation S is available only for "offers and sales of securities outside the United States" made in good faith and not as a means of circumventing the registration provisions of the Securities Act. The availability of the issuer (Rule 903) and the resale (Rule 904) safe harbors is contingent on two general conditions:

- the offer or sale must be made in an offshore transaction; and
- no "directed selling efforts" may be made by the issuer, a distributor, any of their respective affiliates, or any person acting on their behalf.

Regulation S is composed of the following parts: eight preliminary notes; Rule 901, which contains a general statement of the regulation; Rule 902, which sets forth applicable definitions; Rules 903 and 904, which set forth the two safe harbors; and Rule 905, which sets forth the resale limitations applicable to equity securities.

***Who may rely on Regulation S?***

Members of the offering party, including:

- U.S. issuers – both reporting and non-reporting issuers may rely on the Rule 901 general statement or the Rule 903 issuer safe harbor;
- Foreign issuers – both reporting and non-reporting foreign issuers may rely on the Rule 901 general statement or the Rule 903 issuer safe harbor;
- Distributors (underwriters and broker-dealers) – both U.S. and foreign financial intermediaries may rely on the Rule 901 general statement or the Rule 903 issuer safe harbor;
- Affiliates of the issuer – both U.S. and foreign;

- Any persons acting on behalf of the aforementioned persons;
- Non-U.S. resident purchasers (including dealers) who are not offering participants may rely on the Rule 901 general statement or the Rule 904 resale safe harbor to transfer securities purchased in a Regulation S offering; and
- U.S. residents (including dealers) who are not offering participants may rely on the Rule 901 general statement or the Rule 904 resale safe harbors in connection with purchases of securities on the trading floor of an established foreign securities exchange that is located outside the United States or through the facilities of a designated offshore securities market.

***Who may not rely on Regulation S?***

Regulation S is not available for the offer and sale of securities issued by open-end investment companies, unit investment trusts registered or required to be registered under the Investment Company Act of 1940 (the "1940 Act"), or closed-end investment companies required to be registered, but not registered, under the 1940 Act.

***What types of transactions are conducted under Regulation S?***

There are several types of Regulation S offerings that U.S. or foreign issuers may conduct:

- a standalone Regulation S offering, in which the issuer conducts an offering of debt or equity securities solely in one or more non-U.S. countries;
- a combined Regulation S offering outside the United States and Rule 144A offering inside the United States; and
- Regulation S continuous offering programs for debt securities, including various types of medium-term note programs (these continuous offering programs may be combined with an issuance of securities to qualified institutional buyers ("QIBs") in the United States under Rule 144A).

Two other types of offerings also are permitted by Regulation S: (1) offerings made under specified conditions pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States and in accordance with that country's practices and documentation;[1] and (2) offerings of foreign government securities.

The Regulation S portion of any offering refers only to the portion of the offering that requires the offering participants to comply with Regulation S in order to benefit from the safe harbor. The offering itself also must comply with the requirements of the applicable non-U.S. jurisdictions and the requirements of any foreign securities exchange or other listing authority. A Regulation S-compliant offering could be combined with a registered public offering in the United States or an offering exempt from registration in the United States, as well as be structured as a public or private offering in one or more non-U.S. jurisdictions.

[1] For an offering of securities pursuant to an employee benefit plan, the laws, customary practices and documentation with respect to such employee benefit plan may be those of the European Union rather than of a country other than the United States. *See* Securities Act Rules Compliance and Disclosure Interpretations ("C&DI"), Question No. 277.03.

***What conditions must be satisfied to rely on Regulation S?***

Both the issuer and resale safe harbors of Regulation S are available to market participants only if (1) the offer or sale is made as part of an "offshore transaction" and (2) none of the parties make any "directed selling efforts" in the United States. In addition, offerings made in reliance on Rule 903 are subject to additional restrictions that are calibrated to the level of risk that securities in a particular type of transaction will flow back into the United States.

Rule 903 distinguishes three categories of transactions based on the type of securities being offered and sold, whether the issuer is domestic or foreign, whether the issuer is a reporting issuer under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and whether there is a "substantial U.S. market interest" or "SUSMI."

"Category 1" transactions are those in which the securities are least likely to flow back into the United States. Therefore, the only restrictions are that the transaction must be an "offshore transaction" and that there be no "directed selling efforts" in the United States.

"Category 2" and "Category 3" transactions are subject to an increasing number of offering and transactional restrictions for the duration of the applicable "distribution compliance period." "Distribution compliance period" is defined in Rule 902(f) generally as the period following the offering when any offer or sales of Category 2 or 3 securities must be made in compliance with the requirements of Regulation S in order to prevent the flow back of the offered securities into the United States. The period ranges from 40 days to six months for reporting issuers or one year for equity securities of non-reporting issuers.

For further discussion of transactions conducted under Categories 1, 2 and 3, *see* "Eligible Transactions" below.

***Can issuers conduct exempt or excluded offerings concurrently with Regulation S transactions?***

Yes. For purposes of determining whether Rule 903's general requirement for offshore transactions is met, a contemporaneous registered offering or exempt private placement in the United States will not be integrated with an offshore offering that otherwise complies with Regulation S. In fact, Regulation S contemplates that a private placement in the United States may be made simultaneously with an offshore public offering in reliance on the issuer safe harbor. Thus, offshore offerings and sales of securities made in reliance on Regulation S do not preclude the resale of those same securities made in reliance on Rule 144A or Regulation D, even if the resale occurs during the distribution compliance period. Conversely, in determining whether the requirements for a Section 4(a)(2) exempt private placement are met, offshore transactions made in compliance with Regulation S will not be integrated with domestic offerings that are otherwise exempt from registration under the Securities Act.

***What are the holding periods applicable to the sale of Regulation S securities?***

Securities cannot be offered or sold to a U.S. person during the distribution compliance period unless the transaction is registered under the Securities Act or exempt from registration. There is no distribution compliance period in connection with securities sold in

a Category 1 transaction. The distribution compliance period for Category 2 transactions involving both equity and debt securities and for Category 3 transactions involving debt securities is 40 days. The distribution compliance period for Category 3 offerings of equity securities is six months, if the issuer is a reporting company, and one year otherwise. The difference in the length of the distribution compliance period for reporting issuers and non-reporting issuers was implemented by the Securities and Exchange Commission (the "SEC") in 2008 in connection with amendments to Rules 144 and 145 of the Securities Act. Prior to these amendments, all Category 3 equity securities were subject to a one-year distribution compliance period.

Under Rule 902(f), the distribution compliance period begins on the later of (1) the date when the securities were first offered to persons other than distributors, or (2) the date of the closing of the offering, and continues until the end of the time period specified in the relevant provision of Rule 903. All offers and sales by a distributor of an unsold allotment are considered to be made during the distribution compliance period.

***What happens if an issuer reopens an issuance of securities during the distribution compliance period?***

If, for example, a Category 3 issuer were to reopen an issuance of debt securities during the 40-day distribution compliance period, then the distribution compliance period for the initial tranche of debt securities would have to be extended until the completion of the distribution compliance period for the new, or reopened, tranche. This is an inconvenience for the purchasers in the initial tranche, but is necessary because the clearing systems have no mechanism to distinguish between the debt securities of the initial tranche and the debt securities of the reopened tranche. Consequently, the ISIN number for the temporary global note for the initial tranche would be used for the reopened tranche.

If a Category 3 issuer were to reopen an initial tranche of debt securities after the completion of the 40-day distribution compliance period, then the reopened tranche would be represented by a temporary global note with a separate ISIN number from the debt securities of the initial tranche. As there would be different ISIN numbers for the two tranches, the distribution compliance period for the initial tranche would not be affected, and once the distribution compliance period of the reopened tranche is completed, then both tranches would be in the same permanent global note and be completely fungible.

We discuss the use of temporary global securities by Category 3 issuers below under "Conducting Regulation S Transactions—Debt Securities—*Category 3 Safe Harbor*."

***How is the distribution compliance period measured for different types of securities?***

Distribution compliance periods for continuous offerings of medium-term notes, warrants, convertible securities, and American depositary receipts ("ADRs") are measured differently:

1. Medium-Term Notes.

In the case of continuous offerings, the distribution compliance period is deemed to begin at the completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions. For continuous offering programs, such as medium-term note programs, the distribution compliance period is determined on a

tranche-by-tranche basis. As to any tranche, the distribution compliance period begins when the manager for the offering certifies the completion of the distribution of that tranche.

2. Warrants.

Securities underlying warrants are considered to be subject to a continuous distribution as long as the warrants remain outstanding, provided that the legending and certification requirements of Rule 903(b)(5), which are designed to limit the exercise of warrants by U.S. persons, are satisfied.[2] The distribution compliance period will commence upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person performing similar functions.

3. Guaranteed Securities.

Under Rule 903(b)(4), which applies to offerings of debt securities fully and unconditionally guaranteed as to principal and interest by the parent of the issuer of the debt securities, only the requirements of Rule 903(b) that are applicable to the offer and sale of the guarantee must be satisfied with respect to the offer and sale of the guaranteed debt securities. In addition, Rule 903(b)(4) would apply in situations where the parent company is the issuer (or a co-issuer) of the debt securities and one or more subsidiaries is a guarantor, and where the parent company is a guarantor and there are one or more subsidiaries which are also guarantors of the securities, in each case as long as the payment obligation of the parent company is full and unconditional.[3]

4. Convertible Securities.

In the case of convertible securities, both the convertible security and the underlying security are treated in the same manner. The distribution compliance period for both the convertible and the underlying security typically commences on the later of: (1) the date on which the offering of the convertible security closes, or (2) the date on which the convertible security was first offered to persons other than distributors in reliance on Regulation S. If, however, conversion of the convertible security is not exempt under section 3(a)(9) of the Securities Act, the convertible security will be treated in the same manner as a warrant.

5. ADRs.

ADRs are issued by U.S. depositary banks and each represents one or more shares, or a fraction of a share, of a foreign issuer. ADRs allow foreign equity securities to be traded on U.S. stock exchanges. Ownership of an ADR entitles one to the right to obtain the foreign share that the ADR represents, although most U.S. investors find it is easier to own just the ADR. An American depositary share ("ADS"), on the other hand, is the actual underlying foreign share that an ADR represents. The issuance of ADRs in exchange for the underlying foreign shares or the withdrawal of deposited ADRs during the distribution compliance period is not precluded by Regulation S.

[2] Issuers and distributors may use electronic procedures to obtain the certifications and agreements required under Rule 903(b)(5), as well as the certifications and agreements required under the Category 3 safe harbor. Such processes may be implemented by third parties and issuers and distributors may rely on those procedures to the same extent and in the same manner as when certifications and agreements are obtained in paper. *See* C&DI, Question No. 277.05.

[3] *See* C&DI, Question No. 277.06.

***Does Regulation S apply to resales of equity securities?***

Yes. Under Rule 905, equity securities acquired from the issuer, a distributor or their respective affiliates in a transaction subject to the conditions of Rules 901 or 903 are deemed to be restricted securities as defined in Rule 144 under the Securities Act (there is no similar rule for debt securities). Therefore, an offshore purchaser can resell such securities only in accordance with Regulation S (in which case a distribution compliance period may apply) or the registration requirements of the Securities Act. Any restricted securities or equity securities of a domestic issuer will continue to be restricted securities despite the fact that such securities were acquired in a resale transaction pursuant to Rules 901 or 904.

Rule 905 only applies to equity securities that, at the time of issuance, were those of a domestic issuer. A holder of restricted securities that were originally acquired from a foreign private issuer in a transaction described in Rule 144(a)(3) (other than Rule 144(a)(3)(v)) may resell those securities offshore under Rule 904 and without regard to Rule 905, even if the issuer no longer qualifies as a foreign private issuer at the time of resale.[4]

## Eligible Transactions

***What types of transactions are eligible for exclusion under Regulation S?***

1. Category 1 Transactions.

Category 1 transactions include offerings of:

- securities by foreign issuers who reasonably believe at the commencement of the offering that there is no SUSMI in certain securities;
- securities by either a "foreign issuer" or, in the case of non-convertible debt securities, a U.S. issuer, in an "overseas directed offering";
- securities backed by the full faith and credit of a foreign government or sovereign, including securities issued directly by a foreign government or sovereign or a political subdivision thereof and securities guaranteed by a foreign government or sovereign or political subdivision thereof;[5] and
- securities by foreign issuers pursuant to an employee benefit plan established under foreign law.

Since Category 1 securities are deemed the least likely to flow back into the United States, there are no additional precautionary limitations imposed in connection with Category 1 transactions by foreign issuers. For Category 1 transactions, there is no distribution compliance period during which time the securities may not be resold. However, issuers engaging in a Category 1 transaction that includes a Rule 144A tranche may choose to impose a 40-day distribution compliance period.

Under Rules 902(e) and 405, a "foreign issuer" refers to any issuer which is "a foreign government, a national of any foreign country or a corporation or other

[4] *See* C&DI, Question No. 279.01, January 23, 2015.

[5] Foreign governments or sovereigns or political subdivisions thereof also frequently register securities under Schedule B of the Securities Act. Schedule B offers a separate and generally more streamlined registration process for sovereign issuers compared with the process for domestic issuers and foreign private issuers, which are not entitled to use Schedule B. Schedule B requires a short list of disclosures compared with registration statements for other registered securities offerings.

organization incorporated or organized under the laws of any foreign country"; and under Rule 903, an "overseas directed offering" refers to the offering of securities of a foreign issuer directed into a single country other than the United States in accordance with that country's local laws and customary practices.[6]

2. Category 2 Transactions.

Category 2 transactions include offerings of:

- equity securities of a reporting foreign issuer;
- debt securities of a reporting U.S. or foreign issuer; and
- debt securities of a non-reporting foreign issuer.

The Category 2 safe harbor is available even if there is a substantial U.S. market interest in the securities. All Category 2 securities are subject to a 40-day distribution compliance period. For purposes of Category 2, debt securities include non-participating preferred stock and asset-backed securities.

In addition, persons relying on the Category 2 safe harbor must ensure (by whatever means they choose) that any non-distributor to whom they sell securities is a non-U.S. person and is not purchasing for the account or benefit of a U.S. person.[7] The Category 2 safe harbor also would not be available where offers and sales were made nominally to non-U.S. persons to evade the restrictions under the safe harbor.[8]

3. Category 3 Transactions

Category 3 is the residual safe harbor because it applies to all transactions not eligible for the Category 1 or Category 2 safe harbors. Category 3 transactions include:

- debt or equity offerings by non-reporting U.S. issuers;
- equity offerings by U.S. reporting issuers; and
- equity offerings by non-reporting foreign issuers for which there is a substantial U.S. market interest.

The risk of flow back into the United States is highest for these securities. Consequently, Category 3 has the most restrictions, and requires a six-month distribution compliance period for equity securities of reporting issuers and a one-year period for equity securities of non-reporting issuers. For purposes of Category 3, debt offerings include offerings of non-participating preferred stock and asset-backed securities.

In addition, persons relying on the Category 3 safe harbor must ensure (by whatever means they choose) that any non-distributor to whom they sell securities is a non-U.S. person and is not purchasing for the account or benefit of a U.S. person.[9] The Category 3 safe harbor also would not be available where offers and sales were made nominally to non-U.S. persons to evade the restrictions under the safe harbor.[10]

***What is an "offshore transaction"?***

Rule 902(h) provides that any offer, sale, and resale is part of an "offshore transaction" if:

- no offer is made to a person in the United States; and
- either (1) at the time the buy order is originated, the buyer is (or is reasonably

[6] An "overseas directed offering" may include an offering of securities in more than one country that is part of the European Union. *See* C&DI, Question No. 277.02.
[7] *See* C&DI, Question No. 277.04.
[8] *Id*.
[9] *Id*.
[10] *Id*.

believed to be by the seller) physically outside the United States, or (2) the transaction is, for purposes of Rule 903, executed on a physical trading floor of an established foreign securities exchange, or for purposes of Rule 904, executed on a "designated offshore securities market" and the seller is not aware that the transaction has been pre-arranged with a U.S. purchaser.

A buyer is generally deemed to be outside the United States if the buyer (as opposed to the buyer's agent) is physically located outside the United States. However, if the buyer is a corporation or investment company, the buyer is deemed to be outside the United States when an authorized agent places the buy order while physically situated outside the United States. Notwithstanding Rule 902(h)(1), offers and sales of securities specifically directed at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, are not considered to be offshore transactions. In addition, offers and sales of securities made to persons excluded from the definition of "U.S. person," even if physically present in the United States, are deemed to be made in offshore transactions.

Under Rule 902(b), "designated offshore securities market" refers to (1) various foreign securities exchanges, including, but not limited to, the London Stock Exchange, the Bourse de Luxembourg, the Tokyo Stock Exchange, and the Toronto Stock Exchange, and (2) any foreign securities exchange or non-exchange market designated by the SEC. Factors that the SEC may consider in determining whether to designate an offshore securities market include, among others:

- organization under foreign law;
- association with a generally recognized community of brokers, dealers, banks, or other professional intermediaries with an established operating history;
- oversight by a governmental or self-regulatory body;
- oversight standards set by an existing body of law;
- reporting of securities transactions on a regular basis to a governmental or self-regulatory body;
- a system for exchange of price quotations through common communications media; and
- an organized clearance and settlement system.

***What are "directed selling efforts"?***

The Rule 903 issuer safe harbor is only available to issuers, distributors, affiliates and any persons acting on their behalf if they make no directed selling efforts within the United States or to U.S. persons. "Directed selling efforts" is defined by Rule 902(c) as "any activity undertaken for the purpose of, or that could be reasonably expected to result in, conditioning the U.S. market for the relevant securities." This applies during the offering period as well as during the distribution compliance period. Violation of the prohibition against directed selling efforts by any of these parties precludes reliance on the safe harbor. However, selling efforts could still be initiated from the United States, provided that these efforts are directed or effected abroad.

The following activities constitute "directed selling efforts" targeted at U.S. persons:

- advertising the offering in publications with a "general circulation" in the United States

(which includes any publication printed primarily for distribution in the United States or that has had on average a circulation of at least 15,000 copies per issue within the prior twelve months);

- mailing printed materials to U.S. investors;
- conducting promotional seminars in the United States;
- placing advertisements with radio or television stations that broadcast in the United States; and
- making offers directed at identifiable groups of U.S. citizens in a foreign country, such as members of the U.S. military.

Rule 902 specifically excludes certain advertisements and activities from the definition of "directed selling efforts," including the following:

- an advertisement required to be published by U.S. or foreign laws, regulatory or self-regulatory authorities, where the advertisement contains no more information than that which is legally required and includes a legend disclosing that the securities have not been registered under the Securities Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to a Category 2 or 3 offering) absent registration or reliance on an applicable exemption from the registration requirements of the Securities Act;
- a communication with persons excluded from the Rule 902(k) definition of U.S. person;
- a tombstone advertisement in a publication having less than 20% of its worldwide circulation in the United States that contains the following:
  - a legend disclosing that the securities have not been registered under the Securities Act, and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to a Category 2 or 3 offering) absent registration or an applicable exemption from registration; and
  - limited permitted information, including: (1) the issuer's name and a brief indication of its business; (2) the amount, title, and price of the securities sold; (3) the yield of any debt securities with a fixed interest rate; (4) the name and address of the managing underwriters; (5) the dates on which sales commence and conclude; and (6) whether the securities are or were offered by rights issued to security holders, and if so, the class of securities entitled to subscribe, the subscription ratio, record date, any dates upon which the rights were issued and expired, and the subscription price.
- bona fide visits and tours of real estate facilities in the United States by prospective investors;
- quotations of a foreign broker-dealer distributed by a third-party system that primarily distributes this information in foreign countries, provided that no security transaction can be executed through the system between broker-dealers and persons in the

United States, and no communication with U.S. persons is initiated;

- a notice in accordance with Rule 135 or 135c of the Securities Act that an issuer intends to make a registered or unregistered offering of its securities (which is similar to the permitted tombstone advertisement discussed above, and contains a legend and limited information about the issuer and the offering);
- providing journalists with access to issuer meetings held outside the United States, or providing written press or press-related materials released outside the United States in compliance with Rule 135e of the Securities Act;
- isolated limited contact within the United States;
- routine activities conducted in the United States unrelated to selling efforts, including normal communications to shareholders; and
- publication and distribution of research reports by a broker or dealer under Rule 138(c) or 139(b) of the Securities Act.[11]

Because of the fine line demarcating "directed selling efforts" from legitimate offering activities in certain contexts, further discussion is warranted for Internet postings, foreign press-related activity, research reports released by broker-dealers, offering notices, and advertising.

[11] Rules 138(c) and 139(b) of the Securities Act apply to Exchange Act reporting companies and foreign private issuers, but not foreign governments or sovereigns or political subdivisions thereof.

***What is a "U.S. person"?***

Pursuant to Rule 902(k)(1), the following are "U.S. persons":

- any natural person resident in the United States;
- any partnership or corporation organized or incorporated under the laws of the United States;
- any estate of which any executor or administrator is a U.S. person;
- any trust of which any trustee is a U.S. person;
- any agency or branch of a U.S. person located outside the United States;
- any non-discretionary or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;
- any discretionary or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated or, if an individual, resident in the United States; and
- any partnership or corporation if (1) organized or incorporated under the laws of any foreign jurisdiction, and (2) formed by a U.S. person principally for the purpose of investing in securities not registered under the Securities Act, unless it is organized or incorporated and owned by accredited investors under Rule 501(a) of the Securities Act who are not natural persons, estates, or trusts.

Rule 902(k)(2) explicitly excludes the following from the definition of "U.S. person":

- any discretionary or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated or, if an individual, resident in the United States;
- any estate of which any professional fiduciary acting as executor or administrator is a U.S. person, if (1) an executor or administrator who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate, and (2) the estate is governed by foreign law;
- any trust of which any professional fiduciary acting as trustee is a U.S. person, if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settler if the trust is revocable) is a U.S. person;
- an employee benefit plan established and administered in accordance with the laws, customary practices, and documentation of a country other than the United States;
- any agency or branch of a U.S. person located outside the United States if (1) the agency or branch operates for valid business reasons; and (2) the agency or branch is engaged in the business of insurance or banking, and is subject to substantive insurance or banking regulation in the jurisdiction where it is located; and
- such international organizations (and their agencies, affiliates and pension plans) as the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, and the United Nations.

In addition, contacts with certain of the non-U.S. persons listed above, even if made within the United States, are still not considered to be "directed selling efforts."

***Would a non-discretionary account that is held in the United States by a non-U.S. person be considered not to be a U.S. person?***

Rule 902(k) of Regulation S does not address this fact pattern. However, there is reason to believe that an offer or sale of a security to a non-U.S. person through a non-discretionary account located in the United States would be an offshore transaction within the meaning of Regulation S.

For fiduciary accounts, Regulation S generally treats the person with investment discretion as the buyer; therefore, the status of that person governs. If a non-U.S. person is making the investment decision for the account and at the time that the buy order was originated, the buyer was outside of the United States, one could take the view that the account is a non-U.S. person and the transaction is an offshore transaction.[12]

## Information Requirements

***What reasonable steps must the reseller take to make the buyer aware that the reseller may rely on Regulation S in connection with the resale?***

1. Offering Memorandum.

If the offering is a standalone Regulation S offering (or a Regulation S tranche of a combined

[12] Release No. 33-6863 (Apr. 24, 1990) at III(B)(2)(b)(1)(a).

Rule 144A/Regulation S offering), and the securities are either Category 2 or Category 3, the offering memorandum (which is similar to a prospectus) and any other offering materials and documents (other than press releases) used in connection with offers and sales prior to the expiration of the applicable distribution compliance period must include:

- statements to the effect that the securities have not been registered under the Securities Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are registered under the Securities Act, or an exemption from such registration requirements is available; and
- for equity securities of domestic issuers, an additional statement that hedging transactions involving those securities may not be conducted unless in compliance with the Securities Act.

In addition, for Category 3 equity securities:

- the offer or sale, if made prior to the expiration of the one-year distribution compliance period (six months for a reporting issuer), may not be made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and
- the offer or sale, if made prior to the expiration of the applicable one-year or six-month distribution compliance period, is made pursuant to the following conditions:
- 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 any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Securities Act; and
- the purchaser agrees to resell such securities only in accordance with the provisions of Regulation S, pursuant to registration under the Securities Act, or pursuant to an available exemption from registration; and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the Securities Act.

The purchaser's certifications are set forth in the offering memorandum and in most cases, a purchaser is deemed to have made such representations when it purchases beneficial interests in the Regulation S global security.

The offering memorandum for a combined Rule 144A/Regulation S offering contains extensive disclosure regarding resale limitations and transfer restrictions. If the securities will be held in book-entry format, as is customary, the disclosure also will include information regarding:

- the book-entry process and the forms of global securities;
- the delivery of the securities;
- the depositary procedures of DTC, Euroclear and Clearstream as holders of the book-entry certificates, particularly with respect to payments and any voting rights relating to the securities;
- the exchange of global notes for certificated notes, which is required under specified circumstances, and generally the prohibition

on the exchange of certificated notes for beneficial interests in the global notes;

- exchanges between the Rule 144A security and any Regulation S security;
- same day settlement and payment procedures; and
- any registration rights, including discussion of any registered exchange offer.

2. Legend.

Regulation S requires that the certificates for the securities of a domestic issuer contain a legend to the effect that transfer is prohibited except in accordance with the provisions of Regulation S, pursuant to registration under the Securities Act, or pursuant to an available exemption from registration; and that hedging transactions involving those securities may not be conducted unless in compliance with the Securities Act. A sample Rule 903 legend would read: "These securities will be offered only outside of the United States to non-U.S. persons, pursuant to the provisions of Regulation S of the U.S. Securities Act of 1933, as amended. These securities will not be registered under the Securities Act, and may not be offered or sold in the United States absent registration or an applicable exemption from the registration requirements."

The issuer of a Regulation S security also is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of Regulation S, pursuant to registration under the Securities Act, or pursuant to an available exemption from registration. However, the SEC recognized that securities of foreign issuers are often issued in bearer form and that foreign law may prevent the issuer from refusing to register securities transfers. Therefore, in such cases, Regulation S permits an issuer to implement "other reasonable procedures" (such as the legends described above) to prevent any transfer of the securities not made in accordance with the provisions of Regulation S.

3. Confirmation

Regulation S also requires each distributor selling securities to a distributor, a dealer, or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day distribution compliance period in the case of debt securities, or the applicable one-year or six-month distribution compliance period in the case of equity securities, to send a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

## Conducting Regulation S Transactions

***How are Regulation S transactions structured?***

1. Debt Securities

*(A) Category 1 Safe Harbor*

The issuer safe harbor is available for debt offerings if a foreign issuer reasonably believes at the commencement of the offering that there is no SUSMI in the debt securities. A SUSMI in debt securities exists if:

- the issuer's debt securities are held of record by 300 or more U.S. persons, and
- U.S. persons hold of record at least 20% and at least $1 billion or more of the principal amount of debt securities, plus the greater of the

liquidation preference or par value of non-participating preferred stock, and the principal amount or balance of asset-backed securities.

If there is no SUSMI in a foreign issuer's debt securities, the issuer need only comply with the general Regulation S requirements (*i.e.*, offshore transaction and no directed selling efforts).

Alternatively, foreign issuers of debt securities (and U.S. issuers of non-convertible debt securities) may rely on the Category 1 safe harbor if the transaction qualifies as an overseas directed offering. An offering of non-convertible debt securities of a U.S. issuer must similarly be directed into a foreign country in accordance with that country's local laws and customary practices, and the securities must be non-U.S. dollar denominated or linked securities in order to qualify as an overseas directed offering. In addition, foreign issuers offering debt securities backed by the full faith and credit of a foreign government or that are offered pursuant to an employee benefit plan may rely on the Category 1 safe harbor, provided that the offers and sales are made as part of an offshore transaction and no directed selling efforts are made.

*(B) Category 2 Safe Harbor*

The issuer safe harbor is available to foreign issuers (both reporting and non-reporting) and reporting U.S. issuers of debt securities, subject to compliance with the offering and transactional restrictions for the applicable distribution compliance period.

The following offering restrictions must be observed by the issuer, as well as by its affiliates and any distribution participants:

- each distributor must agree in writing to the following:
  - all offers and sales of the securities prior to the expiration of a 40-day distribution compliance period must be made in accordance with Rule 903, pursuant to registration under the Securities Act or to an exemption from registration; and
  - for any offers and sales of equity securities of U.S. issuers, not to engage in hedging transactions with respect to such securities prior to the expiration of the distribution compliance period, unless in compliance with the Securities Act;
- all offering materials and documents (except press releases) used in connection with offers and sales of the securities prior to the expiration of the distribution compliance period must include legends in specified places in the prospectus or offering circular and in advertisements disclosing that the securities have not been registered under the Securities Act and may not be offered or sold in the United States or to U.S. persons (except distributors) absent registration under the Securities Act or in reliance on an exemption from registration; and
- the offering materials and documents relating to equity securities of U.S. issuers must state that hedging transactions involving such securities may not be conducted unless in compliance with the Securities Act.

An issuer must also comply with the following transactional restrictions:

- no offer or sale is made during the distribution compliance period to (or for the account or benefit of) a U.S. person, except for distributors; and
- each distributor selling securities to a distributor, a dealer, or a person receiving a selling concession, fee or other remuneration with respect to the securities sold, prior to the expiration of the distribution compliance period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales.

Non-compliance with the offering restrictions renders the safe harbor unavailable to all distribution participants. By contrast, noncompliance with the transactional restrictions renders the safe harbor unavailable only for the party (and its affiliates and persons acting on their behalf) that failed to comply with the restrictions.

*(C) Category 3 Safe Harbor*

The issuer safe harbor is available to non-reporting U.S. issuers of debt securities, provided that the debt securities are not offered or sold to (or for the benefit of) a U.S. person (other than a distributor) during the 40-day distribution compliance period, except pursuant to the registration requirements of the Securities Act or an exemption from registration. Issuers must comply with the offering and transactional restrictions applicable to Category 2 offerings and Rule 903(b)(3)'s three additional transactional restrictions during the distribution compliance period:

- the securities may not be offered or sold to (or for the account or benefit of) a U.S. person other than a distributor;
- the securities must be represented by a temporary global security that cannot be exchanged for definitive securities (1) by distributors until the end of the distribution compliance period; and (2) for persons other than distributors, until certification of beneficial ownership of the securities by non-U.S. persons (or by any U.S. person who purchased the securities in an exempt transaction); and
- any distributor selling securities to another distributor or to a dealer or any person receiving a selling concession or similar compensation must send confirmation to the purchaser before the end of the distribution compliance period stating that the purchaser is subject to the same restrictions on offers and sales applicable to a distributor.

2. Equity Securities

Regulation S uses the definition of "equity security" set forth in Rule 405 of the Securities Act. Under Rule 405, "equity security" refers to:

- any stock or similar security, certificate of interest or participation in any profit sharing agreement, pre-organization certificate or subscription, transferable share, voting trust certificate or certificate of deposit for an equity security, limited partnership interest, interest

in a joint venture, or certificate of interest in a business trust;

- any security future on any such security;
- any security convertible, with or without consideration into such a security, or carrying any warrant or right to subscribe to or purchase such a security;
- any such warrant or right; or
- any put, call, straddle, or other option or privilege of buying such a security from or selling such a security to another without being bound to do so.

The provisions of the issuer safe harbor that are specific to offerings of equity securities are summarized below.

*(A) Category 1 Safe Harbor*

The Category 1 safe harbor is available for equity offerings if a foreign issuer reasonably believes at the beginning of the offering that there is no SUSMI in the equity securities. A SUSMI in equity securities exists if, during the shorter of the issuer's prior fiscal year or the period since incorporation, either:

- the U.S. securities exchanges and inter-dealer quotation systems in the aggregate, constituted the single largest market for a class of the issuer's securities; or
- at least 20% of all trading in a class of the issuer's securities occurred on the facilities of U.S. securities exchanges and inter-dealer quotation systems, and less than 55% of such trading occurred on the facilities of the securities markets of a single foreign country.

If there is no SUSMI in a foreign issuer's equity securities, the issuer need only comply with the general Regulation S requirements to make offers and sales.

*(B) Category 2 Safe Harbor*

The Category 2 safe harbor is only available for equity offerings by a reporting foreign issuer. Even if there is a SUSMI in the securities, reporting foreign issuers who implement the Category 2 offering and transactional restrictions for the distribution compliance period may rely on the safe harbor.

*(C) Category 3 Safe Harbor*

The Category 3 safe harbor is available to any issuer of equity securities who, for the duration of a distribution compliance period of one year (or six months, if the issuer is a reporting company), implements and complies with the Category 2 offering and transactional restrictions and the following additional restrictions:

- the purchaser of the securities (except a distributor) must either certify (1) that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person; or (2) that it is a U.S. person who purchased securities in a transaction under an applicable exemption from registration under the Securities Act;
- the purchaser of the securities must agree to resell the securities only in accordance with Regulation S, pursuant to the registration requirements of the Securities Act or in reliance on an exemption from registration;
- the purchaser of the securities must agree not to engage in hedging transactions unless in compliance with the Securities Act;

- the securities of a U.S. issuer must contain a legend stating that (1) the transfer of the securities is prohibited unless made in accordance with Regulation S, pursuant to the registration requirements of the Securities Act or in reliance on an exemption from registration; and (2) hedging transactions involving those securities must be made only in compliance with the Securities Act;
- the issuer must be required by contract or by its charter, bylaws or similar document to refuse to register any transfer made in violation of Regulation S unless the securities are in bearer form or foreign law prevents the issuer from refusing to register transfers. In the latter two instances, the issuer must implement other reasonable procedures in order to prevent any transfer of securities not made in accordance with Regulation S. For example, an issuer may include a legend on the securities stating that transfers not made in accordance with Regulation S, the registration requirements of the Securities Act or in reliance on an exemption from registration, are prohibited; and
- any distributor selling securities to another distributor or to a dealer or any person receiving a selling concession or similar compensation must send confirmation to the purchaser before the end of the distribution compliance period stating that the purchaser is subject to the same restrictions on offers and sales applicable to a distributor.

***What type of documentation is typically involved in a Regulation S offering of debt securities?***

Regulation S offerings are typically combined with Rule 144A offerings. The documentation typically used in both debt and equity Rule 144A transactions, with or without a Regulation S tranche, is similar to that used in registered offerings, including:

- an offering memorandum, which is similar to a prospectus;
- a purchase agreement between the issuer and the initial purchasers, which is similar to an underwriting agreement;
- an agreement among underwriters or syndication agreement;[13]
- in some cases, a registration rights agreement between the issuer and the initial purchasers;
- in a debt offering, an indenture;
- comfort letters from the issuer's auditors; and
- closing documentation including "bring down" comfort letters, legal opinions, a "10b-5" or "negative assurance" letter from legal counsel, and closing certificates.

As in a public registered offering, the issuer will work with its counsel, investment bank, investment bank's

[13] Many broker-dealers are already party to a "master agreement among underwriters" that governs the relationship among syndicate members. Therefore, a deal-specific agreement among underwriters typically is not required. Combined offerings that are syndicated to a substantial number of non-U.S. broker-dealers may use a number of syndication agreements, including agreements among underwriters (on a per syndicate level), intersyndicate agreements and transaction-specific dealer agreements. The International Primary Market Association's Standard Form Agreement Among Managers is sometimes used in Regulation S debt offerings syndicated primarily to London-based broker-dealers.

counsel and independent accountants to prepare the necessary documents.

In the case of a Rule 144A offering that is combined with a Regulation S offering, the Regulation S offering may be conducted using documents that are based on the country-specific practices of the relevant non-U.S. jurisdiction or jurisdictions. However, the disclosure documents in such a case generally will contain the same substantive information so that investors have the same "disclosure package."

U.S. issuers commonly use U.S. style underwriting documents in offerings targeted at U.S. investors. However, offerings by non-U.S. issuers or led by non-U.S. financial intermediaries may use underwriting documentation that follows local practices, particularly if the Rule 144A tranche is small.

3. Offering Memorandum.

Regardless of the type of issuer, if the Regulation S tranche is an offering of Category 2 or Category 3 securities, all participants (including the issuer and its affiliates and persons acting on behalf of either) are responsible for ensuring that all offering materials and documents other than press releases used in connection with the offer or sale of securities during the distribution compliance period bear legends stating that the securities have not been registered under the Securities Act and may not be offered or sold in the United States or to a U.S. person, absent registration under the Securities Act or in reliance on an exemption therefrom. Moreover, in the case of equity securities offered by U.S. issuers, the legends must also state that hedging transactions may not be conducted except in compliance with the Securities Act. These legends must appear both on (or inside) the cover page and in the underwriting section of any offering memorandum used in connection with the offer or sale of securities (if the legend is on the front page of the offering memorandum, it may be printed in summary form). The legends must also be printed in any advertisement made or issued by the issuer, any distributor, and their respective affiliates or representatives. In addition, because of the complexity of clearance and settlement procedures in global offerings, an offering memorandum usually includes extensive clearance and settlement discussions.

Once the preliminary offering memorandum is prepared, unlike a public offering, it is not subject to SEC review and the only subsequent changes are to disclose changes in the issuer's business, financial condition or other circumstances and to provide the final terms of the securities and the offering.

4. Purchase Agreement

In a combined Rule 144A/Regulation S transaction, a purchase agreement will contain standard representations and warranties related to the issuer, the securities offered, the business and other representations designed to supplement the due diligence investigation of the initial purchasers. In addition, the agreement will contain representations, warranties and covenants specific to the Rule 144A/Regulation S offering, including:

- the issuer will not use "directed selling efforts" as defined under Regulation S, and if the securities offered are Category 2 or 3 securities, it has implemented the necessary Regulation S offering restrictions;
- the issuer has not engaged in general solicitation or general advertising (unless the issuer chooses to use general solicitation or general advertising, which are now permitted

for Rule 144A offerings so long as the securities are sold to a QIB or to a purchaser that the seller and any person acting on the seller's behalf reasonably believes is a QIB);

- the offered securities meet the eligibility requirements under Rule 144A;
- the issuer is not an open-end investment company, unit investment trust or face-amount certificate company; and
- if the securities are debt securities or ADRs, the issuer will not resell any securities in which it or any of its affiliates has acquired a beneficial ownership interest.

In addition, if the offering involves common equity, either directly or upon conversion of preferred stock or debt securities or upon exercise of warrants, the initial purchaser may require the issuer and even its senior management or other shareholders to "lock up" their common stock.

Unlike an underwriting agreement for a public offering, the initial purchasers in a combined Rule 144A/Regulation S transaction will also make limited representations, warranties and covenants. The initial purchasers, as "distributors" (within the meaning of Regulation S) will also represent, warrant and covenant that they will offer and sell securities throughout the applicable distribution compliance period exclusively in compliance with either Regulation S or any other available exemption from the Securities Act registration requirements, or pursuant to a registration statement filed with the SEC. If the transaction is an equity offering by a U.S. issuer, the distributor also must agree not to engage in any hedging transactions involving Category 2 or Category 3 securities during the distribution compliance period, unless in compliance with the Securities Act.

If there is a standalone Regulation S offering (or the combined offering is structured to permit separate Rule 144A and Regulation S syndicates), the agreement between the financial intermediaries and the issuer may be very dissimilar to a U.S. style purchase (or underwriting) agreement.

5. Indenture and the Trust Indenture Act.

Because Rule 144A and Regulation S debt offerings are exempt from the registration requirements of the Securities Act, the indenture will not need to be qualified under the Trust Indenture Act of 1939, as amended (the "Trust Indenture Act"). However, these debt offerings, particularly of U.S. issuers contemplating a subsequent registered exchange offering, should be issued under an indenture that is qualifiable under the Trust Indenture Act. When the registration statement is subsequently filed, the indenture must then be qualified under the Trust Indenture Act. In the ordinary course, issuers and initial purchasers choose trustees that can comply with the requirements of the Trust Indenture Act, but such trustee qualification (on Form T-1) also is required when the registration statement is subsequently filed. Although it is standard to use an indenture, if the debt will not be registered subsequently with the SEC (which usually is the case in a standalone Regulation S offering), a fiscal and paying agency agreement may be used that covers substantially the same matters.

***What is the due diligence process for initial purchasers in connection with a Regulation S offering?***

While it is generally believed that Rule 144A and Regulation S offerings are not subject to the liability

provisions of Section 11 or Section 12(a)(2) of the Securities Act, thereby limiting the potential need to establish a formal "due diligence" defense, the issuer and the initial purchasers could, under some circumstances, be subject to liability for rescission under Section 12(a)(1), as well as be subject to private rights of action under Section 10(b) of the Exchange Act and Rule 10b-5 for material misstatements or omissions. Thus, a thorough due diligence investigation by the initial purchasers and their counsel generally will result in better disclosure and a lower risk of liability or potential liability for material misstatements or omissions, satisfy the initial purchasers' internal risk management requirements and protect their institutional reputations.

In a predominately Regulation S offering with a small Rule 144A tranche, non-U.S. offering participants may proceed with less diligence. However, if an initial purchaser is committing to purchase all the securities and is requiring negative assurance letters from counsel, this seems unlikely. Limited due diligence, therefore, is more likely in standalone Regulation S offerings that do not involve firm commitments from the financial intermediaries.

The due diligence process can be divided into two parts: (1) financial, business and management due diligence, and (2) documentary, or legal, due diligence. The actual extent of the diligence required may vary based on:

- the nature of the issuer, including whether the issuer is a newer entity, a well-established company (whether public or not) or a U.S. reporting company;
- the business of the issuer and its current risk profile; and
- the securities to be offered, whether investment grade or high yield debt securities (and the ratings, if any, of similar securities of the issuer) or preferred or common equity.

An issuer, its investment banks and their respective counsel may negotiate the expected extent of the diligence. For example, in a large high yield debt offering, the extent of the due diligence will mirror that of a public offering.

In order to help establish a due diligence defense, market practice requires the initial purchasers in Rule 144A and Regulation S offerings to condition the offerings upon receipt of documents similar to those used in an underwritten offering, including a comfort letter, legal opinions and officer certificates, as discussed above.

## Liability Issues

Failure to comply with the conditions of Regulation S may trigger liability under certain provisions of the Securities Act, the Exchange Act, and applicable state blue sky laws.

***Does the failure to comply with the conditions of Regulation S trigger Securities Act liability?***

1. Section 12 Liability

Section 12 of the Securities Act imposes liability on any person who offers or sells a security in violation of Section 5 or by means of a prospectus or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not

misleading. Section 12 does not require reliance on the misstatement or omission, or even the receipt of a prospectus. Liability under Section 12 may be for rescission, if the security is still owned by the defendant, or for damages, if the security is no longer owned by the defendant. A defense may be sustained under Section 12(a)(2) if the person selling the security can demonstrate that "he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission." Despite the fact that the statute does not explicitly require the defendant to actually exercise reasonable care, the "reasonable care" standard under Section 12(a)(2) appears to be the same as the Section 11 "reasonable investigation" standard for the "due diligence" defense.[14] Therefore, the defendant must establish that it performed due diligence in order to sustain the defense.

The U.S. Supreme Court has ruled that the term "prospectus" for purposes of Section 12(a)(2) has the same meaning as it does under Section 10.[15] Since the prospectus requirements under Section 10 are only triggered if an offering is required to be registered under Section 5, transactions exempt from the registration requirements of Section 5 pursuant to Section 4 are not subject to the liability provisions of Section 12(a)(2).[16] As a result, private placements of securities that are exempt from the registration requirements of Section 5 pursuant to Section 4, as well as Rule 144A and Regulation S offerings, are not subject to Section 12(a)(2) liability. However, an offering made in reliance on Regulation S, but which fails to comply with the applicable Regulation S safe harbors, may still be subject to the liability provisions of Section 12(a)(2).

[14] *See Sanders v. John Nuveen & Co.*, 619 F.2d 1222 (7th Cir. 1980).
[15] *Gustafson v. Alloyd Co., Inc.*, 516 U.S. 561 (1995).
[16] *Id*.

2. Section 11 Liability

Under Section 11 of the Securities Act, liability may arise from misstatements or omissions in a registration statement at the time it became effective. However, since Regulation S provides an exclusion from the registration requirements of Section 5, Regulation S offerings do not subject the issuer and initial purchasers to liability under Section 11. Accordingly, the initial purchasers are not entitled to the "due diligence" defense that may be established under Section 11. However, underwriters often choose to conduct due diligence comparable to that conducted for a registered offering, particularly if the offering is a combined Rule 144A/Regulation S offering.

***Does failure to comply with the conditions of Regulation S trigger Exchange Act liability?***

Regulation S does not shield a transaction from the extraterritorial application of anti-fraud provisions or limit compliance with Exchange Act registration requirements or broker-dealer registration requirements. However, in 2010, the U.S. Supreme Court limited the territorial application of Rule 10b-5 by holding that Section 10(b) of the Exchange Act covers only: (1) transactions in securities listed on domestic exchanges, and (2) domestic transactions in other securities.[17] "Foreign-cubed" cases – foreign issuers, foreign plaintiffs and foreign transactions – may no longer be brought in the U.S. courts. One federal appeals court has held that to be liable for "domestic transactions in other securities," a "plaintiff must allege facts suggesting that irrevocable liability was incurred

[17] *See Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

or title was transferred within the United States."[18] Another federal district court has held that sponsored, but unlisted, ADRs in the United States could nevertheless constitute a "domestic transaction" under *Morrison*.[19] Notwithstanding the above, there continue to be cases exploring the limitations of *Morrison*.[20]

***Does failure to comply with the conditions of Regulation S trigger liability under State Blue Sky Laws?***

Preliminary Note 4 to Regulation S expressly states that Regulation S does not provide a safe harbor from any applicable state blue sky laws. Many state securities laws are based on Section 414 of the Uniform Securities Act, which asserts that state jurisdiction over transactions encompasses those made in the state, including transactions in which the offer originates from the state. State securities laws are particularly likely to apply to Regulation S offerings by U.S. issuers. Many state securities laws also contain a civil liability provision substantially similar to Section 12 of the Securities Act. As a result, Regulation S transaction documents often contain, in the representations and warranties section, an acknowledgement by the issuer that the securities are exempt from or not subject to the registration requirements of any state blue sky laws.

[18] *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, No. 11-0221-cv, Slip. Op. (2d Cir. Mar. 1, 2012).

[19] *See In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, MDL No. 2672 CRB (JSC) (Jan. 4, 2017).

[20] For more information regarding the limitations of *Morrison*, *see* our "Frequently Asked Questions about Foreign Private Issuers," available at: https://media2.mofo.com/documents/100521faqforeignprivate.pdf.

## Miscellaneous Issues

***Are FINRA filing requirements applicable to Regulation S transactions?***

No. Regulation S offerings are beyond the scope of FINRA filing requirements and rules governing conflicts of interests.

***May an issuer publish a notice about a proposed Regulation S transaction?***

Placing an advertisement containing a reference to a Regulation S offering in a publication with general circulation in the United States falls squarely within the meaning of "directed selling efforts." A publication of "general circulation" in the United States includes any publication printed primarily for distribution in the United States or that has had on average, a circulation of at least 15,000 copies per issue, within the prior 12 months. Certain types of advertising are excluded from the definition of "directed selling efforts," including tombstone advertisements.

***May issuers use a Rule 135c-compliant press release to announce a Regulation S offering?***

Yes, issuers may use a Rule 135c-compliant press release to announce a Regulation S offering. Under Rule 135c of the Securities Act, an announcement that an issuer proposes to make, is making or has made an unregistered offering will not be deemed to be an offer of securities, for purposes of Section 5 of the Securities Act, if, among other things, the announcement contains certain limited information regarding the offering (*e.g.*, the name of the issuer, the basic terms and size of the offering, the timing of the offering, a brief statement of the manner and purpose of the offering and

statements that the securities have not been registered) and is not used for the purpose of conditioning the market in the United States for the offered securities. A Rule 135c-compliant press release is not a "directed selling effort" and therefore will not affect the availability of the Regulation S safe harbor.

In addition, for Regulation S offerings with a Rule 144A tranche, the SEC has clarified that general solicitation and general advertising in connection with a Rule 144A offering will not be viewed as "directed selling efforts" in connection with a concurrent Regulation S offering. This is particularly relevant because general solicitation and general advertising are now permitted for Rule 144A offerings (so long as the securities are sold to a QIB or to a purchaser that the seller and any person acting on behalf of the seller reasonably believes is a QIB). As a result, issuers are now permitted to broadly disseminate a press release regarding a proposed or completed Rule 144A offering free of the prior restrictions on the types of permitted information under Rule 135c.

Offering participants should keep in mind that Rule 135c is a non-exclusive safe harbor, and offering-related press releases may be able to satisfy a different safe harbor, such as Rule 135e under the Securities Act in respect of any offshore activities for any Regulation S tranche. Under Rule 135e, foreign issuers, selling security holders or their representatives will not be deemed to offer any security for sale, for purposes of Section 5 of the Securities Act, by virtue of providing any journalist with access to any of the following:

- its press conferences held outside of the United States;
- meetings with the issuer or selling security holder representatives conducted outside of the United States; or
- written press-related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if:
  - the present or proposed offering is not being, or will not be, conducted solely in the United States;
  - access is provided to both U.S. and foreign journalists; and
  - any written press-related materials pertaining to transactions in which any of the securities will be or are being offered in the United States satisfy the requirements of Rule 135e(b) with respect to legends and certain other information.

***Why are Regulation S offerings sometimes considered "backdoor IPOs"?***

Rule 144A and Regulation S may be used by non-reporting issuers, both domestic and foreign, for common stock offerings that are sometimes referred to as "backdoor IPOs." However, a backdoor IPO would not be available to a foreign issuer that has either its ordinary shares or ADRs for its ordinary shares listed on a securities exchange or quoted because the ordinary shares and ADRs are considered to be of the same class and fungible within the meaning of Rule 144(d)(3)(i). The benefits of a Rule 144A/Regulation S common stock offering compared to a registered offering include:

- more flexible disclosure requirements;

- no liability for a registration statement under Section 5 of the Securities Act (although the anti-fraud provisions are still applicable);
- lower costs;
- limited ongoing reporting obligations; and
- none of the corporate governance provisions of the federal securities laws and the exchanges and related liabilities, particularly those of the Sarbanes-Oxley Act.

However, one perceived drawback of a Rule 144A/Regulation S offering is the ability of the secondary Rule 144A/Regulation S trading market to absorb a large volume of equity securities. Historically, the valuation discount because of this lack of liquidity was not sufficiently offset by the benefits of the Rule 144A/Regulation S offering and the public company costs avoided. In addition, a non-reporting issuer that intends to rely on Rule 144A/Regulation S for offerings of its equity securities must monitor the number of its equity holders in order not to exceed the shareholder threshold of Section 12(g) of the Exchange Act and related rules amended by Titles V and VI of the Jumpstart Our Business Startups (JOBS) Act enacted in April 2012. Title V amended Section 12(g)(1)(A) of the Exchange Act to provide that an issuer will become subject to Exchange Act requirements: within 120 days after the last day of its first fiscal year ended on which the issuer has total assets in excess of $10 million and a class of equity security (other than an exempted security) held of record by either (i) 2,000 persons, or (ii) 500 persons who are not accredited investors. Title VI added a new Section 12(g)(1)(B) to provide that, in the case of an issuer that is a bank or a bank holding company as defined in Section 2 of the Bank Holding Company Act of 1956, the issuer will become subject to Exchange Act requirements, not later than 120 days after the last day of its first fiscal year ended after the effective date of this amended section, on which the issuer has total assets exceeding $10 million and a class of equity security (other than an exempted security) held of record by 2,000 or more persons. (Congress enacted similar provisions for savings and loan holding companies in December 2015.)

***How do Category 3 offerings comply with the EU regulation requiring settlement in book-entry form?***

As discussed above, Regulation S requires Category 3 issuers to place restrictive legends on their share certificates. As a result, historically, most U.S. issuers selling their equity securities in Regulation S offerings used only physical stock certificates to settle issuances and transfers. However, in 2014, the European Union adopted the "Regulation on Central Securities Depositories," which requires transactions taking place on EU-regulated markets to settle in book-entry form through a central securities depository. These markets include key targets of offerings for U.S. issuers, such as the London Stock Exchange's Main Market, and the AIM, a smaller market operated by the LSE for smaller and medium-sized companies.

In order to make it possible for U.S. issuers to comply with these rules, the CREST electronic clearing system amended its operating manual in 2015 to contemplate the settlement of Category 3 securities. The updated procedures are designed to incorporate the legending, certification and stop transfer requirements of Category 3. CREST members are also responsible for ensuring that the Regulation S transfer restrictions are observed.

To facilitate the issuance and settlement of these securities, the CREST system now:

- sets forth identifiers in the security type, security abbreviation and security description fields designed to inform investors that a security is a category 3 security;
- enables users to access the restrictive legends required by Regulation S; and
- only permits transactions in those securities where the relevant CREST members provide certifications demonstrating compliance with the Regulation S rules.

---

By Lloyd S. Harmetz, Partner,
Morrison & Foerster LLP